No. 20-905

In the Supreme Court of the United States

INDEPENDENT SCHOOL DISTRICT NO. 283, PETITIONER

v.

E. M. D. H. EX REL. L. H. AND S. D.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record
KRISTEN CLARKE
Assistant Attorney General
COLLEEN E. ROH SINZDAK
Assistant to the Solicitor General
BONNIE I. ROBIN-VERGEER
ALISA C. PHILO
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

EMMA LEHENY
Principal Deputy General Counsel
FRANCISCO LOPEZ
TIMOTHY MIDDLETON
Attorneys
U.S. Department of Education
Washington, D.C. 20202

QUESTION PRESENTED

Whether the court of appeals correctly held that at least some of respondent's claims that petitioner breached its child-find obligation under the Individuals with Disabilities Education Act, 20 U.S.C. 1412(a)(3)(A), accrued within the Act's two-year statute of limitations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

In the Supreme Court of the United States

No. 20-905

INDEPENDENT SCHOOL DISTRICT NO. 283, PETITIONER

v.

E. M. D. H. EX REL. L. H. AND S. D.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Acting 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. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, provides federal grants to States "to provide special education and related services to children with disabilities." 20 U.S.C. 1411(a)(1). With limited exceptions, see 34 C.F.R. 300.102, States that receive federal funds must make a "free appropriate public education" (FAPE) available to every child in the State with a disability. 20 U.S.C. 1412(a)(1)(A); see *Endrew F.* v. *Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993-994 (2017). To do so, "[s]tate educational authorities must identify and evaluate disabled children," "develop an [individualized educational program (IEP)]

for each one," and "review every IEP at least once a year." *Schaffer* v. *Weast*, 546 U.S. 49, 53 (2005) (citations omitted).

a. The first step in this process—typically referred to as the "child-find" obligation—is of "paramount importance." *Forest Grove Sch. Dist.* v. *T. A.*, 557 U.S. 230, 245 (2009). "States are obligated to 'identify, locate, and evaluate' 'all children with disabilities residing in the State' to ensure that they receive needed special-education services." *Ibid.* (quoting 20 U.S.C. 1412(a)(3)(A)) (brackets omitted); see 34 C.F.R. 300.111. Local educational agencies (generally, school districts) share this affirmative child-find obligation with respect to the children within their jurisdiction. See 34 C.F.R. 300.200-300.201.

The child-find obligation covers "all" children with disabilities, 20 U.S.C. 1412(a)(1)(A), including those with high cognitive skills. The Department of Education has thus emphasized that "a child suspected of having a disability" must be "considered in the child find process" even if she "is making academic progress" and "passing from grade to grade." 71 Fed. Reg. 46,540, 46,584 (Aug. 14, 2006); see 34 C.F.R. 300.111(c)(1). And in response to concerns that some school districts were "hesitant" to evaluate "children with high cognition," the Department has "remind[ed]" districts of their "obligation to evaluate all children, regardless of cognitive skills, suspected of having [a qualifying disability]." Office of Special Educ. Programs, U.S. Dep't of Educ., *Memorandum to State Directors of Special Education*, 65 IDELR 181, at 939 (Apr. 17, 2015).

b. The IDEA establishes procedures to resolve disputes about a covered student's education. See *Fry* v.

Napoleon Cmty. Schs., 137 S. Ct. 743, 749 (2017) (summarizing process). Either a parent or a local educational agency may file an administrative complaint requesting a due process hearing "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." 20 U.S.C. 1415(b)(6)(A); see 20 U.S.C. 1415(f)(1)(A).

Before 2004, the IDEA did not include a statute of limitations for such complaints. See 20 U.S.C. 1415(f)(3) (2000); see also 20 U.S.C. 1415(b)(6) (2000). As a result, school districts were left "open to litigation for the entire length of time a child [was] in school." H.R. Rep. No. 77, 108th Cong., 1st Sess. 115 (2003). A district could be surprised, for example, "by claims from parents involving issues that occurred in an elementary school program when the child may currently be a high school student." *Ibid.*

In 2004, Congress amended the IDEA to add a statute of limitations. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, Tit. I, § 101, 118 Stat. 2647-2799. Unless state law sets a different deadline, a parent or agency now must request a hearing "within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint." 20 U.S.C. 1415(f)(3)(C); see 20 U.S.C. 1415(b)(6)(B). Congress also provided two exceptions, specifying that the limitation period does not apply "if the parent was prevented from requesting the hearing" because (1) the school district made "specific misrepresentations * * * that it had resolved the problem forming the basis of the complaint" or (2) the district "withh[eld]" information the IDEA required it to provide. 20 U.S.C. 1415(f)(3)(D).

2. Petitioner is a school district in St. Louis Park, Minnesota. Respondent was a gifted student in the district who suffered from psychological disorders that disrupted her education in a pattern that began in eighth grade and recurred through her junior year of high school. Pet. App. 2a-3a.

a. Respondent started eighth grade in 2014. As the school year went on, she "began to be more frequently absent" because of anxiety and other issues. Pet. App. 3a. By March 2015, she had "stopped attending school altogether." *Id.* at 25a. In May 2015, she was admitted to a psychiatric day-treatment facility. *Ibid.* Although petitioner was aware of these developments, it decided not to refer respondent for an evaluation "because her grades were excellent when she attended school." *Id.* at 26a. Instead, petitioner gave respondent incomplete grades and ultimately disenrolled her. *Ibid.*

Before respondent began ninth grade in the fall of 2015, "her parents alerted the ninth-grade guidance counselor that [she] had not been present for the latter part of eighth grade due to anxiety and school phobia." Pet. App. 4a. Petitioner reenrolled respondent, *ibid.*, but "did not address the issue of special education or evaluation," *id.* at 26a. Again, respondent's "attendance became irregular," she was admitted to the day-treatment facility, and petitioner disenrolled her. *Ibid.*

In December 2015, petitioner reenrolled respondent. Pet. App. 26a. That spring, petitioner "discussed evaluating [respondent] as a candidate for special education" with her parents, but "le[ft] them with the impression that decisions related to special education were theirs to make" and that, if respondent "availed herself of special-education opportunities[,] she would not be

allowed to remain in her honors classes." *Id.* at 4a. Petitioner did not provide respondent's parents with notice of their procedural rights under the IDEA, her parents did not request an evaluation, and petitioner did not undertake one. See *id.* at 4a, 45a. Petitioner disenrolled respondent again before the end of the spring semester. D. Ct. Doc. 2, at 9 (Apr. 4, 2018); see Pet. App. 4a. Respondent then spent the summer at an in-patient treatment facility. Pet. App. 4a, 27a.

In September 2016, at the beginning of respondent's tenth-grade year, petitioner reenrolled her with accommodations, such as increased time on assignments and the use of a fidget spinner, "even though it had never conducted an evaluation of her." Pet. App. 27a; see *id.* at 4a-5a. But respondent attended almost no classes after the first six weeks of school, and petitioner again disenrolled her in December 2016. *Id.* at 5a, 27a-28a.

In January 2017, petitioner "met with [respondent's] parents to reexamine the possibility of providing special education." Pet. App. 5a. Again, petitioner did not provide notice of the parents' procedural rights under the IDEA, *id.* at 45a, and left them with the impression that "special education would not be an appropriate placement" because respondent "is talented and gifted," *id.* at 28a; see *id.* at 5a. And again, petitioner did not refer respondent for a special education evaluation. *Ibid.*; see *id.* at 5a. Petitioner disenrolled respondent in February 2017, after she had attended only one day of school during the semester. *Id.* at 5a, 28a.

In April 2017, respondent was readmitted to the inpatient psychiatric hospital. Pet. App. 5a, 28a. A doctor at the facility conducted a comprehensive psychological evaluation and concluded that respondent's "spate of mental illnesses had 'resulted in an inability to attend

school, increasing social isolation, and continued need for intensive therapeutic treatment.'" *Id.* at 5a; see *id.* at 28a-29a.

On April 28, 2017, while respondent was at the facility, her parents asked petitioner to evaluate her eligibility for special education. Pet. App. 5a, 28a. On June 14, 2017, petitioner held an "evaluation planning meeting" and for the first time notified the parents of their IDEA rights. *Id.* at 29a, 45a. During the evaluation process, petitioner reenrolled respondent for her eleventh-grade year, but her problems persisted. *Id.* at 6a, 30a. She attended three partial days of school and then stopped attending altogether. *Id.* at 6a.

In November 2017, petitioner completed its evaluation and concluded that respondent was not eligible for special education because, in its view, her mental health issues did not affect her educational performance when she attended school. Pet. App. 6a, 31a; see *id.* at 42a. In response, respondent's parents hired their own team to conduct an independent evaluation. *Id.* at 6a, 31a. That evaluation confirmed respondent's diagnoses and recommended that "she receive special education that would allow her to complete rigorous coursework while managing the symptoms that had made doing so difficult, if not impossible, in the past." *Id.* at 6a. Petitioner rejected the recommendation. *Ibid.*

b. On June 27, 2017, two weeks after petitioner first notified respondent's parents of their IDEA rights, the parents filed an administrative complaint requesting a due process hearing. Pet. App. 18a, 33a. Among other things, the complaint asked the hearing officer to determine whether petitioner had failed to timely identify respondent "as a possible child with a disability under the

IDEA" and whether petitioner had failed to provide respondent a FAPE. *Id.* at 34a.

After a seven-day hearing, the hearing officer concluded that petitioner had violated the IDEA by failing to identify respondent as a child with a disability. Pet. App. 6a-7a, 34a-35a. The officer rejected petitioner's argument that it "'had no reasons to suspect'" that respondent had a disability because she "was in advanced classes" and "earning high grades when she came to school." D. Ct. Doc. 2, at 32 (citation omitted). The officer observed that respondent "would not or could not go to school due to her mental health issues," which should have been a "red flag" indicating that "an evaluation was required." *Ibid.*

The hearing officer then provided a "closer look at each year leading up to the Parents' request for an initial evaluation" to demonstrate how petitioner had repeatedly failed "to timely identify and evaluate" respondent. D. Ct. Doc. 2, at 32. After detailing the numerous points at which petitioner had failed to "raise the issue of an evaluation," *id.* at 34, or failed to "propose an evaluation," *id.* at 34-35; see *id.* at 36 (similar), the officer concluded that petitioner had "failed to timely identify and evaluate [respondent] in the spring of 2015, when [she] was in the eighth grade," *id.* at 38. The officer added that petitioner's "special education supervisor did not know why a referral was not made by staff in [respondent's] eighth, ninth, or tenth grade years." *Id.* at 39.

The hearing officer also rejected petitioner's assertion that any child-find claim was barred by the IDEA's two-year statute of limitations. D. Ct. Doc. 2, at 42-43. Petitioner had argued that respondent's parents "knew or should have known" that they had a child-find claim

"as early as eighth grade," but that they did not file their complaint "until over two years later." *Ibid.* The hearing officer found that argument "unconvincing" given the evidence that respondent's parents did not know about their right to request a hearing until April 2017. *Id.* at 43. The hearing officer further explained that "[t]he limitations period cannot be applied in a situation where the School District simply ignored a potentially eligible child with disabilities and did not inform parents of their rights." *Ibid.*

After further concluding that petitioner had improperly denied respondent a FAPE, D. Ct. Doc. 2, at 56-57, the hearing officer ordered a number of remedies, *id.* at 58-63. Among other things, the officer ordered petitioner to reimburse respondent's parents for their "past diagnostic and educational expenses," as well as certain "compensatory services," such as private tutoring. Pet. App. 7a; see D. Ct. Doc. 2, at 58-63

3. Petitioner filed a complaint in district court seeking review of the hearing officer's decision, arguing—as relevant here—that any child-find claim was untimely. Pet. App. 35a.

a. The district court rejected petitioner's argument. Pet. App. 45a. The court recognized that, "because the Parents first requested a due process hearing on June 27, 2017, [their] claims would normally be limited to [petitioner's] conduct after June 27, 2015." *Id.* at 44a. But, applying the second statutory exception, the court found that "the statute of limitations should not apply here because [petitioner] failed to provide an adequate and complete notice of procedural safeguards as required by the IDEA and by applicable regulations." *Id.* at 45a. Specifically, petitioner did not provide the parents with the required notice until June 2017, despite

discussing special education with them before then. *Ibid.* "By withholding this critical information," the court concluded, petitioner "'denied [the parents] the knowledge necessary to request a due process hearing.'" *Ibid.* (brackets, capitalization, and citation omitted).

b. Petitioner appealed, arguing that any child-find claim was "time-barred" because "by not later than June 12, 2015," at the end of respondent's eighth-grade year, her parents had enough information "to seek a special education evaluation from the School District if [they] wanted one." Pet. C.A. Br. 62-63.

The Eighth Circuit rejected that assertion without reaching the theories relied on by the hearing officer and the district court. Pet. App. 18a. Instead, the court observed that, even "[a]ssuming the parents knew or should have known they had a child-find claim when [respondent] was an eighth-grader, the District staff responsible for identifying [respondent] in the ninth and tenth grades likewise failed to fulfill their child-find obligation." *Ibid.* "In other words," the court explained, "the violation was not a single event like a decision to suspend or expel a student," but "instead the violation was repeated well into the limitations period." *Ibid.* Thus, while recognizing that "[a]ny claim of a breach falling outside of the IDEA's two-year statute of limitations would be untimely," the court determined that this proposition did not preclude respondent from prevailing because petitioner's "continued violation of its child-find duty" meant that "at least some of [respondent's] claims of breach of that duty accrued within the applicable period of limitation." *Ibid.*

DISCUSSION

The court of appeals correctly rejected petitioner's contention that the IDEA's statute of limitations barred respondent from asserting a claim based on petitioner's breach of its child-find obligations. Petitioner "repeated[ly]" failed to identify and evaluate respondent's disability, and the court rejected petitioner's invocation of the time-bar because "at least some" of those failures occurred within the two-year statute of limitations. Pet. App. 18a. The court's determination that respondent is entitled to recover for the child-find breaches that fell within the IDEA's limitations period is correct and does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

Petitioner's arguments to the contrary rest on a misunderstanding of the Eighth Circuit's decision. The court of appeals did not, as petitioner asserts, create an equitable exception allowing respondent to recover for violations outside the limitations period. Instead, as respondent explains (Br. in Opp. 3), the court relied on petitioner's discrete violations of its child-find obligations "within" the limitations period, Pet. App. 18a. This case therefore presents no occasion for the Court to consider the propriety of the sort of equitable exception petitioner attacks.

Moreover, even if the Eighth Circuit's decision could be read to adopt such an exception, this case would be a poor vehicle for considering the issue. The parties' briefs would likely focus on their case-specific disputes rather than on the broader legal issue petitioner seeks to raise, and the resolution of that issue is also unlikely to materially affect the ultimate outcome.

A. The Court Of Appeals' Decision Is Correct

The court of appeals correctly held that respondent's child-find claims are not time-barred merely because the first "breach occurred in the spring of 2015." Pet. App. 17a-18a. As even petitioner acknowledges, a school can violate its child-find obligation more than once with respect to the same child. Here, the hearing officer and the Eighth Circuit identified multiple points within the two-year statute of limitations when school staff should have, but did not, initiate a special education evaluation for respondent. Under the plain terms of the IDEA's statute of limitations, respondent was entitled to relief for those within-limits breaches. And, contrary to petitioner's contentions, this case does not present an opportunity to consider whether respondent might also be able to recover under an equitable exception for "continuing violations" that would sweep in the first, pre-limitations breach. The court of appeals did not rely on such an exception, and the remedy it affirmed was fully justified by petitioner's within-limits breaches.

1. The IDEA imposes an affirmative and ongoing obligation on local educational agencies to ensure that all students with disabilities are identified, located, and evaluated for special education and related services. 20 U.S.C. 1412(a)(3)(A). Schools violate this child-find obligation if they fail to evaluate a student "suspected of being a child with a disability * * * and in need of special education." 34 C.F.R. 300.111(c)(1). An IDEA claim accrues when a parent "knew or should have known about the alleged action that forms the basis for the[ir] complaint." 20 U.S.C. 1415(f)(3)(C). Thus, for a child-find claim to be timely, the parents must request a hearing within two years of the date on which they

knew or should have known of the school district's breach of its duty to identify, locate, and evaluate the child, unless state law provides otherwise or a statutory exception applies. 20 U.S.C. 1415(f)(3)(C)-(D).

Applying these principles, the court of appeals correctly rejected petitioner's assertion that respondent's child-find claims were untimely because petitioner first breached its child-find obligation when respondent was in eighth grade, more than two years before her parents filed their administrative complaint. The court recognized that "[a]ny claim of a breach falling outside of the IDEA's two-year statute of limitations would be untimely," and it thus assumed that respondent could not bring a claim based on petitioner's failure to identify and evaluate her when she was "an eighth-grader." Pet. App. 18a. But the court correctly determined that respondent could bring claims based on the violations that occurred when the "staff responsible for identifying [respondent] in the ninth and tenth grades likewise failed to fulfill their child-find obligation." *Ibid.* In other words, while the statute of limitations might bar a claim based on the violation that occurred while respondent was in eighth grade, "the violation was repeated" in subsequent years and respondent was unquestionably entitled to pursue the "claims of breach" that "accrued within the applicable period of limitation." *Ibid.*[*]

[*] To determine whether a school violated its child-find obligation, courts ask if the school had "reason to suspect" a student had a qualifying disability and, if so, whether it responded within a "reasonable time." See, *e.g.*, *Dallas Indep. Sch. Dist.* v. *Woody*, 865 F.3d 303, 320 (5th Cir. 2017). Some courts articulate the "reason to suspect" standard by asking if the school was "on notice of behavior that is likely to indicate a disability." *Ridley Sch. Dist.* v. *M.R.*, 680 F.3d 260, 271-272 (3d Cir. 2012) (citation omitted); see also *Timothy O.* v.

2. Even petitioner does not dispute that a child-find violation can recur and thereby trigger a new statute of limitations. Petitioner acknowledges that, "[i]f a school district takes 'action' affirmatively to change its identification decision," or if there is "a material change in circumstances that should have led the district to respond," then parents will have a new "statutory two-year window to challenge that decision." Reply 12 (citing *Mr. P & Mrs. P* v. *West Hartford Bd. of Educ.*, 885 F.3d 735, 751 (2d Cir.), cert. denied, 139 S. Ct. 322 (2018), and 20 U.S.C. 1415(f)(3)(C)).

This concession makes eminent sense. To contend otherwise would mean that, once two years have passed after the initial failure to "find" a student, the school district is forever immune from any liability for breaching its ongoing child-find obligation—regardless of how much additional information the school district receives or how egregious the breaches become. For example, failing to identify a student's reading disability in the first grade would bar a parent's claims in the eighth grade, even if the child's difficulties become more and more obvious each year.

Paso Robles Unified Sch. Dist., 822 F.3d 1105, 1118-1119 (9th Cir. 2016), cert. denied, 137 S. Ct. 1578 (2017). Other courts ask whether the claimant has shown 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." *W.A.* v. *Hendrick Hudson Cent. Sch. Dist.*, 927 F.3d 126, 144 (2d Cir. 2019) (citation omitted), cert. denied, 140 S. Ct. 934 (2020); *Board of Educ. of Fayette Cnty.* v. *L.M.*, 478 F.3d 307, 313 (6th Cir.) (citation omitted), cert. denied, 552 U.S. 1042 (2007). Under either articulation, the Eighth Circuit reasonably concluded that petitioner repeatedly violated its obligation within the limitations period. Pet. App. 18a.

While petitioner's concession is therefore sensible, it is also fatal to its assertion that the statute of limitations completely bars respondent's child-find claim. Respondent's parents filed their administrative claim on June 27, 2017, and the hearing officer found numerous material changes in circumstances during the two-year period before that date. During the fall semester of 2015 alone, for example, respondent started ninth grade at a new school after having been disenrolled at the end of her eighth-grade year; was checked into a day-treatment program and disenrolled again; and was checked out of that treatment program and reenrolled. D. Ct. Doc. 2, at 32-35. Petitioner could not plausibly deny that those events were a "material change in circumstances" (Reply 12) supporting the Eighth Circuit's conclusion that it committed a new child-find violation by failing to identify respondent during the ninth grade.

3. Petitioner nonetheless asserts (Pet. 2, 19) that the Eighth Circuit did not rely solely on breaches within the limitations period. Rather, petitioner asserts (Pet. 2) that the court applied an equitable "continuing violation" exception to allow respondent to recover for petitioner's first breach of its child-find obligation in the spring of 2015, on the theory that this original breach "continued into the limitations period."

The text of the Eighth Circuit's opinion belies petitioner's understanding. The court expressly stated that "[*a*]*ny* claim of a breach falling outside" the limitations period "would be untimely." Pet. App. 18a (emphasis added). That statement would be illogical if, as petitioner asserts (Pet. 19), the court meant to hold that every claim of a breach of the child-find obligation is timely because the statute of limitations for the original

violation "begins running anew every day that a school district does not identify a student for services."

Further, in explaining why respondent's child-find claim was not time-barred, the Eighth Circuit relied on *Mancini* v. *Boehringer Ingelheim Pharms., Inc.* (*In re Mirapex Prods. Liab. Litig.*), 912 F.3d 1129 (8th Cir. 2019). That decision recognized that, where "an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period." *Id.* at 1134 (citation omitted). That citation demonstrates that the court viewed the child-find obligation as "continuing" only in the sense that the duty to identify a child is "'recurring,'" so a school district may commit many discrete breaches of its duty over time, and each "'wrongful act'" triggers a "'new limitations period.'" *Ibid.* (citation omitted).

Petitioner asserts that despite what the Eighth Circuit said, it must have implicitly relied on an equitable exception because it affirmed the hearing officer's relief in its entirety, even though that relief had been fashioned "on the understanding that 'the statute of limitations should not apply' at all." Reply 5 (citation omitted). But petitioner never suggested that the court do otherwise. It argued that respondent's entire child-find claim was time barred, see Pet. C.A. Br. 57-63, but it never suggested that the court should alter the remedies as a result of the statute of limitations—even though it extensively briefed several other challenges to the hearing officer's remedies, *id.* at 69-80. The court thus properly rejected the only relevant argument petitioner had made when it held that the claim as a whole was not barred.

In any event, even in its briefing before this Court, petitioner has not explained how the Eighth Circuit

should have altered the relief to account for the statute of limitations. That is likely because none of the relief awarded is tied to the pre-limitations period. Respondent's parents filed their claim on June 27, 2017, and none of the services for which they were awarded compensation occurred more than two years before that date. Specifically, petitioner was ordered to reimburse respondent's parents for a private psychological assessment in May 2017, Pet. App. 46a-48a, 62a; the individual educational evaluation services obtained in November 2017, *id.* at 31a, 46a-47a, 62a; and the private tutoring that began in January 2018, *id.* at 48a-49a, 62a. And, while petitioner was also ordered to reimburse respondent's parents for the additional tutoring and services necessary to bring respondent up to grade-level, see *id.* at 20a-21a, petitioner has not offered any reason why this relief should be narrowed based on the statute of limitations. Nor would such an argument be plausible given that petitioner itself has stated that respondent's parents should have known of the initial breach a mere 15 days before the cut-off for within-limits breaches on June 27, 2015. Pet. C.A. Br. 62-63.

4. There may be cases that present difficult questions about what constitutes a new breach of a school district's child-find obligation sufficient to trigger a new statute of limitations. But this is not one of them. Under petitioner's own articulation, the statute of limitations begins anew whenever there is a "material change in circumstances that should have led the district to respond." Reply 12. Here, there were numerous such incidents including six disenrollments and three hospitalizations within the limitations period, see pp. 4-6, *supra*, all of which should have "created a reasonable suspicion that [respondent] might require special education."

Mr. P, 885 F.3d at 751. Because those incidents fully justify the relief respondent received, there is no merit to petitioner's assertion that the Eighth Circuit implicitly swept in otherwise untimely claims based on an equitable "continuing violation" doctrine.

B. The Question Presented Does Not Warrant Review

The court of appeals' determination that at least some of respondent's child-find claims were timely does not conflict with any decision of this Court or another court of appeals.

1. Petitioner asserts (Pet. 11-12) that the courts of appeals are divided as to whether to recognize an equitable exception to the IDEA's two-year statute of limitations for child-find obligations. That assertion, however, is based on the mistaken premise that the decision below recognized such an exception. It did not; it merely allowed respondent to pursue claims that accrued "within the applicable period of limitation." Pet. App. 18a; see p. 12 , *supra*.

Accordingly, there is no tension between the decision below and the decisions petitioner describes (Pet. 11-12) as rejecting the theory that parents may use equitable tolling doctrines to recover for a breach of the IDEA that occurs outside the statute of limitations. See *G.L.* v. *Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 626 (3d Cir. 2015); *D.K.* v. *Abington Sch. Dist.*, 696 F.3d 233, 248 (3d Cir. 2012); see also *Reyes* v. *Manor Indep. Sch. Dist.*, 850 F.3d 251, 255 (5th Cir. 2017). To the contrary, those decisions reinforce the basic proposition that a claim is not wholly barred by the statute of limitations merely because some of the breaches occurred outside the two-year window.

In *D.K.*, for example, the Third Circuit "beg[a]n by delimiting the time period to which [the student's]

claims apply." 696 F.3d at 244. There, the student's parents filed a due process complaint on January 8, 2008, in which they requested compensatory education dating back to September 2004. *Id.* at 242. The court rejected their assertion that they could recover for claims arising outside the two-year statute of limitations, finding that neither of the statutory exceptions applied and that various forms of equitable tolling could not "save claims otherwise foreclosed by the IDEA statute of limitations." *Id.* at 248. But, as in this case, the Third Circuit recognized that the statute of limitations posed no bar on claims of "violations after January 8, 2006," because they fell within the two-year limitations period. *Ibid.*; see *id.* at 249-252 (rejecting claims based on later violations on the merits); see *G.L.*, 802 F.3d at 625 (observing that *D.K.* found that the statute of limitations prevents parents from "sweep[ing]" in "both timely and expired claims," but finding that parents are entitled to a "'complete'" remedy for "timely" claims) (citation omitted).

Similarly, in *Reyes* the Fifth Circuit affirmed that the complaining parents were entitled to bring their IDEA claims with respect to the portion of the school district's conduct that occurred within the statute of limitations, while rejecting the argument that they could recover for older alleged breaches by borrowing a state statutory provision permitting tolling for plaintiffs of "unsound mind." 850 F.3d at 255 (citation omitted). And in any event, *Reyes* is of questionable relevance because it did not involve an alleged child-find violation and because the equitable doctrine on which plaintiffs attempted to rely was found in a state statute that the court found inapplicable to the IDEA. *Id.* at 253-256.

Moreover, as respondent observes (Br. in Opp. 22-23), the Second and Eleventh Circuits have both recognized that a parent may bring claims based on within-limitations breaches even if the school district's first breach allegedly occurred outside the limitations period. See *Mr. P*, 885 F.3d at 750-752 (refusing to consider allegations of a child-find violation based on a student hospitalization that occurred outside the statutory window, but considering merits of claim based on student's second hospitalization); *Durbrow* v. *Cobb Cnty. Sch. Dist.*, 887 F.3d 1182 (11th Cir. 2018) (considering the merits of alleged IDEA breaches that occurred within the limitations period, even though parents alleged the first breaches occurred many years before).

Accordingly, far from establishing a conflict, the case law reflects broad agreement that a parent may bring a claim based on alleged breaches of the child-find obligation within the statutory time limit, regardless of whether the school district's first breach occurred outside the limitations period. And contrary to petitioner's assertion (Pet. 15-16), that consensus view is consistent with the Department of Education's statement that the IDEA does not provide an "explicit exception[]" to the statute of limitations "when a violation is continuing." 71 Fed. Reg. at 46,697. Unlike a continuing-violation rule permitting recovery for untimely claims, allowing recovery for new breaches within the limitations period does not require any "exception"; it is simply an application of the statute's plain terms.

2. Even if there were some ambiguity about whether the Eighth Circuit's decision endorsed an equitable exception allowing recovery for pre-limitations breaches, the question presented still would not warrant certio-

rari. No other court of appeals has adopted such an exception, and this Court's review would thus be premature at least unless and until the Eighth Circuit revisits the issue and unambiguously adopts the rule petitioner attributes to it.

In the meantime, there is no reason to believe that the court of appeals' decision will have the "grave, negative consequences" petitioner fears. Pet. 18 (capitalization and emphasis omitted). To date, only one district court in the Eighth Circuit appears to have applied the decision below to the IDEA's statute of limitations. *In re Minneto* v. *M.L.K.*, No. 20-1036, 2021 WL 780723, at *6 (D. Minn. Mar. 1, 2021), appeal pending, No. 21-1707 (docketed Mar. 29, 2021), and No. 20-1770 (docketed Apr. 7, 2021). In that case, the district court cited the decision for the proposition that claims outside the two-year window may not be heard, suggesting that petitioner may be alone in its contrary understanding. See *ibid.* ("Because Parents filed their due process complaint on August 8, 2019," the district court held that "any claims based on District actions before August 8, 2017 are untimely.").

C. This Case Would Be A Poor Vehicle In Which To Consider The Question Presented Even If It Warranted Review

Even if the question presented otherwise warranted review, this case would be a poor vehicle in which to consider it for at least three reasons.

First, the parties' disagreement about the meaning of the decision below would complicate this Court's review. Respondent does not defend the rule petitioner attacks; instead, she argues that the Eighth Circuit's decision rests solely on independent breaches within

the limitations period. The parties' briefs would inevitably focus on that case-specific dispute rather than the broader legal question petitioner seeks to raise.

Second, the resolution of the question presented likely has little practical significance here. Petitioner acknowledges that respondent may bring claims based on any child-find violations resulting from a "material change in circumstances" during the limitations period. Reply 12. Even if the Court agreed with petitioner that the Eighth Circuit failed to apply that rule, petitioner would at most be entitled to a remand to allow the Eighth Circuit to consider whether petitioner breached its child-find obligations within the limitations period and whether those within-limits breaches justify the relief awarded. And, as shown above, petitioner has not identified any reason to doubt that its conduct during respondent's ninth- and tenth-grade years violated its child-find obligations or that those violations fully support the hearing officer's grant of relief. See pp. 13-16, *supra*.

Third, even if petitioner could establish that it did not commit any within-limits breaches or that those breaches did not justify all of the relief awarded, that relief might still be upheld under one of the alternative theories relied on by the hearing officer and the district court. Those theories, which are rooted in different aspects of the text of the statute of limitations and its exceptions, have not yet been considered by the court of appeals. But if this Court were to grant certiorari and reverse, the court of appeals might adopt one of the theories on remand.

The hearing officer focused on the requirement that the statute of limitations does not begin to run until a

parent "knew or should have known" about the violation. 20 U.S.C. 1415(f)(3)(C). It found that this requirement was not satisfied until April 2017, when the parents stated that they knew of their rights. D. Ct. Doc. 2, at 43. Among other things, the hearing officer observed that, before that point, the school district did not notify the parents of their rights, *ibid.*, and instead gave "misinformation" suggesting that it was the *parents'* burden to request special education services, *id.* at 36.

The district court was similarly troubled by the proposition that the parents' claim could be barred as untimely even though petitioner appears to have played a role in preventing them from asserting their IDEA rights sooner. But, unlike the hearing officer, the court found that the claim was timely under the statutory exception in 20 U.S.C. 1415(f)(3)(D)(ii) for instances in which a "parent was prevented from requesting a hearing" because the school district withheld information the IDEA requires it to provide. Pet. App. 44a. The relevant IDEA provisions require a district to provide parents with a "[p]rocedural safeguards notice" at specified occasions, including "upon initial referral or parental request for evaluation." 20 U.S.C. 1415(d)(1)(A)(i) (emphasis omitted); see 34 C.F.R. 300.504. Here, the court found that, "[a]lthough [petitioner] discussed special education with the Parents prior to June 2017, the evidence shows that the Parents did not first receive a notice until that time." Pet. App. 45a.

Respondent preserved those alternative arguments in the Eighth Circuit, Resp. C.A. Br. 37-45, and she would be entitled to prevail on remand unless the court rejected both of them. That provides still more reason to doubt that the resolution of the question presented

will affect the ultimate outcome here, which further confirms that this case is an unsuitable vehicle for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General
KRISTEN CLARKE
Assistant Attorney General
COLLEEN E. ROH SINZDAK
Assistant to the Solicitor General
BONNIE I. ROBIN-VERGEER
ALISA C. PHILO
Attorneys

EMMA LEHENY
Principal Deputy General Counsel
FRANCISCO LOPEZ
TIMOTHY MIDDLETON
Attorneys
U.S. Department of Education

AUGUST 2021