

No. 14-99012

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Zane Floyd,
Petitioner – Appellant,

v.

Timothy Filson; Adam Paul Laxalt, Attorney General,
Respondents – Appellees.

Appeal from the United States District Court
for the District of Nevada
The Honorable Phillip M. Pro, Presiding

**Brief of Amici Curiae Disability Law Center of Alaska,
Disability Rights California, National Disability Rights Network, and
Nevada Disability Advocacy & Law Center in Support of
Petitioner-Appellant Zane Floyd’s Petition for Rehearing and
Suggestion for Rehearing En Banc**

All parties have consented. Circuit Rule 29-2(a).

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure,
Amici Curiae make the following disclosures:

1. Amici are not publicly held corporations;
2. Amici have no parent corporations;
3. Amici do not have 10 percent or more of stock owned by a
corporation.

Dated: January 3, 2020

DISABILITY RIGHTS CALIFORNIA

By: /s/ Elizabeth Ballart
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STATEMENT OF AUTHORSHIP

Pursuant to Rule 29(a)(4)(E) and (b)(4) of the Federal Rules of Appellate Procedure, Amici Curiae certify that:

1. No counsel for either party authored this brief in whole or in part;
2. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and
3. No person other than the named Amici Curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

Dated: January 3, 2020

DISABILITY RIGHTS CALIFORNIA

By: /s/ Elizabeth Ballart

INTERESTS OF AMICI CURIAE

Amici Curiae are four nonprofit organizations that represent and advocate for people with disabilities. Amici Disability Law Center of Alaska (DLCA), Disability Rights California (DRC), and Nevada Disability Advocacy & Law Center (NDALC) are the nonprofit Protection and Advocacy (“P&A”) agencies mandated under federal law to advance the legal rights of people with disabilities in Alaska, California, and Nevada respectively. Amici National Disability Rights Network (NDRN) is the non-profit membership association of P&A agencies. Collectively, Amici’s work spans all fifty states and the U.S. territories, assisting thousands of individuals with disabilities each year.

Individuals with disabilities continue to face ignorance, prejudice, insensitivity, and lack of or difficulty accessing legal protections in their endeavors to achieve fundamental dignity and respect. Among other services, Amici provide public education, conduct research, and litigate on behalf of people with disabilities.

Amici have expertise in the service delivery systems for people with intellectual and developmental disabilities (I/DD) and barriers that people with Fetal Alcohol Spectrum Disorders (FASD) face to access services and supports for people with I/DD. Amici believe that their expertise and

perspective can help the Court understand more fully the unintended consequences of the language used by the Court to discuss FASD and people with disabilities.

Although the instant case directly involves only one individual, Zane Floyd, the Court's decision in this matter could significantly affect access to services and supports for people with FASD. This Court should grant the Petitioner-Appellant's request for rehearing by the panel or en banc to clarify that FASD is distinct from Attention Deficit Hyperactivity Disorder (ADHD) and avoid unintended consequences for people with FASD attempting to access critical services and supports, including Amici's present and future clients, throughout the Ninth Circuit and the nation.

This brief is submitted with the consent of all parties and without a motion requesting leave pursuant to Circuit Rule 29-2(a).

Amici Curiae include:

Disability Law Center of Alaska: The Disability Law Center of Alaska (DLCA) is the state-designated P&A organization that serves Alaskans with disabilities. For many years, DLCA has advocated for Alaskans with I/DD, FASD, and other conditions such as ADHD, in relation to Medicaid services, release from mental health institutions, and general community education. In 2016, DLCA sponsored continuing legal

education presentations on FASD. For non-assault crimes, Alaska law lists as a mitigating factor at sentencing FASD that substantially impairs the defendant's judgment.¹ Under state regulations, a child with FASD may qualify for special education services under the category "other health impairment."²

Disability Rights California: Disability Rights California (DRC) is the non-profit P&A agency mandated under state and federal law to advance the legal rights of Californians with disabilities, including individuals with I/DD, FASD, and ADHD.³ DRC was established in 1978 and is the largest disability rights legal advocacy organization in the nation. As part of its mission, DRC works to ensure that people with I/DD have access to necessary services and supports that enable them to live in the community and avoid institutionalization. In 2018 alone, DRC assisted more than 26,000 Californians with disabilities, including people with I/DD, FASD,

¹ Alaska Stat. ("AS") § 12.55.155(d)(20)(A).

² 4 Alaska Admin. Code ("AAC") § 52.130(k).

³ Protection and Advocacy for Individuals with Developmental Disabilities, 42 U.S.C. §§ 15001-09, 15041-45; Protection and Advocacy for Individuals with Mental Illness, 42 U.S.C. §§ 10801-27; Protection and Advocacy of Individual Rights, 29 U.S.C. § 794e.

and ADHD.

National Disability Rights Network: The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated P&A and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

Nevada Disability Advocacy & Law Center (NDALC): Amicus Nevada Disability Advocacy & Law Center (NDALC) is a private, nonprofit organization and serves as Nevada's federally mandated P&A system for the

human, legal, and service rights of individuals with disabilities.⁴ NDALC was designated as Nevada's P&A system by the Governor in March 1995. NDALC's mission includes protecting and advocating for the human and legal rights, interests, and welfare of Nevadans with disabilities, including individuals with intellectual disabilities.

ARGUMENT

The issue before the Court is whether to grant the Petitioner-Appellant's request for rehearing by the panel or en banc. Amici respectfully urge the Court to grant the request for rehearing for the following reasons:

1. FASD and ADHD are not categorically equivalent disabilities, and the Court should reconsider its finding that mistakenly equates the two.
2. The consequences of the Court's erroneous equation of ADHD and FASD will not be limited to this one case or even the criminal justice context; rather those consequences are likely to reach far beyond the matter at hand, creating unintended and potentially insurmountable

⁴ 42 U.S.C. §§ 15001-09, 15041-45; 42 U.S.C. §§ 10801-27; 29 U.S.C. § 794e.

barriers for people with FASD who lawfully attempt to access critical services and supports for people with disabilities.

Amici respectfully request that the Court grant Petitioner-Appellant's request for rehearing so that it may clarify that ADHD and FASD are distinct and not categorically equivalent disabilities, and explain the impacts of FASD, both for Petitioner-Appellant and more broadly, in a manner that is consistent with the available science as outlined in the amicus brief concurrently filed by the National Organization on Fetal Alcohol Syndrome (NOFAS).

I. FASD and ADHD Are Not Categorically Equivalent Disabilities.

In its recent decision in *Floyd v. Filson*, this Court found that “testimony by an FASD expert would likely not have changed any juror’s balancing of mitigating versus aggravating circumstances.”⁵ This conclusion was based in part on the Court’s reasoning that “at least one juror would have had to have considered a formal FASD diagnosis more severe and debilitating than [ADHD] and Floyd’s other mental illnesses....”⁶ The

⁵ 940 F.3d 1082, 1092 (9th Cir. 2019).

⁶ *Id.* at 1092.

clear implication, therefore, is that FASD is no more severe or debilitating than ADHD.

This Court's erroneous equation of FASD and ADHD is of great consequence for people with FASD, and will likely lead to unintended consequences outside of and within the criminal justice system. As discussed below, this Court's treatment of FASD has a very real chance of leading to countless denials or revocation of eligibility for critical disability-based services and supports, as well as having adverse effects on future sentencing decisions for people with FASD.

As NOFAS establishes in its separate and concurrently filed amicus brief, FASD and ADHD are distinct disabilities in both type and severity.⁷ FASD refers to a spectrum of conditions caused by prenatal alcohol exposure that interferes with human development and causes permanent brain damage.⁸ People with FASD often experience significant and lifelong

⁷ Brief of the [NOFAS] as Amicus Curiae in Support of Petitioner/Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc ("NOFAS Brief") concurrently filed on January 3, 2020 (Dkt No.__) at 7-13.

⁸ NOFAS Brief at 7-8; *see also Basics about FASDs*, U.S. Centers for Disease Control and Prevention, <https://www.cdc.gov/ncbddd/fasd/facts.html> (last accessed Dec. 18, 2019).

challenges regulating their behavior and mood, and experience deficits in global intellect, impulse control, conduct, concept formation, executive functioning, and adaptive behavior.⁹ By contrast, ADHD is a common disorder that results in deficits in an individual's ability to pay attention and control impulsive behaviors, and may cause an individual to be overly active.¹⁰ Although ADHD and FASD may cause some similar behavioral symptoms (such as hyperactivity), ADHD is not known to cause the more significant features of FASD, such as life-long intellectual deficits, making it both erroneous and detrimental to people with FASD to inadvertently equate the two.

Amici agree with and incorporate by reference the description of the distinctions between FASD and ADHD as articulated by NOFAS in its concurrently filed amicus brief. Rather than repeat the factual arguments raised by NOFAS, Amici will briefly highlight the legal consequences of conflating or equating these conditions, which support this Court's

⁹ NOFAS Brief at 8.

¹⁰ NOFAS Brief at 9-11; *see also What is ADHD?* U.S. Ctr. for Disease Control and Prevention, <https://www.cdc.gov/ncbddd/adhd/facts.html> (last accessed Dec. 19, 2019).

reconsideration of the matter at hand.

II. The Court’s Sweeping and Erroneous Equation of ADHD and FASD Will Likely Create Additional Barriers and Cause Unintended Consequences for People with FASD When Attempting to Access Critical Services and Supports.

As discussed below, many states across the country, including those within the Ninth Circuit, have robust service systems under state law to protect the rights of people with I/DD and ensure access to services and supports across their lifetimes.¹¹ People with FASD frequently qualify for these services and supports, whereas people with ADHD alone do not. Accordingly, this Court’s equation of the two conditions may create confusion about the rights of people with FASD and jeopardize their ability to access key services and supports provided by their states.

a. Many States, Including Several Within the Ninth Circuit, Provide Robust Service Systems to People with I/DD.

1. *State I/DD Service Systems Provide a Broad Range of Services and Supports to Eligible Individuals.*

The term I/DD refers to both intellectual and developmental disabilities. In general, a developmental disability is a severe, chronic

¹¹ See e.g. California’s Lanterman Developmental Disabilities Services Act (“Lanterman Act”), Cal. Welf. & Inst. Code §§ 4500-4885.

disability that manifests during a person's youth, is likely to continue indefinitely, and results in substantial limitations to multiple enumerated major life activities.¹² FASD can be a developmental disability. The term "intellectual disability" has a narrower meaning and refers to a condition with onset during the developmental period that causes deficits in intellectual functions and adaptive functioning.¹³ Some people with FASD may also meet the criteria for an intellectual disability.

Several states, including California, Nevada, and Alaska, provide services to people with I/DD. California and Nevada have similar systems wherein eligible individuals with I/DD are entitled to a broad range of services and supports through private nonprofit corporations called "regional centers."¹⁴ State agencies are responsible for the overall administration of

¹² 42 U.S.C. § 15002(8)(A).

¹³ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS DSM-5 33 (5th ed. 2013).

¹⁴ *See e.g.* Cal. Welf. & Inst. Code §§ 4501, 4620(a), 4646, 4646.5, 4648. In California, the Lanterman Act is a comprehensive statutory scheme that sets forth the rights of people with developmental disabilities in California and the responsibilities of the state towards such individuals. Cal. Welf. & Inst. Code §§ 4500-4885; Cal. Code of Regs., tit. 17 §§ 50201-59072.

the I/DD service systems in California and Nevada.¹⁵ Alaska provides services and supports to people with I/DD through a Medicaid waiver system and an annual state plan for persons with I/DD.¹⁶

Through I/DD service systems like regional centers or Medicaid waiver programs, eligible individuals may receive funding and coordination of a broad range of services and supports, including, but not limited to: vocational support; day training and services; community integration services; independent living skills services; supported living services; services to ensure that individuals can live in settings of their choice, including a group setting, a family home or other shared living arrangement; family preservation services; and respite care.¹⁷ Services and supports

¹⁵ In California, the Department of Developmental Services (DDS) is the agency responsible for administering the I/DD service system. Cal. Welf. & Inst. Code §§ 4434, 4629, 4635. DDS contracts with twenty-one regional centers throughout the state. Cal. Welf. & Inst. Code § 4620(a).

In Nevada, the Division of Aging and Disability Services operates the state's three regional centers. Nev. Rev. Stat. ("NRS") 435.400.

¹⁶ AS § 47.80.090(5) (citing 42 U.S.C. § 15024).

¹⁷ See e.g. Cal. Welf. & Inst. Code § 4512(b) (enumerating a non-exhaustive list of services and supports available through California regional centers); Cal. Welf. & Inst. Code §§ 4501, 4640.6, 4640.7, 4647(a) (outlining the service coordination duties of regional centers in California).

ensure that people with I/DD can remain in their homes in the community and avoid unnecessary institutionalization consistent with the Supreme Court's decision in *Olmstead v. L.C.*¹⁸

2. *To Receive Services through a State I/DD Service System, an Individual Must Establish that They Meet Eligibility Criteria.*

To receive services through a state's I/DD service system, an individual must establish that they meet eligibility criteria. California, Nevada, and Alaska have similar definitions of I/DD under their respective state laws. To establish a developmental disability, each state requires the following elements:

- a. The disability must manifest before age 18 (California)¹⁹ or age 22 (Alaska and Nevada)²⁰;
- b. The disability must be likely to continue indefinitely;²¹

¹⁸ 527 U.S. 581 (1999).

¹⁹ Cal. Welf. & Inst. Code § 4512(a).

²⁰ AS § 47.80.900(6)(B); NRS 435.007(5)(a).

²¹ Cal. Welf. & Inst. Code § 4512(a); AS § 47.80.900(6)(C); NRS 435.007(5)(b).

- c. The disability must result in substantial functional limitations in three or more of the following major life activities: (1) self-care; (2) receptive and expressive language; (3) learning; (4) mobility; (5) self-direction; (6) capacity for independent living; and (7) economic self-sufficiency (Alaska and California only).²²

In addition to these requirements, Alaska, California, and Nevada require that an individual have at least one of five eligible conditions, including (1) an intellectual disability²³; (2) cerebral palsy; (3) epilepsy (California and Nevada) or a seizure disorder (Alaska); (4) autism; or (5) an additional category.²⁴

²² Cal. Welf. & Inst. Code §§ 4512(a) & (l); Cal. Code Regs., tit. 17, § 54001; AS § 47.80.900(6)(D); NRS 435.007(5)(c).

²³ Nevada defines intellectual disabilities separately from developmental disabilities. NRS 435.007(9) (defining an intellectual disability as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period”).

²⁴ Cal. Welf. & Inst. Code § 4512(a); NRS 435.007(5); 7 AAC § 140.600(c). For ease of reference, Amici will refer to these additional or last eligibility categories collectively as “fifth category.”

In California, the last eligibility category is referred to as “fifth category” eligibility and requires a “disabling condition[] found to be closely related to intellectual disability or [that] require[s] treatment similar to that required for individuals with an intellectual disability...that are [is not] solely physical in nature.”²⁵ Alaska has a similar provision requiring that a qualifying condition be “closely related to intellectual or developmental disability because that condition results in impairment of general intellectual functioning and adaptive behavior similar to that of individuals with intellectual and developmental disabilities.”²⁶ Nevada includes “any other neurological condition diagnosed by a qualified professional” as its last eligibility category.²⁷

Finally, Alaska and Nevada also have an additional requirement that an eligible person require individualized services and supports for their entire life or an extended duration.²⁸

²⁵ Cal. Welf. & Inst. Code § 4512(a).

²⁶ 7 AAC § 140.600(c)(2)(B).

²⁷ NRS 435.007(5).

²⁸ NRS 435.007(5)(d) (requiring that the condition “result[] in the person affected requiring a combination of individually planned and coordinated

b. People with FASD Regularly Face Barriers to Accessing I/DD Service Systems; the Court's Decision Will Likely Cause Unintended Consequences by Exacerbating the Difficulties People with FASD Face.

Although people with FASD are not explicitly included under the definition of intellectual or developmental disability, they often still meet eligibility criteria for the I/DD service system. As established in the brief filed by NOFAS, FASD causes significant impairments to intellectual functioning that may not be adequately detected by traditional cognitive testing despite their severity.²⁹ As a result, most people with FASD do not meet the intelligence testing standards necessary to establish an intellectual disability.³⁰ Accordingly, many individuals with FASD, must rely on the

(cont'd)

services, support or other assistance that is lifelong or has an extended duration.”); AS § 47.80.900(6)(E) (requiring that the disability “reflect[] the person’s need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated”).

²⁹ NOFAS Brief, *supra* note 7, at 12.

³⁰ Ann P. Streissguth, et al., *Risk Factors for Adverse Life Outcomes in Fetal Alcohol Syndrome and Fetal Alcohol Effects*, 25 Dev. & Behav. Pediatrics J. 228 (Aug. 2004) (discussing a clinical study that found that only 13% of patients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE) qualified as having an intellectual disability with an IQ of 70 or below).

“fifth category” to establish eligibility for services.

In contrast to FASD, ADHD alone may not justify a finding of fifth category eligibility.³¹ Thus, the likening of FASD to ADHD has the potential to be particularly damaging for individuals with FASD attempting to access their state’s I/DD service system. Supports comparable to the I/DD service system do not exist for people with ADHD.

Fifth category eligibility cases often require significant medical documentation to establish a developmental disability before the age of 18 or 22, depending on the state’s requirement.³² In Amici’s experience representing people with FASD, obtaining such medical documentation from before age 18 or 22 through expert screening and assessment is often difficult and presents a barrier for people with FASD to obtain services and supports through state I/DD systems.

Eligibility denials within state I/DD service systems are regularly

³¹ See e.g. *Samantha C. v. Dep’t of Developmental Services*, 185 Cal. App. 4th 1462, 1479 (2010);

³² Cal. Welf. & Inst. Code § 4512(a); AS § 47.80.900(6)(B); NRS 435.007(5)(a).

contested, and “fifth category” eligibility denials are contested particularly often. In California, regional center eligibility cases make up the largest category of hearing decisions concerning the I/DD service system.³³ While California’s agency responsible for overseeing the state’s I/DD service system only posts a small percentage of hearing decisions on its website,³⁴ it is clear from the available sample and Amici’s experience that many of these cases involve fifth category disputes. The body of case law deciding fifth category eligibility denials further supports the conclusion that these cases are contested with regularity and raise complicated issues for hearing officers and courts.³⁵

³³ *Data on California’s Regional Center System Serving People with I/DD*, Stanford Intell. & Dev. Disabilities Law and Pol’y Project (SIDDLAPP), datasets accessible at <https://law.stanford.edu/siddlapp/data-on-californias-regional-center-system-serving-people-with-idd/> (last visited Dec. 30, 2019).

³⁴ Lane Zuraw et al., *The Scope of the Lanterman Entitlement*, Stanford Intell. & Dev. Disabilities Law and Pol’y Project (SIDDLAPP), at 7 <https://www-cdn.law.stanford.edu/wp-content/uploads/2019/07/Lanterman-Entitlement-Report-Posted-July-1-2019.pdf> (last visited Dec. 30, 2019) (opining that DDS’ contractor only posts about 8% of thousands of decisions on its website).

³⁵ See e.g. *Mason v. Office of Administrative Hearings*, 89 Cal. App. 4th 1119 (2001); *Samantha C.*, 185 Cal. App. 4th 1462; *Ronald F. v. Dep’t of Developmental Services*, 8 Cal. App. 5th 84 (2017). Although there are extremely few published appellate cases decided under California’s

Challenging an eligibility decision by the state or its regional center contractors requires exhaustion of a complex administrative process.³⁶ Given the complicated medical nature of an FASD diagnosis, individuals with FASD who wish to challenge an eligibility denial within the I/DD service system often must hire their own expert and navigate the complicated administrative appeals process on their own. The Court's finding analogizing ADHD and FASD will only stand to make it more difficult for people with FASD attempting to access critical services and supports.

The language used by this Court in *Floyd* will likely result in adverse and presumably unintended consequences for people with FASD if hearing officers and courts deciding regional center eligibility cases accept the proposition that ADHD and FASD are equivalent and deny individuals with FASD critical services and supports. As described above, this is a very real possibility.

Lanterman Act, several of them address regional center eligibility under the fifth category.

³⁶ See e.g. Cal. Welf. & Inst. Code §§ 4700-4731 (setting forth the appeals and administrative hearing process to challenge a regional center's decision in California).

CONCLUSION

For the reasons stated above, Amici respectfully urge this Court to grant Petitioner-Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc to (a) clarify that FASD and ADHD are distinct and not equivalent disabilities, and (b) explain the impacts of FASD consistent with the amicus brief filed by NOFAS in this matter.

Dated: January 3, 2020

Respectfully submitted,

By: /s/ Elizabeth Ballart
Elizabeth Ballart
William Leiner
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. Rs. of App. P. 29(a)(4) & (b)(4) and Circuit Rule 29-2(c)(2) because this brief contains 3,399 words, excluding the tables, certificates, and disclosures.

Dated: January 3, 2020

DISABILITY RIGHTS CALIFORNIA

By: /s/ Elizabeth Ballart