17-40461

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

ASHLEY KRAWIETZ, an individual with disabilities, by and with and through her parent/guardian/next friend, Amanda Parker; AMANDA PARKER,

Plaintiffs-Appellees,

—v.—

GALVESTON INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF OF *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF APPELLEES AND AFFIRMANCE

SELENE ALMAZAN-ALTOBELLI, ESQ.
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC.
PO Box 6767
Towson, Maryland 21285
(844) 426-7224

ROY T. ATWOOD, ESQ.
ATWOOD GAMEROS LLP
6116 N. Central Expressway, Suite 1400
Dallas, Texas 75206
(214) 559-7399

Attorneys for Amicus Curiae Council of Parent Attorneys and Advocates, Inc.

CERTIFICATE OF INTERESTED PERSONS

Ashley Kraweitz, an individual with disabilities, by and through her parent and next friend, Amanda Parker v. Galveston Independent School District No. 17-40461. The following statement is made pursuant to Federal Rules of Appellate Procedure 26.1 and 29(C) and 5TH Cir. R. 26.1.1.

Amicus Curiae has no parent corporation, subsidiaries or affiliates that has issued shares to the public.

Amicus Curiae has no direct or indirect interest associated with the parties to this matter, or to their attorneys or counsel, though it and its members have a general interest in the issue and outcome of the case. Attorneys for Appellees and other putative *amicus* are independent members of COPAA, an organization which opens membership to attorneys who are interested in and/or represent parents and children with disabilities. COPAA has not contributed in any way to the Appellees or their pursuit of this matter.

Amicus Curiae adopts the statements of the Appellee and Appellant concerning the parties, trial judge(s), persons, firms, partnerships or corporations who have an interest in the outcome of the case.

Pursuant to 5th Cir. R. 26.1.1, as this brief is filed by *amicus* the following is list of all entities known to have an interest in the outcome of this appeal which has been "omitted from the certificate contained in the first brief filed and in any other

brief that has been filed":

Amicus Curiae: Council of Parent Attorneys and Advocates, Inc., a non-profit organization.

Respectfully submitted, this the 8th day of November 2017.

/s/ Selene Almazan-Altobelli
Selene Almazan-Altobelli
Council of Parent Attorneys and Advocates
PO Box 6767
Towson, Maryland 21285

/s/Roy Atwood
Roy Atwood
Atwood Gameros LLP
6116 N. Central Expressway, Suite 1400
Dallas, Texas 75206
Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Rules

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Council of Parent Attorneys and Advocates (COPAA) is a not-for-profit organization of parents of children with disabilities, their attorneys and advocates in forty- eight states and the District of Columbia who are routinely involved in special education advocacy and due process hearings throughout the country. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not undertake individual representation but provides resources, training, and information for parents, advocates and attorneys to assist in obtaining the free appropriate public education (FAPE) such children are entitled to under the Individuals with Disabilities Education Act 20 U.S.C. § 1400, *et seq*. (IDEA). COPAA also supports individuals with disabilities, their parents and advocates, in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq*. (ADA).

[1] Pursuant to Fed. R. App. P. 29, *Amicus* certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *Amicus* and its members and counsel contributed money intended to fund the brief's preparation or submission.

COPAA offers a unique perspective on an issue raised by a Memorandum and Order of the United States District Court for the Southern District of Texas, because the Order affects the ability of children with disabilities and their families to obtain attorney's fees.

IDEA embodies substantial procedural safeguards for students and their parents, including the right to equal and meaningful participation in the educational planning process. COPAA has found, however, that students and their parents are often unable to exercise these important procedural and substantive rights without legal representation.

Appellees have consented to the filing of this brief; Appellants have not consented.

INTRODUCTION AND SUMMARY OF ARGUMENT

The IDEA, 20 U.S.C. § 1400 *et seq*., was first enacted in 1975, after Congress determined that children with disabilities were routinely denied educational opportunities afforded to children without disabilities. The IDEA ensures that each child with a disability receives a comprehensive evaluation of his or her unique needs, and a "free appropriate public education." *Id.* § 1412(a)(1)(A). To further this goal, Congress added a fee-shifting provision to the IDEA in 1986, providing for an award of reasonable attorneys' fees "to a prevailing party who is the parent of a child with a disability." *Id.* § 1415(i)(3)(B)(i). Congress made clear that fees

awarded under the IDEA, as with other civil rights fee-shifting statutes, "shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." *Id.* § 1415(i)(3)(C).

Even with the IDEA's fee-shifting provision, however, structural challenges still exist and prevent low-income families of students with disabilities from enforcing their rights under the IDEA. Access to legal representation for students with disabilities and their parents is limited, as few attorneys practice in this complex, specialized area of law, and even fewer provide such representation without charge. Low income and even middle-class families face a dearth of attorneys available to take their cases on a purely contingent basis because, too often, a prevailing parent's recovery of attorneys' fees may prove to be elusive even in the most meritorious cases. As Congress has recognized, attorneys' fees are essential for parents and their children to vindicate their IDEA rights. Therefore, we urge the Court to affirm the decision of the District Court.

FACTUAL BACKGROUND

Amicus adopts fully by reference herein the Statement of Facts in the Brief of Appellee at 1-10.

ARGUMENT

I. The Ability for Parents to Recover Fees is Critical for the Proper Functioning of the IDEA

A. IDEA Secures Appropriate Educational Services for All Students Through Informed Parental Involvement and Procedural Protections

A "proper interpretation of [the IDEA] requires a consideration of the entire statutory scheme." *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 523 (2007). Congress enacted the precursor statute to IDEA "in 1970 to ensure that all children with disabilities are provided 'a free appropriate public education' [FAPE] which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of [such] children and their parents or guardians are protected.'" *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (*quoting Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 367 (1985)). The IDEA "embodies a strong federal policy to provide an appropriate education" for every child with disabilities.

> [I]nterrelated purposes underlay its passage. First, Congress sought to secure by legislation the right to a publicly-supported equal educational opportunity which it perceived to be mandated by *Brown v Board of Educ.*, [347 U.S. 483 (1954)] and explicitly guaranteed with respect to the handicapped by two seminal federal cases, *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, [334 F. Supp. 1257 (E.D. Pa. 1971), modified 343 F. Supp. 279 (1972)] and *Mills v. Board of Educ.*, [348 F. Supp. 866 (D.D.C. 1972)]. Second, Congress intended the provision of education services to increase the personal independence and enhance the productive capacities of handicapped citizens." *Kruelle v. New Castle County Bd. of Educ.*, 642 F.2d 687, 690-691 (3d Cir. 1981).

The IDEA confers upon students with disabilities, an enforceable substantive right to public education in participating States. *See Honig v. Doe*, 484

U.S. 305, 310 (1988); *Hous. Indep. Sch. Dist. v. VP*, 582 F.3d 576, 583 (5th Cir. 2009). A state must therefore have "policies and procedures in place to ensure that all eligible children receive a FAPE." *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1125 (9th Cir. 2003).

To that end, the IDEA requires that states provide eligible students with "special education and related services that – (A) have been provided at public expense, under public supervision, direction, and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary school, or secondary education in the State involved; and (D) are provided in conformity with the individualized education program [IEP] required under section 1414(d) of [IDEA]." 20 U.S.C. § 1401(9). States provide these required services through an IEP. Ultimately, an IEP is intended to provide a student with a disability with "meaningful educational progress," as defined in the case law interpreting the IDEA. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982).

In order to ensure meaningful educational progress through the IEP, parents and guardians must "play a significant role in the IEP process." *Schaffer v. Weast*, 546 U.S. 49, 53 (2005); *Winkelman*, 550 U.S. at 519. Indeed, "one of the central innovations of the special education law, and a key to its success, is that it empowers parents to participate in designing programs for their children and to challenge school district decisions about educational services and placement."

Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources, 65* Ohio St. L.J. 357, 369 (2004). Thus, to facilitate the provision of a FAPE in accordance with an appropriate Individualized Educational Program, the IDEA contains significant procedural protections for parents. *Id.* at 524; *Schaffer*, 546 U.S. at 53.

B. Parental Enforcement, Integral to the Effective Functioning of the IDEA, Must Be an Option for All Parents

The United States Supreme Court made clear in *Winkelman*, that the "IDEA grants parents independent, enforceable rights." 550 US at 533. Those rights include "the entitlement to a free appropriate public education for the parents' child." *Id.* The Court noted that, if parents were not allowed to enforce their child's right to a FAPE, the "potential for injustice in this result is apparent." *Id.*. Recognizing the importance of parental advocacy to ensure the protection of the rights of children with disabilities, Congress included parents in every critical point of the statutory scheme. *See, e.g.,* 20 U.S.C. §§1400(d(1)(B), 1414(a)(1)(D) and 1414(d)(1)(B) . When Congress required States to provide FAPE at no cost to parents, it did not intend "that only some parents would be able to enforce that mandate." *Id.* Thus, any interpretation of the IDEA must take into account access for the families of students regardless of the parents' economic means.

Access to the protections afforded by the IDEA was guaranteed by Congress through the inclusion of fee shifting provisions in the Handicapped Children's Protection Act of 1985 (HCPA), P.L. 99-372, 100 Stat. 796. Congress enacted the HCPA in response to *Smith v. Robinson*, 468 U.S. 992 (1984), which denied parents the right to collect attorney's fees in cases brought under the predecessor to the IDEA, the Education for All Handicapped Children Act of 1975 (EHA) 94 Pub. L. No. 142, 89 Stat. 773. The Court decided *Smith* on July 5, 1984. The House and Senate Bills to remedy the *Smith* ruling were both introduced before the end of July, 1984. Myron Schreck, *Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act: of Carey, Crest Street and Congressional Intent*, 60 Temple L.Q. 599. 612 n. 91 (1987) (citing S. 2859, 98th Cong., 2d Sess., 130 Cong. Rec. S. 9078 (daily ed. July 24, 1984); H.R. 6014, 98th Cong., 2d Sess., 130 Cong. Rec. H7688 (daily ed. July 24, 1984)).

The HCPA was based on Section 1988 and other federal fee-shifting provisions in civil rights legislation. S. Rep. No. 99-112, at 14; *Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188, 1193 (5th Cir. 1990) (prevailing party analysis pertinent to claims for fees under HCPA). One of the congressional purposes in providing attorney's fees in civil rights cases was to eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary

compliance with the law. S. Rep. No. 94-1011, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5913; H.R. Rep. NO. 94-1558 (1976)

The legislative history of the HCPA undeniably establishes the primacy of the fee provision in the enforcement scheme for federal special education laws. The House Report states:

> In sum, since 1978, it has been Congress' intent to permit parents or guardians to pursue the rights of handicapped children through EHA, section 504, and section 1983. Attorneys' fees could be awarded under section 504 (by virtue of section 505) and under section 1983 (by virtue of section 1988) . . . Congressional intent was ignored by the U.S. Supreme Court when, on July 5, 1984, it handed down its decision in *Smith v. Robinson*. . . . H.R. 1523 is designed to: (1) authorize courts to award reasonable attorneys' fees to parents of handicapped children who prevail in actions or proceedings under EHA; (2) re-establish statutory rights repealed by the US. Supreme Court in *Smith v. Robinson* . . . .

H.R. Rep. No. 99-296, at 4.

The Senate Report similarly emphasized the importance of fee-shifting to ensure compliance with the IDEA, stating:

> Congress' original intent was that due process procedures, including the right to litigation if that became necessary, be available to *all parents*. On July 5, 1984, the Supreme Court, in *Smith v. Robinson* . . . determined that Congress intended the EHA provide the exclusive source of rights and remedies in special education cases covered by that act. The effect of this decision was to preclude parents from bringing special education cases under section 504 of the Rehabilitation Act of 1973, *and recovering attorney's fees available under section 505 of that act.*

S. Rep. No. 99-112, at 2 (emphasis supplied); *see also* 131 Cong. Rec. S. 10396 ("unless the EHA is to become a mere hollow pronouncement which the financially strapped parents and legal representatives of handicapped children cannot enforce, Congress must guarantee access to legal counsel to assist parents in obtaining what is guaranteed to them by EHA") (remarks of Sen. Weicker). The committee's intent was clear – to ensure that children with disabilities would be provided with fee awards on a basis similar to other fee shifting statutes. S. Rep. No. 99-112, at 14.

Any interpretation of the IDEA that drastically limits the ability of families to recover their fees will undermine the statutory purposes of achieving an appropriate education for <u>*all*</u>:

> The wealth-based disparities in private enforcement raise troubling questions about the IDEA's effectiveness for children in poverty. Nothing in the statute suggests that it is intended to privilege comparatively wealthy children. To the contrary, while the statute is a universal rather than a means-tested program, its intent to pay particular attention to traditionally disadvantaged populations is clear. As a matter of history, the statute grew out of lawsuits brought by civil rights attorneys and poverty lawyers, who went on to be instrumental in drafting the original statutory provisions in ways that they thought would benefit their clients.

Id. at 1430. The disparity in access created by a crabbed reading of the fee-shifting statute "is particularly disturbing because children with disabilities are more likely to live in poverty than children in the general population are." *Id.* at 1432.

In the *Smith* dissent, Justice Brennan, citing to the legislative history of Section 1988, emphasized the central importance of fee awards in cases where

individual citizens must act as private attorneys general to enforce federal civil rights laws:

> [A]lthough Congress, in enacting § 1988, did not specifically refer to the applicability of § 1983 to constitutional claims by handicapped children seeking education, it clearly intended to authorize attorney's fees in all cases involving the deprivation of civil rights. Adopted in response to this Court's decision in *Alyeska Pipeline Service Co*. v. *Wilderness Society*, 421 U.S. 240 (1975), § 1988 was intended to close "anomalous gaps in our civil rights laws whereby awards of fees are . . . unavailable." S. Rep. No. 94-1011, p. 4 (1976). The Senate Report thus stated:
>
> > "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."
> >
> > . . . .
> >
> > "'Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. . . . Without counsel fees the grant of Federal jurisdiction is but an empty gesture. . . .' *Hall* v. *Cole*, 412 U.S. 1 (1973), *quoting* 462 F.2d 777, 780-81 (2d Cir. 1972)."
> >
> > "The remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven." *Id*., at 2-3."

Smith, 468 U.S. at 1029-30 (quoting S. Rep. No. 94-1011, p. 4 (1976)).

Unfortunately, "[t]here is a growing literature on the problem of economic disparities in the implementation and enforcement of the IDEA. Chief among the

concerns in the literature is that wealthier parents use the private enforcement mechanisms more than poor parents do." Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 Notre Dame L. Rev. 1413, 1417-18 (2011). The fee-shifting provision in the HCPA, like all other fee-shifting provisions, "are thought to level the playing field for individuals without financial resources, as they are designed to encourage attorneys to take up the meritorious cases of plaintiffs, especially those who would otherwise not be able to afford legal fees." *Id.* at 1424-25; *see also* Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 Denv. U.L. Rev. 441, 467 (2014) (Congress wanted aggrieved persons to pursue certain categories of cases, and wanted lawyers to represent plaintiffs in those cases). "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." *Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (quoting 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney).

The purpose of the HCPA was undeniably to encourage liberal application of the fee-shifting provisions in the IDEA. This is consistent with the Act's emphasis on procedural protections for parents to secure FAPE for covered students.

C. Awarding Attorneys' Fee to Parents Who Prevail on Any Significant Legal Issue Are Prevailing Parties And Is Essential to Enabling All Parents to Obtain Legal Assistance to Challenge Illegal Actions by School Districts and Fulfill the Mandates of IDEA and the HCPA

The IDEA provides, like many fee shifting statutes codified in federal law, that "the court in its discretion, may award reasonable attorneys' fees as part of the costs (I) to a prevailing party who is the parent of a child with a disability … ." 20 U.S.C. § 1415(i)(3)(B)(i). "[A] prevailing party 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citations omitted). "A request for attorney's fees should not result in a second major litigation." *Id.* at 437. Unfortunately, the "prevailing party" language has done just that on way too many occasions when school districts having lost at the District Court level contend, as in the instant case, that the parent is not the prevailing party.[2]

The motivations for school districts to make last ditch pleas to deprive parents of an attorney's fee recovery are obvious. The scarcity of attorneys available to assist families with children with disabilities is well established, particularly for families unable to pay for attorneys and experts. Elisa Hyman, *et al.*, *How IDEA Fails Families without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 Am. U. J. Gender Soc. Pol'y & L 107, 111 (2011). Recent studies confirm that without counsel, parents left on their own are without

[2] *See, e.g.*, F*arrar v. Hobby*, 506 U.S. 103 (1992); *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989); *Ector County Indep. Sch. Dist. v. VB*, 420 Fed. Appx.338 (5th Cir. 2011), *Gary G. v. El Paso Indep. Sch. Dist.*, 632 F.3d 201 (5th Cir. 2011); *El Paso Indep. Sch. Dist. v. Richard R.*, 591 F.3d 417 (5th Cir. 2009); *Angela L.*, 918 F.2d 1188.

the experience or ability to "navigat[e] the intricacies of disability definitions, evaluations processes, the developments of IEPs, the complex procedural safeguards, among other provisions in the statute," and, as a result, parents of students who were represented by counsel were far more likely to be successful in the IDEA claims than those without counsel. Lisa Lukasik, *Special Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. Va. L. Rev. 735, 775 (2016) (over twelve years, North Carolina pro se parents prevailed on at least one issue in just 11.1% of the cases, while those with counsel were five times more likely to prevail on at least one issue (51.3%)), Kevin Hoagland-Hanson, *Comment: Getting Their Due (Process): Parents and Lawyers in Special Education Due Process Hearings in Pennsylvania*, 163 U. Penn. L. Rev. 1806, 1820 (2015)(over a five-year period, Pennsylvania parents who had legal counsel prevailed 58.75% of the time whereas *pro se* parents prevailed only 16.28% of the time).

Unlike parents who are frequently unrepresented and cannot afford expert witnesses, schools are represented by counsel with expertise in special education law and can draw on the expertise of school staff (without incurring additional expense) as well as paid experts. The imbalance is perpetuated by the fact that schools often

have insurance that covers special education litigation[3] in addition to other funding sources to pay fees, including tax dollars paid by parents and others. Thus, parents are often paying through their tax dollars for the very counsel fighting against them. There can be no question that school districts would prefer that no parent bring an IDEA claim and that, if they do, they not be able to find counsel who will represent them. However, depriving parents of the ability to obtain counsel is completely contrary to Congress' intent when it empowered parents to enforce the IDEA by adopting the HCPA.

In the present case, the District Court concluded that Galveston Independent School District denied Ashley a FAPE and upheld relief granted by the Special Education Hearing Officer of training for both Ashley and her family and transition services to prepare Ashley for adulthood. *Krawietz v. Galveston Indep. Sch. Dist.*, No. CIVIL ACTION NO. 3:15-CV-203, 2017 WL 1177740, at *7 (S.D. Tex. Mar. 30, 2017). The court correctly concluded that this relief was necessary to fulfill the IDEA's purpose of providing disabled students with a free appropriate education. *Id.* This Court, therefore, should reject the school district's assertion that Ashley is not the prevailing party.

[3] Such insurance coverage "allows school districts to avoid internalizing all of the costs of litigation under the IDEA. A school might refuse to provide an expensive benefit to a disabled child, knowing that it can incur up to $100,000 in legal fees at no marginal cost."

In *Farrar*, the United States Supreme Court held that a plaintiff who won a nominal damage award in a civil rights case was the prevailing party. *Farrar*, 506 U.S. at 112. This Court said in *Angela L.* that "The parents of a handicapped child can recover attorney's fees under the HCPA even if they do not obtain their principal objective." 918 F.2d at 1196. In *Angela L.*, the Court relied on an Eleventh Circuit decision which held that parents were the prevailing party even though they did not obtain the change in placement they had sought. *Id.* (citing *Mitten v. Muscogee Cty. Sch. Dist.*, 877 F.2d 932, 936 (11th Cir. 1989)).

As the Eleventh Circuit noted in *Mitten*, the HCPA's legislative history "explicitly requir[ed] that the term 'prevailing party' be given the same meaning it was given by the U.S. Supreme Court, in *Hensley*, 461 U.S. 424, which employed the significant relief standard." *Id.*, citing to H.R.Rep. No. 99-296, 99th Cong., 2nd Sess. (1985) at 5-6 (addendum 3). *See also* S.Rep. No. 99-112 at 13, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.Code Cong. & Admin.News 1798, 1803. Thus, Ashley's failure to obtain a change in placement does not dictate a finding that she did not prevail.

In *Ector County Indep. Sch. Dist.*, this Court stated, "But in determining whether a party is a "prevailing party" and thereby eligible to receive attorney's fees at all, we examine whether the remedy the party obtained fosters the IDEA's purposes." 420 Fed. Appx. At 345. The test is not, as the school district seems to

suggest here, "did the parent get everything they asked for in just the way they asked for it." The remedy awarded Ashley here without doubt fosters the IDEA's purposes, and the District Court did not abuse its discretion in finding that Ashley was the prevailing party. Any other conclusion will have the effect of making it more difficult for parents to obtain counsel to help enforce their rights in the manner Congress contemplated.

II. Federal Courts Have Jurisdiction of IDEA Attorneys' Fees Claims Regardless of Whether the Underlying Legal Claims are Moot

Federal courts have consistently held that they have jurisdiction of an attorneys' fees claim under IDEA even if that case subsequently became moot on the merits of the underlying legal claim. *See, e.g.*, E.*D. v. Newburyport Pub. Sch.*, 654 F.3d 140, 143 (1st Cir. 2011) ("eligibility for a fee award is not lost even when subsequent developments render claim moot overall"); *Doe v. Eagle-Union Cmty. Sch. Corp.*, 2 F. App'x 567, 569 (7th Cir. 2001) (although appeal to district court was moot, parents' fee claim for due process proceedings was decided on the merits, not because of mootness); *Dep't of Educ. v. Rodarte ex rel Chavez ex rel. Chavez*, 127 F. Supp. 2d 1103, 1116-17 (D. Haw. 2000) (mootness of school district's appeal does not affect prevailing party status of parent who prevailed at due process hearing). *See also Jefferson County Bd. of Educ. v. Bryan M*, 2017 U.S. App. LEXIS 14879, at *11-12 (11th Cir. Aug. 11, 2017) (holding parents entitled to attorneys' fees despite mootness of their claims).

Congress specifically provided that federal district courts have jurisdiction over attorneys' fees claims for parents who prevail in due process proceedings. 20 U.S.C. § 1415(i)(3). IDEA does not require that the underlying educational controversy remain alive at the time the claim is filed in federal district court. *Id.* In fact, if a school district determines not to appeal the case, the hearing order becomes final, and the controversy between the parties is over. *See* 20 U.S.C. § 1415(i).

The IDEA encourages resolution of claims and specifically penalizes school districts that unreasonably protract the final resolution by providing that parent's attorneys' fees awards will not be reduced in such cases. 20 U.S.C § 1415(i)(3)(G). *See, e.g.,* C*obb Cty. Sch. Dist. v. D.B.*, 670 F. App'x 684, 685 (11th Cir. 2016) (remanding for fees to be awarded applying § 1415(i)(3)(G)). Thus, the statute encourages school districts to accept adverse hearing decisions if there are no reasonable grounds for appeal and resolve attorneys' fees claims rather than continue litigation. Thus, the fact that a case subsequently becomes moot on the merits does not deprive parents of their right to attorneys' fees as the prevailing parties in the administrative proceeding. *See, e.g., E.D. ex rel Doe,* 654 F.3d at 143. As the Supreme Court noted in *Burlington*, IDEA proceedings are "ponderous," and "[a] final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed." 471 U.S. at 370.

CONCLUSION

For the foregoing reasons, the judgment below should be AFFIRMED.

Date: November 8, 2017

Respectfully submitted,

/s/ Selene Almazan-Altobelli
Selene Almazan-Altobelli
Council of Parent Attorneys and Advocates
PO Box 6767
Towson, Maryland 21285

/s/Roy Atwood
Roy Atwood
Atwood Gameros LLP
6116 N. Central Expressway, Suite 1400
Dallas, Texas 75206
Attorneys for Amicus Curiae

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C)

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Fifth Circuit Rule 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 4,377 words.

Dated: November 8, 2017

/s/ Selene Almazan-Altobelli
SELENE ALMAZAN-ALTOBELLI
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on November 8, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF if they are registered users, or if they are not, by serving a true copy and correct copy at the addresses below.

Amy C. Tucker
Rogers, Morris & Grover, L.L.P.
5718 Westheimer, Suite 1200
Houston, Texas 77057

Dorene Philpot
7314 Offats Pointe
Galveston, Texas 77551

Andrew K. Cuddy & Jason H. Sterne
Cuddy Law Firm, PLLC
5693 South Street Road
Auburn, New York 13021

Deborah McElvaney
3902 Travis Court
Missouri City, Texas 77459

/s/Selene Almazan-Altobelli
SELENE ALMAZAN-ALTOBELLI
Attorney for Amici Curiae