No. 19-1148

In The
Supreme Court of the United States

MICHAEL BRUNO, AS PARENT/GUARDIAN/NEXT FRIEND OF R.B., A MINOR; R.B., INDIVIDUALLY, A MINOR; BRITTANY BRUNO, AS PARENT GUARDIAN/NEXT FRIEND OF R.B., A MINOR,

***Petitioners*,**

v.

NORTHSIDE INDEPENDENT SCHOOL DISTRICT,

***Respondent*.**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* DUKE CHILDREN'S LAW CLINIC; SPAN PARENT ADVOCACY NETWORK; NATIONAL CENTER FOR PARENT LEADERSHIP, ADVOCACY, AND COMMUNITY EMPOWERMENT; PARENT EDUCATIONAL ADVOCACY TRAINING CENTER; AND THE EDUCATION LAW CENTER, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Children's Law Clinic: The Children's Law Clinic at Duke Law School is a clinical education program that functions as a community law office specializing in legal issues related to children.[1] Specifically, the Clinic advocates to enhance the educational opportunities for children by enforcing the constitutional and statutory rights of children in North Carolina. Having represented students with disabilities for nearly twenty years, the Clinic has developed considerable expertise in the legal requirements imposed on states by the Individuals with Disabilities Education Act. The Clinic has an interest in ensuring that all North Carolina students receive their statutorily-mandated educational rights, including the right to "comparable services" for students with disabilities who move from another state. This is especially critical for the 52,000 military children in the state and the thousands of North Carolina children who are particularly vulnerable as a result of poverty.

SPAN Parent Advocacy Network: The SPAN Parent Advocacy Network (SPAN) is a New Jersey-based, family-led non-profit organization whose mission is to empower and support families and to involve professionals interested in the healthy development and education of children and youth. Its foremost commitment is to children and families with the greatest need due to disability or special

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[1] Pursuant to this Court's Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity other than the *Amici* listed here or its members made any monetary contribution to the preparation or submission of the brief. *Amici* received written consent from both parties to file this brief.

health/mental health needs; poverty; discrimination based on race/ethnicity, gender, language, immigrant or homeless status; involvement in the child welfare or juvenile justice systems; geographic location; or other special circumstances. In addition to serving as the federally-designated Parent Training and Information Center and Family-to-Family Health Information Center for New Jersey, SPAN houses the national Center for Parent Information and Resources (national technical assistance center for parent centers) and regional Parent Technical Assistance Center.

SPAN has significant experience working with families whose children depend on the "comparable services" mandate of IDEA, including highly mobile families in the military via our Military Family 360 Support Project on Joint Base McGuire-Dix-Lakehurst and highly mobile children in foster care via our Child Welfare Peer Advocate and Education and Health Rights of Children with Disabilities in the Child Welfare System programs. SPAN also has an interest in ensuring that families are involved in every decision regarding their child with a disability and that the services and supports agreed upon by the previous IEP team, including the parent(s) and professionals on that team, are not changed without an IEP meeting at which the parent(s) have the right and ability to develop a new IEP with professionals on their new team.

National Center for Parent Leadership, Advocacy, and Community Empowerment: The National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE) is a national, family-led membership organization that works to

strengthen the voice of families and family-led organizations at decision-making tables that affect our nation's children, youth, and families. Its sixty-five local, state, and national members represent Parent Training and Information and Community Parent Resource Centers, Family-to-Family Health Information Centers, Parent-to-Parent USA affiliates, National Federation of Families for Children's Mental Health chapters, Family Empowerment Centers, Early Start Family Resource Centers, and other family-led, family-run organizations committed to ensuring the highest quality and most effective services and supports for diverse children and families, including those with disabilities and others who face the greatest challenges to equitable access and positive outcomes.

National PLACE's interest lies in the importance of ensuring that the parent(s)' voice and right to engage in decision-making regarding their child with a disability is protected when they move across state lines. IDEA's "comparable services" provision requiring districts in another state to implement the existing IEP protects that right by ensuring that the new district cannot unilaterally change the amount or types of services and/or placement, and provides both the parent(s) and the district/school staff the time they need to reconvene the IEP team, as needed, to make decisions in a new IEP. Allowing districts to provide only loosely "similar" services undermines the parent(s)' role in decision-making contrary to the language and intent of IDEA.

Parent Educational Advocacy Training Center: The Parental Educational Advocacy Training Center (PEATC) is a statewide, non-profit organization

focused on building positive futures for Virginia's children by working collaboratively with families, schools, and communities in order to improve opportunities for excellence in education and success in school and community life for children with disabilities. PEATC's work primarily consists of direct service and support for families and professionals, easy-to-understand and research-based information and training, and opportunities for strategic partnerships and advocacy for systemic improvement.

PEATC has a large Military Outreach Initiative in Virginia and recognizes the additional support needed for military families who have children with disabilities. This additional support includes the assurance that comparable services ensure critical continuity of special education for children with disabilities who move from state to state, with recognition that those comparable services are especially important for highly mobile children with disabilities such as those from military families, families in poverty, experiencing homelessness, or foster families. The current interpretation of comparable services, requiring only similar services, does a great disservice to our families.

The Education Law Center: The Education Law Center-PA (ELC) is a non-profit, legal advocacy organization dedicated to ensuring that all children have access to a quality public education. Through individual and impact litigation, as well as advocacy at the local, state, and national levels, ELC advances the rights of vulnerable children. During its forty-plus-year history, ELC has handled thousands of

individual matters and impact cases, including multiple class action lawsuits.

ELC has a long history of vigorous advocacy on behalf of highly mobile children with disabilities including children in the foster care system, the juvenile justice system, and those experiencing homelessness. ELC has worked on a systemic level to enforce and expand the rights of these children through litigation, legislative advocacy, and policy reform. Nationally, ELC is a founding member of the Legal Center for Foster Care and Education and the National Working Group for Foster Care and Education and recognized as a national expert on the educational rights of children with disabilities in foster care and experiencing homelessness.

ELC joins this amicus brief on behalf of highly mobile children who are most impacted by the current ambiguity of the "comparable services" provision at issue in this case. This Court's decisive interpretation of this statutory provision is necessary to restore its original intent to mitigate the impact of recurring educational challenges that highly mobile children in foster care and those experiencing homelessness face by ensuring the continuity of equivalent services critical for these children to make meaningful progress.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA) establishes that students with disabilities who move to a new state or transfer within a state during the school year are entitled to receive special education services that are "comparable" to

those they were receiving prior to the move, at least for a transitional period of time. 20 U.S.C. §§ 1414(d)(2)(C)(i)(I)-(II) (2012). This provision ensures the continuity of a student's special education services during a critical transition. Across the country, however, lower courts, hearing officers, and school special education teams have failed to consistently interpret the comparable services requirement with fidelity to its purpose by approving services that are only vaguely similar to those previously provided. When the new school district immediately alters a new student's special education programming, it undermines the individualized plan that was carefully developed and implemented by the previous school's special education team. This, in turn, undermines the purpose and promise of the comparable services requirement: ensuring the continuity of the student's special education services during the transition.

This inconsistency is harming students with disabilities. While service disruptions are detrimental to any student with disabilities who transfers schools, they are especially harmful to children with conditions such as autism and anxiety, for whom change is acutely debilitating. Likewise, disruptions are particularly damaging to highly mobile children with disabilities, such as children from military families, children in foster care, migrant children, and children experiencing poverty and homelessness. These children rely on the comparable services provision many times throughout their school careers.

The current inconsistency of interpretation appears to stem from a comment made by the U.S. Department of Education's Office of Special

Education Programs (OSEP) when corresponding regulations were promulgated. Upon a request to clarify the meaning of "comparable services," OSEP stated that "comparable" did not need further definition because its ordinary meaning was clear: "similar or equivalent." 71 Fed. Reg. 46681 (2006). As has become evident in the years since then, stark differences exist between "similar" and "equivalent" special education services, resulting in unnecessary disputes about whether a child has been offered truly comparable services. In the case at bar, for example, the Court of Appeals for the Fifth Circuit concluded that a half day of instruction was "comparable" to a full day. The hearing officer who presided over the initial administrative hearing, however, found that it was not.

The Court should grant certiorari to clarify the precise meaning of "comparable services" under the IDEA and to protect the educational rights of these vulnerable children. *Amici* urge the Court to recognize that in order to fulfill the purpose of the comparable services provision, a receiving school should fully implement an incoming student's previous Individualized Education Program (IEP), barring some significant impediment to doing so, during the transition period. The definition of "comparable" as "equivalent," rather than "similar," should be adopted. This approach honors the congressional purpose of shielding children from abrupt changes to special education services that address their individualized needs, imposed by educators who have not yet had a chance to understand those needs. Only this Court's interpretation can provide the guidance that courts, hearing officers, and school teams need to properly

implement the comparable services requirement. Certiorari should be granted.

ARGUMENT

I. THIS COURT'S INTERVENTION IS NEEDED TO DEFINE COMPARABLE SERVICES AS THOSE THAT ARE EQUIVALENT TO THE SERVICES PROVIDED PRIOR TO A CHILD'S MOVE TO A NEW SCHOOL DISTRICT.

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482 (2012), guarantees to all children with disabilities the right to receive a "free, appropriate public education" (FAPE). The IDEA requires local educational agencies (LEAs, which are typically school districts) to develop an Individualized Education Program (IEP) that offers a FAPE to each child with a disability. *See* 20 U.S.C. §§ 1414–1415. "[T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement." *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). The IDEA thereby "guarantees a substantively adequate program of education to all eligible children." *Id.* at 995. As the name suggests, IEPs are highly individualized to the specific educational and developmental abilities and needs of each child.

When a child with a disability transfers to a new school district during the school year, the IDEA contemplates continued compliance with its provisions. Specifically, the IDEA mandates that upon a new student's enrollment, the receiving school district "shall provide such child with a

[FAPE], *including services comparable to those described in the previously held IEP*…." 20 U.S.C. § 1414(d)(2)(C)(i)(II) (2012) (emphasis added). After providing these comparable services, the new district may, if necessary, conduct an evaluation and develop a new IEP. *Id.* Typically, a new IEP evaluation will be conducted by a receiving school district within thirty days of a new student's enrollment.

The provision of comparable services during a new student's transition period is a critical protection. The purpose of the comparable services requirement is to ensure "continuity of services for disabled children who move from state to state." *Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 311 (5th Cir. 2017). The comparable services requirement "preserves both the District's right to evaluate and the child's continuity of special education services." *Id.* at 312. An abrupt disruption to a child's special education services risks at least a delay in the child's progress, if not a stark regression. The comparable services provision protects against these negative consequences by promising continuity during the transition.

This promise has not been kept. The Department of Education's Office of Special Education Programs (OSEP), the federal agency responsible for implementing the IDEA, issued ambiguous commentary that has resulted in contradictory practices throughout the country.

In 2006, OSEP included the comparable services requirement in its IDEA regulations. *See* 34 C.F.R. § 300.323 (requiring the new district to provide a transferring student with a disability "services

comparable to those described in the child's IEP from the previous public agency"). Neither the IDEA itself nor the applicable regulations, though, define "comparable services." In declining a commenter's request to define the term, OSEP stated that it was unnecessary because the term "comparable" should be interpreted according to its plain meaning, "similar or equivalent." 71 Fed. Reg. 46,681 (2006). In the years since, numerous hearing officers and federal courts have explicitly relied on this statement in interpreting and enforcing the comparable services provision. *See, e.g., Sterling A. v. Washoe County School District*, 2008 WL 4865570, 5–6, (D. Nev. 2008) (referring to OSEP's commentary in defining "comparable.")

In practice, "equivalent" and "similar" are very different standards, with the former requiring adherence to the previous IEP and the latter allowing deviation from it. By defining "comparable" as "similar or equivalent," OSEP created rather than resolved ambiguity. Consequently, courts and hearing officers have interpreted the comparable services provision inconsistently and have deviated from the statutory purpose of ensuring continuity of special education services when students move to new schools.

Following OSEP's ambiguous comment, a receiving school could be considered compliant with the comparable services requirement while differing substantially from the new student's previous IEP, so long as there is general similarity to the previous services. This outcome is a natural product of defining "comparable" as the wide spectrum of relatedness between "similar" and "equivalent." Indeed, the

Merriam-Webster Dictionary defines "similar" as "having characteristics in common," and lists "alike" as its first synonym. *Similar*, *Webster's New Collegiate Dictionary* (8th ed. 1977). In sharing the common characteristics of being sweet, brightly-colored fruits, then, apples and oranges could reasonably be described as "similar." "Equivalent," contrastingly, means "corresponding or virtually identical, especially in effect or function," and is synonymous to "same." *Equivalent*, *Webster's New Collegiate Dictionary* (8th ed. 1977). Apples and oranges, as the common trope insinuates, are not equivalent; they are neither virtually identical nor the same.

The Court should grant certiorari to resolve this problematic inconsistency. Specifically, certiorari should be granted to allow this Court to properly define "comparable services" under the IDEA as services that are equivalent, i.e., those that are virtually identical. This definition properly ensures that the comparable services provision will be enforced in alignment with its statutory purpose of mandating continuity of services. That is not happening now; this Court needs to intervene.

To adhere to the purpose of ensuring continuity of special education services, the default rule should be that a receiving school district must strictly follow the student's previous IEP. In other words, during the transition period, a receiving school district should provide exactly the same special education services that the student received at his or her previous school, unless providing identical services is functionally impossible. In those cases, the receiving school should be required to (1) provide services that are as close to

the previous school's services as possible, and (2) be able to justify how the altered services are reasonably calculated to allow the child to make reasonable progress towards his or her IEP goals.

This expectation is reasonable. Because the IDEA is a federal law requiring the same basic services to be available to students across the country, most receiving school districts should be able to duplicate special education services without significant difficulties. For instance, all school districts must have qualified special education teachers and speech and occupational therapists, who provide the vast majority of special education services. *See* 20 U.S.C. § 1412(a)(14) (2012) (charging state with responsibility to ensure availability of qualified personnel). Under the clarified definition of "comparable services," a school district receiving a student whose previous IEP included these general services would be required to provide services identical in duration, frequency, and setting. For exceptionally unique services for children with rare disabilities, the proposed definition would provide a receiving school district with the necessary leeway to provide interim services that are as close to the previous services as functionally possible given the receiving school district's available personnel and resources.

The proposed definition would fulfill the statutory purpose of the IDEA by minimizing disruption to a student's special education services during a move. First, by ensuring that the comparable services provision is implemented consistently between districts and states, this definition would protect all students with disabilities who move

between and within states, particularly highly mobile, highly vulnerable youth such as military children, foster or homeless children, and children living in poverty. Second, adopting this definition would further benefit students with disabilities by mandating rightful deference to a student's previous IEP team, whose judgment reflects the most detailed and reliable information about that student's unique educational needs, while the receiving district conducts its own evaluations. The proposed definition would thus ensure that the comparable services provision achieves its statutory purpose: ensuring nationwide continuity of special education for students with disabilities.

Only this Court can guide the lower courts, hearing officers and school teams toward an understanding of "comparable services" that is consistent with the congressional intent of preventing unnecessary disruption to the educational services of a student with disabilities upon that child's move to a new school district. Therefore, certiorari should be granted.

II. COMPARABLE SERVICES ARE VITAL FOR CHILDREN FOR WHOM CHANGE IS ESPECIALLY DEBILITATING AND FOR HIGHLY MOBILE CHILDREN.

The Court's grant of certiorari is needed to protect the nearly half a million students with disabilities who move to a new state or school district each year and require comparable services. *See Children and Youth with Disabilities*, National Center for Education Statistics (May 2019); Sarah A. Cordes, *The Effect of Residential Mobility on Student*

Performance: Evidence from New York City, 6 Am. Edu. Research J. 1380, 1381 (2019). School changes involve multiple social and emotional adjustments and are major stressors for any child, particularly children with disabilities. *See* Barry A. Fields, *Family Mobility: Social and Academic Effects on Young Adolescents*, 14 Youth Stud. Aus. 27, 31 (1995). School changes can result in severe negative impacts on a student's academic performance and mental health due to interruptions to one's social network and learning environment, making comparable services all the more important. *See* Sheila Crowley, *The Affordable Housing Crisis: Residential Mobility of Poor Families and School Mobility of Poor Children*, 72 J. Negro Educ. 22, 22 (2003).

Certain groups are disproportionately affected by residential mobility. First, children with particular educational disabilities, such as autism, who are often extremely resistant to change, may suffer more from a residential move. Further, highly mobile children—such as children from military families, families experiencing poverty and homelessness, and foster families—suffer from the compounded impacts of multiple moves. With the comparable services provision as well as other provisions, the IDEA specifically protects highly mobile students to mitigate the impact of the recurring school changes and educational challenges these children experience. *See, e.g.,* 20 U.S.C. § 1412(a)(3) (expressly referencing wards of the state and students experiencing homelessness in defining the duty of states to identify, locate, and evaluate all children with disabilities); Office of Special Education and Rehabilitative Services, Letter to State Directors of Special Education on Highly Mobile Children with

Disabilities (July 19, 2013) (strongly encouraging school districts to expedite the evaluation process for highly mobile students, including those in foster care, migrant students, those in military families, and students experiencing homelessness). These particularly vulnerable students seek the protection of this Court to demand that schools provide critical continuity as they transition to a new school district.

A. Comparable Services That Are Equivalent to Previous Services Are Critical for Children with Autism and Emotional Disabilities, Who Can Be Especially Distressed by School Transitions.

This Court's grant of certiorari is particularly critical to ensure the proper implementation of the comparable services requirement for children, like the Petitioner, with autism spectrum disorder (ASD). Approximately ten percent of all children with disabilities with Individualized Education Programs (IEPs) have ASD, and its prevalence is increasing. *See* Centers for Disease Control and Prevention, *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years — Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States*, Morbidity and Mortality Weekly Report, Mar. 2020 (documenting autism in 1 in 54 children in the U.S.). Children with ASD tend to be extremely resistant to change; indeed, the diagnostic criteria are "insistence on sameness, inflexible adherence to routines, or ritualized patterns." *See* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 299.00 (5th ed. 2013). Thus, for children with ASD, a move to a new school district can cause

severe distress due to changes to routines and expectations.

Children with other mental disabilities, such as anxiety and obsessive-compulsive disorder (OCD), also exhibit extraordinary difficulty with change. *See* Katherine Gotham et al., *Exploring the Relationship Between Anxiety and Insistence on Sameness in Autism Spectrum Disorders*, 6 Autism Res. 33, 34 (2013) (noting that insistence on sameness behaviors are frequently accompanied by obvious symptoms of anxiety); Daisy Yuhas, *Untangling the Ties Between Autism and Obsessive-Compulsive Disorder*, Spectrum Autism Research News 3 (Feb. 2019) (noting that OCD's compulsions cause insistence on sameness). Anxiety affects approximately three percent of all children. *See* Mary M. Barker, *Prevalence and Incidence of Anxiety and Depression Among Children, Adolescents, and Young Adults with Life-Limiting Conditions: A Systematic Review and Meta-Analysis*, 9 JAMA Pediatrics 835, 836 (2019). Similarly, OCD affects one to three percent of children and adolescents. *See* Susanne Walitza, *Obsessive-Compulsive Disorder in Children and Adolescent*, 11 Deutsches Arzteblatt 173, 173 (2011); Yuhas, *supra*, at 3. As children especially vulnerable to academic losses during residential transitions, these children need this Court to accept the case for a determination on the merits to protect their rights to stability.

A comparable services standard that requires equivalent—not simply similar—services from one school to the next would mitigate the inherent harms of change caused by moving and provide children with ASD, anxiety, and OCD some sense of familiarity

during this transition. A school day of the same length, a classroom offering the same level of interaction with typically-developing peers, or a schedule providing the same related services can limit the harm of unwelcome changes. A comparable services standard requiring equivalent services protects a child's right to a continuous free, appropriate public education consistent with the IDEA's guarantee.

B. Comparable Services that Are Equivalent to Previous Services Are Critical for Highly Mobile Children, such as Children in Military Families, in Homeless Families, and in Foster Families.

Children in military families, foster families, and homeless families, who experience many more moves than other children, likewise need the protection of this Court. A highly mobile child with a disability will likely require comparable services many times during her school years, thus repeatedly relying on the IDEA's promise of continuity. Given that frequent moves compound the negative effects on a child's mental health and academic performance, *see* Crowley, *supra*, at 24, the initial provision of comparable services that replicate the previous school's special education services is a critical tool to enhance consistency amid the turbulent life of a highly mobile child.

1. A Standard of Comparable Services Requiring Equivalent Services Provides Critical Support for Military Children.

Military children are disproportionately in need of the proposed comparable services standard because they move much more frequently than their civilian peers. On average, military children move and change schools six to nine times from the start of kindergarten to high school graduation, three times more frequently than their civilian peers. *See* Beth Ruff & Michael A. Keim, *Revolving Doors: The Impact of Multiple School Transitions on Military Children*, 4(2) Prof. Counsel 103, 103 (2014). Comparable services could therefore affect six to twelve months of a military child's overall time in school. Again, a strong comparable services requirement that preserves as much of a student's previous special education program as possible would lessen the negative impacts of a move to a new school district on a disabled student in a military family. Such a requirement safeguards FAPE for the child during the transition, ensuring that the decisions made by the child's previous IEP team, which was familiar with her conditions and needs, continue to be implemented.

2. A Standard of Comparable Services Requiring Equivalent Services Provides Critical Support for Children Living in Poverty and Experiencing Homelessness.

Children living in poverty move twice as frequently as their peers, and thus are another group more likely to need the protection of comparable services. *See* Robin Phinney, *Exploring Residential*

Mobility Among Low-Income Families, 87 U. Chic. Press J. 780, 782 (2013). Thus, they, too, need this Court to grant certiorari to protect them. Frequent mobility experienced by children living in poverty is particularly detrimental because low-income families often move involuntarily. Approximately seventy percent of low-income families make their relocation decisions as reactions to outside forces such as increases in living costs, demolition, increases in neighborhood violence, eviction, and domestic violence. *See* Stefanie DeLuca et al., *Why Poor People Move (and Where They Go): Residential Mobility, Selection and Stratification*, 18 City Community 556, 564 (2019).

When a child with a disability experiences an involuntary move or homelessness, the combined challenges make the need for educational stability all the more vital. Immediate implementation of the special education services previously received can give a disabled child in this type of extreme personal instability at least something familiar to cling to. Allowing a school district to alter a child's services during a transition period deprives the child of statutorily mandated rights and can further disrupt the child's already turbulent life. Comparable services after a move to a new school is paramount to assuring continued FAPE for a disabled child in this circumstance.

3. A Standard of Comparable Services Requiring Equivalent Services Provides Critical Support for Children Living in Foster Families.

During 2018, nearly three-quarters of a million children were in foster care. *See* The AFCARS Report, Children's Bureau (Oct. 2019). They, too, are highly mobile due to frequent foster care placement changes. *See* Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Conditions of Youth Preparing to Leave State Care*, Chaplin Hall Center for Children (Feb. 2004) (finding that approximately one-third of children living in foster care experienced five or more school changes). Furthermore, children living in foster care are far more likely than their more typical peers to need special education services. Foster children are twice more likely to have a learning disability, three times more likely to be diagnosed with Attention Deficit Hyperactivity Disorder, and five times more likely to have anxiety than typical children. *See* Kristin Turney & Christopher Wilderman, *Mental and Physical Health of Children in Foster Care*, 138 (5) Pediatrics (2016). Gaps in communication about a child's needs, often an unintended consequence of a desire to protect a foster student's confidentiality, leave the school personnel even more dependent on the incoming IEP to know what programming is needed. *See* Marni Finkelstein, Mark Wamsley & Doreen Miranda, *What Keeps Children in Foster Care From Succeeding in School*, Vera Institute of Justice (June 2002). A robust comparable services requirement, mandating the immediate implementation of the child's IEP until the new staff can begin to understand the child's disabilities and

educational needs, is necessary to preserve FAPE for the child while everything else is changing. This Court's intervention is critical to protect these children.

III. CURRENT PRACTICE REFLECTS DRAMATIC INCONSISTENCIES IN THE INTERPRETATION AND ENFORCEMENT OF THE COMPARABLE SERVICES PROVISION.

Current practice regarding the comparable services provision of the IDEA reflects dramatic and harmful inconsistencies in interpretation and enforcement. Frequently, decisions about services in a new district stray significantly from the statutory purpose of comparable services. This case's own history joins a growing list of administrative and federal court rulings that lay bare the widely disparate standards used in determining whether a school district's services are deemed "comparable." At the initial hearing, when considering the length of the school day provided to R.B. by NISD (half day) compared to that of the previous district (full day), the Special Education Hearing Officer (SEHO) found that "the school district failed to provide Student with comparable services."[2] ROA.442. Using a definition of "comparable" as "equivalent," this finding is a reasonable one: a half day of school is plainly not equivalent to a full day.

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[2] The SEHO later found that although the district failed to provide comparable services in this regard, it did not amount to an IDEA violation because R.B. could not prove harm. This was an erroneous standard, as harm is only required to prove procedural, not substantive, IDEA violations. That error, however, is not at issue here.

Based upon the exact same facts, though, the District Court ruled differently. The District Court ruled that "while it is true that R.B. did not receive the same number of hours of instruction as he did in Florida, this fact does not render the services he received at NISD as non-comparable." ROA.365. Employing a definition of "comparable" as "similar," the District Court held that the services NISD provided to R.B. upon his initial enrollment did not need to be the same as those provided in his previous school pursuant to his incoming IEP. *Id.* The court found that so long as the new services had "substantial similarity in the substance and the goals," they could be deemed comparable. ROA.366. This holding was affirmed by the Court of Appeals for the Fifth Circuit. *See Bruno v. Northside Indep. Sch. Dist.*, 788 Fed. Appx. 287, 288 (5th Cir. 2019).

Amici agree with Petitioner that the District Court and Court of Appeals ruled erroneously here; a half day of instruction is plainly not comparable to a full day. The legal issue presented by this case, though, goes beyond one erroneous ruling. More broadly, this case exemplifies the problematic ambiguity of OSEP's interpretation of what qualifies as "comparable services," which has been adopted by courts and hearing officers. Enforcement of the comparable services requirement is left unpredictable and inexplicable, straying from its statutory purpose of continuity of special education services.

Numerous administrative decisions and district court cases further illustrate this problematic variance. For instance, regarding location of services, while one district court found that at-school services were sufficiently similar to home-bound services to be

deemed comparable, *see Sterling A. v. Washoe County Sch. Dist.*, 2008 WL 4865570 (D. Nev. 2008), another found that differences in "mainstreamed" classroom time deemed services incomparable. *See G.R. o/b/o B.S. v. New York Dept. of Edu.*, 2012 WL 310947 (S.D.N.Y. 2012).

Further, several administrative hearing decisions illustrate variance regarding changes in instructional service times. While some hearing officers have found dramatically differing minutes of instruction to provide comparable services, others have found that relatively minor differences in instructional minutes render services incomparable. The chart below highlights five cases that are particularly illustrative of this inconsistency. The first two cases (including the case at bar) exemplify vastly differing services that were deemed comparable, while the last three cases show relatively similar services that were deemed not comparable.

Case	Differences between Previous and Interim IEPs	Comparable Services Ruling:
Bruno v. Northside Indep. Sch. Dist.	20 fewer hours of weekly instructional time	Comparable
Presidio School, Arizona State Educational Agency, 65 IDELR 186 (2015)	4.2 fewer hours of weekly writing support; reduced classroom/testing accommodations	Comparable

In re Aberdeen School District, Washington State Educational Agency (2019)	8.75 fewer hours of weekly total services	Not comparable
Williamson County Schools, Tennessee State Educational Agency, 110 LRP 68578 (2010)	8.5 fewer hours of weekly total services	Not comparable
District of Columbia Public Schools, District of Columbia State Educational Agency, 66 IDELR 234 (2015)	5 fewer hours in weekly specialized instructional time	Not comparable

Despite the appearance of comparable services disputes in administrative hearings and district courts, there is a relative lack of litigation regarding the comparable services provision at the federal appellate level. This is not to be mistaken, however,

as a lack of importance or need to clarify its meaning. Because the transitional period during which comparable services are required is typically limited to thirty days, parents will no doubt find it impractical to pursue such a limited claim on appeal. *See, e.g.*, *D.P. v. Council Rock Sch. Dist.*, 482 Fed. Appx. 669 (3d Cir. 2012) (illustrating that plaintiffs with available comparable services claims will chose to focus exclusively on traditional FAPE claims on appeal). Indeed, this highlights the heightened importance of the Court granting certiorari here: despite the vital importance of comparable services in ensuring continuity of services, the inconsistency with which it has been enforced is unlikely to be resolved at lower appellate levels. Thus, the Court has a unique opportunity here.

The disparities in the interpretation and enforcement of the comparable services provision within these decisions illustrate the pressing need for clarification regarding the meaning of "comparable services." On the one hand, some courts rule that drastically differing services and instructional hours, as here, are nevertheless sufficiently similar to be considered "comparable." Contrastingly, other courts rule that increasing or decreasing a student's instructional time even marginally renders a school's services not comparable. This problematic variance dilutes the true purpose of the comparable services provision in the IDEA, which is to ensure vital continuity of special education services for students moving to a new school.

CONCLUSION

Based on the foregoing, *amici curiae* join with Petitioner in requesting that the Court grant the Writ of Certiorari in this matter to provide much needed guidance to special education practitioners, hearing officers, and lower courts on the proper interpretation of the "comparable services" requirement of the IDEA and to protect FAPE for the most vulnerable and highly mobile children who need special education services.

Respectfully submitted, this the 17th day of April, 2020.

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