IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 20-1694

RENA C., individually and o/b/o A.D.,

Plaintiff-Appellant,

v.

COLONIAL SCHOOL DISTRICT,

Defendant-Appellee.

BRIEF OF *AMICI CURIAE* THE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, COMMUNITY LEGAL SERVICES OF PHILADELPHIA, THE EDUCATION LAW CENTER - PA, THE PENNSYLVANIA INSTITUTIONAL LAW PROJECT, ACLU OF PENNSYLVANIA, AND THE PUBLIC INTEREST LAW CENTER

Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania entered on March 5, 2020 in Case No. 15-1914

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1(b) and 28(a)(1) and Third Circuit LAR 26.1, *amici curiae* Council of Parent Attorneys and Advocates, Community Legal Services of Philadelphia, the Education Law Center - PA, the Pennsylvania Institutional Law Project, ACLU Pennsylvania, and the Public Interest Law Center state that none of them have parent corporations and that no publicly-held company owns 10% or more of the stock of any of the *amici*.

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IDENTITY AND INTEREST OF AMICI[1]

Community Legal Services (CLS) has provided free civil legal assistance to more than one million low-income Philadelphians since its founding in 1966, including approximately 10,000 in the past year. CLS provides its clients with a full range of legal services, from individual representation to administrative advocacy to class action litigation. As part of these legal services, CLS attorneys pursue fee-shifting claims for clients under civil rights and consumer rights statutes, the Equal Access to Justice Act, and the Fair Labor Standards Act. Although CLS does not charge its clients fees to represent them, it collects fees from defendants in successful fee-shifting cases, and those fees provide a necessary portion of CLS's annual operating budget.

The Council of Parent Attorneys and Advocates (COPAA) is a not-for-profit organization that supports individuals with disabilities, their parents, and their advocates in safeguarding the civil rights guaranteed to them under federal laws. COPAA's primary goal is to secure appropriate educational services for children with disabilities in accordance with national policy. COPAA brings to this Court the unique perspective of parents, advocates, and attorneys for children with disabilities.

[1] All parties have consented to the filing of this brief. *See* FRAP 29(a)(2). No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amici curiae*, their members, and their counsel contributed money that was intended to fund preparing or submitting this brief. *See* FRAP 29(a)(4)(E).

The Education Law Center-PA (ELC) is a non-profit, legal advocacy organization dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through individual and impact litigation, as well as advocacy at the local, state, and national levels, ELC advances the rights of children who are most marginalized. ELC focuses its advocacy on students with disabilities at the intersections of multiple identities and impacted by deep poverty, racial discrimination, system involvement, and national origin discrimination. ELC submits this amicus brief on behalf of children with disabilities, children who cannot obtain private attorney representation absent strong enforcement of the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA) to ensure that their representation is both available and affordable.

The Pennsylvania Institutional Law Project (PILP) is a legal aid organization dedicated to advancing the civil and constitutional rights of incarcerated and institutionalized people in Pennsylvania. PILP aims to accomplish this through high quality legal representation, legal assistance, advocacy, and information and referrals. PILP seeks to ensure the health, safety, and humane treatment of all incarcerated individuals.

The ACLU of Pennsylvania is a nonprofit, nonpartisan membership organization dedicated to defending and expanding individual rights and personal freedoms throughout Pennsylvania. Through advocacy, public education, and litigation, the ACLU of Pennsylvania works to preserve and enhance liberties

grounded in the United States Constitutions and civil rights laws. The ACLU of Pennsylvania frequently represents plaintiffs who are entitled to attorney's fees under fee-shifting statutes if they prevail. Accordingly, the proper application of fee-shifting statutes is of great significance as the organization relies on fee awards to fund its civil-rights work.

The Public Interest Law Center (Law Center), one of the original affiliates of the Lawyers' Committee for Civil Rights Under Law, uses high-impact legal strategies to advance the civil, social, and economic rights of communities in the Philadelphia region. In addition to its work in employment, environmental justice, healthcare, housing, and voting rights, the Law Center has a long-standing commitment to advocating for and litigating on behalf of children with disabilities and their parents. The Law Center was counsel in the landmark decision of *PARC v. Commonwealth of Pennsylvania*, 343 F. Supp. 279 (E.D. Pa 1972), which led to the congressional passage of the initial version of the Individuals with Disabilities Education Act. The Law Center does not charge clients for its services and relies on the attorney's fees guaranteed by the IDEA and other civil rights statutes to sustain its ability to defend individuals facing discrimination, inequality, and poverty.

The interests of these *amici curiae* align with those of the appellant Rena C., and they urge the Court to reverse the district court and to remand for the award of Rena C's full attorney's fees.

SUMMARY OF ARGUMENT

As detailed above, these *amici curiae* represent and support clients in asserting a broad variety of constitutional and statutory civil rights. *Amici* submit this brief to draw this Court's attention to two specific aspects of the district court's decision that are particularly troubling in the context of civil rights statutes. First, the district court took a punitive view of Rena C's bringing this lawsuit solely to recover attorney's fees authorized under the IDEA, even though Congress expressly established that mechanism for that purpose. Second, defying both policy and precedent, the district court halved the requested fee award on the ground that Rena C.'s attorney had offered alternative arguments that were unsuccessful or unneeded. *Amici* urge the Court to firmly reject both the district court's mindset and its method, and to remand for the proper determination of Rena C.'s attorney's fees based on her overall success under the IDEA.

ARGUMENT

I. ATTORNEY'S FEES AWARDS ARE CRUCIAL TO VINDICATING THE RIGHTS GUARANTEED UNDER THE IDEA

From the outset of this litigation, the district court has made clear its displeasure that Rena C. brought this action seeking only an award of attorney's fees. The district court's attempt to imply a qualitative distinction between "the issues related to Rena's child's interest [and counsel's] fees," —F. Supp. 3d —, 2020 WL 1059684, at *27 (E.D. Pa. Mar. 5, 2020), ignores the critical role that the availability of

fees plays in the relief provided to parents under the IDEA, whose goal is to provide access to a quality education for all children. The district court's skeptical and restrictive approach to Rena C.'s attorney's fee request defies and undercuts the attorney's fee provision Congress adopted in the IDEA and contravenes this Court's ruling in this case that Rena C. was substantially justified in rejecting Colonial School District's ten-day offer.

A. Fee-shifting Provisions Are Typically Intended to Support Private Litigants by Attracting Competent Counsel To Enforce Civil Rights Laws.

Numerous civil rights statutes rely on private litigants to enforce compliance with the law and thereby vindicate the rights Congress has granted. Fee-shifting provisions are a key component of these statutes, assuring these private litigants' access to the court system, particularly those who are most disenfranchised by poverty and discrimination. In the foundational opinion, *Hensley v. Eckerhart*, the Supreme Court wrote that the Civil Rights Attorney's Fees Awards Act of 1976 was "to ensure 'effective access to the judicial process' for persons with civil rights grievances." 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 94-1558, p. 1 (1976)). In his concurring opinion, Justice Brennan emphasized the role private individuals play in ensuring compliance with these laws:

> All of these civil rights laws depend heavily upon private enforcement, and ***fee awards have proved an essential remedy*** if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

> 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 recover what it costs them to vindicate these rights in court.

461 U.S. at 445 (Brennan, J. concurring) (emphasis added) (quoting Senate Report 2); *see also City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) ("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." (quoting 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney)).

The fee awards authorized by these statutes are as much a part of the remedies they afford to litigants as injunctive or monetary relief. And entitlement to fees is particularly important in cases that do not seek monetary damages because the possibility of monetary damages would otherwise naturally create a market of private attorneys willing to work on a contingent basis. For example, the entitlement to fees is critical in cases like this one that enforce the IDEA because the statute does not authorize monetary damages as a remedy.[2] In the absence of the IDEA's fee-shifting provision, few families would be able to obtain counsel to enforce their rights under

[2] *See, e.g.*, *J.L. v. Ambridge Area Sch. Dist.*, 622 F. Supp. 2d 257 (W.D. Pa. 2008) ("While the Third Circuit has yet to issue a definitive ruling on the availability of money damages directly under the IDEA, a majority of other Circuit Courts have held that such relief is not available.").

the act. But the unavailability of money damages does not undercut the value of cases brought to enforce the rights the IDEA or other civil rights statutes confer: As Congress recognized, damage awards "do not reflect fully the public benefit advanced by civil rights litigation" and for that reason, the amount of fees should "'not be reduced because the rights involved may be nonpecuniary in nature.'" *Rivera*, 477 U.S. at 575 (quoting Senate report).

Concerns about access to the court system and the availability of competent counsel were central to Congress's judgment that the vindication of rights under civil rights statutes justified overriding the American Rule that generally bars attorney's fee awards. *See id.* at 576–77. Congress has provided that attorneys who represent prevailing parties are entitled to these fees under the law, and the courts have the duty to uphold that congressional intent by awarding those fees. When courts express disfavor with the process of awarding fees or attribute ill intent to the attorneys pressing this entitlement, as the district court did in this case,[3] they effectively undermine congressional intent.

[3] *See* 2020 WL 1059684 at *5 ("We found that Berney's conduct in this case was similarly contentious and needlessly difficult. We stated, '[h]ad we found that Rena … was substantially justified in rejecting the offer, we would still have reduced Berney's fee for unnecessary prolonging the litigation and persisting in making baseless arguments regarding the validity of Colonial's offer.'" (citing *Rena C. v. Colonial Sch. Dist.*, 221 F.Supp. 3d 634, 649 (E.D. Pa. 2016)); *id.* at *7 ("As we noted in our previous opinion, Rena and her counsel unnecessarily protracted this litigation . . . Rena's pursuit of attorney's fees and pendency caused Colonial's counsel to spend more time." (citation omitted)); *id.* at *9 ("[A]ssuming Berney spent at least the same

B. The Fee-shifting Provision of the Individuals with Disabilities Education Act is Intended to Encourage Lawyers to Represent Parents and Accomplish the Statute's Goals.

The statutory right to attorney's fees is a critical component of the IDEA's express intention that parents act as "private litigants" pushing for change and compliance under the IDEA. In drafting the IDEA's precursor statute, the Education for All Handicapped Act, "Congress sought to protect individual children by providing for parental involvement." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 205–06 (1982). Indeed, "a central purpose of the parental protections is to facilitate the provision of a "'free appropriate public education.'" *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.,* 550 U.S. 516, 524 (2007). This Court has recognized that "Congress expressly found that improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity . . . and to ensure that the rights of children with disabilities and parents of such children are protected." *M.R. v. Ridley Sch. Dist.*, 868 F.3d 218, 226–27 (3d Cir. 2017). In short, Congress intended the IDEA to give parents the tools to hold schools accountable and ensure compliance with the statute.

Although many of the cases refer to the "collaborative process" between parents and schools, the Supreme Court has recognized that "this cooperative approach would not always produce a consensus between the school officials and the

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amount of time on the issues related to Rena's child's interest as he did on his fees, we shall apply the block-billing approach and split the difference.").

parents." *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.,* 471 U.S. 359, 368–69 (1985). To address such situations, the IDEA provides procedural safeguards that allow parents to challenge decisions through administrative hearings and civil actions, and to recover the attorney's fees they incur in doing so. *See generally* 20 U.S.C. § 1415. This elaborate set of procedural safeguards is important "to insure the full participation of the parents and proper resolution of substantive disagreements." *Sch. Comm. of Town of Burlington, Mass.*, 471 U.S. at 368–69.

The history of the IDEA bears this out. "[T]he IDEA's legislative history reflects that Congress enacted the attorney's fees provision specifically to ensure 'that due process procedures, including the right to litigation if that [becomes] necessary, [are] available to all parents.'" *M.R.*, 868 F.3d at 227 (quoting S. Rep. No. 99-112, at 2 (1985)). As this Court explained, "[t]he purpose of the fee provision in [IDEA] is to enable parents or guardians of disabled children for whom the statute was enacted to effectuate the rights provided by the statute." *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 856 (3d Cir. 2006).

In 1985, Congress amended the IDEA's precursor law to grant the award of reasonable attorney's fees to prevailing plaintiffs, and that amendment remains part of the IDEA today. The Senate Report accompanying the amendment stated: "It is the committee's intention that a parent or legal representative should be free to select and be represented by the attorney of his/her choice." S. Rep. No. 99-112, at 1803 (1985). It also noted the "overwhelming demand" and "very limited resources" facing

attorneys serving students with disabilities and their parents, and expressed the "feeling that any additional funds made available to expand legal services to our Nation's disabled poor citizens, is money well spent." *Id.* at 1806.

Just as Congress included fee-shifting provisions in the civil rights statutes to incentivize private attorneys to take such cases, Congress drafted the IDEA and its precursor statute to incentivize lawyers to represent parents, including parents who cannot otherwise afford to hire attorneys. Merely providing parents with the theoretical right to litigate their claims, without also fostering a robust network of knowledgeable attorneys through the possibility of attorney's fees, would not advance the goals of the IDEA.

Experience shows that the availability of counsel can have significant effects on the outcome of IDEA actions. Multiple studies show that parents who are not represented by attorneys are significantly less likely to prevail. For example, more than 300,000 students in Pennsylvania fall under the protections of the IDEA. *See* Pa. Dept. Educ., Bureau Spec. Educ., *Special Education Statistical Summary 2018-2019*, Table 1 (November 2019), https://penndata.hbg.psu.edu/Portals/66/documents/PennDataBooks/Statistical_Summary_2018-2019.pdf. From 2009 through 2013, nearly three-quarters of parents who initiated a due process hearing were represented by counsel. *See* Kevin Hoagland-Hanson, Comment, *Getting Their (Due) Process: Parents and Lawyers in Special Education Due Process Hearings in Pennsylvania*, 163 U. PA. L. REV.

1805, 1820 (2015). Parents represented by counsel prevailed in 58.75% of due process hearings, while *pro se* parents prevailed in only 16.28% of such hearings. *Id.*

This difference in outcomes between represented and *pro se* parents likewise appears in other states. A review of due process hearings in Illinois found that when parents appear *pro se*, the school district was five times more likely to prevail than if the parents were represented. *See* Melanie Archer, *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997-2002*, at p. 7 (December 2002), http://www.dueprocessillinois.org/Access.pdf. The data showed that parents represented by lawyers knowledgeable in the IDEA stood on more equal footing with the school districts, who were almost always represented by lawyers. *Id.* Data from North Carolina show similar findings. *See* Lisa Lukasik, *Special-Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. VA. L. REV. 735, 774-75 (2015) (analyzing data showing that *pro se* parties prevailed on all or some claims in 13.3% of cases, while represented parents prevailed on all or some claims in 82.1% of cases).

The fee-shifting provision of the IDEA is particularly important to enforce the rights of students with disabilities living in poverty who face significant barriers to accessing legal representation and are at higher risk of being left behind. It is well documented that low-income students are disproportionately identified for special education and, in turn, are more likely to be placed in segregated school settings that are not appropriate for their needs. *See, e.g.,* Thomas Hehir, et al., *Students from Low-*

Income Families and Special Education, The Century Foundation, Jan. 17, 2019, at https://tcf.org/content/report/students-low-income-families-special-education/?agreed=1 (presenting research findings regarding outcomes for low-income students in special education); *see also* 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, 112 (2011) (discussing the disproportionate levels of student poverty among the special education population). Nationwide, for families living in poverty, "legal services are simply not affordable, and limited resources restrict free legal aid to a fortunate few." Hyman et. al., 20 AM. U. J. GENDER SOC. POL'Y & L. at 113. In Pennsylvania, as across the country, access to the administrative due process hearing system can be cost-prohibitive for low-income students with disabilities absent the ability of private attorneys to accept cases on a contingent basis. *See* Hoagland-Hanson, 163 U. PA. L. REV. at 1827. The IDEA's fee-shifting provision allows families living in poverty to enforce students' rights to ensure entitlement to a free appropriate public education.

The statutory fee-shifting provision is vital for legal aid agencies, nonprofit organizations, and the private civil rights bar. It is the experience of these *amici* that nonprofit legal organizations more often seek redress for systemic violations of the IDEA, while private civil rights attorneys tend to prosecute individual matters. *Id.* at 1822 ("The vast majority of parents with counsel were represented by members of the private bar. Less than twenty-five of the 383 cases where parents were represented by

counsel involved attorneys from nonprofit or legal aid groups."). The *amici's* experiences also show that a significant number of IDEA cases accepted by private lawyers are done *pro bono*, with the private lawyer only recovering fees if the parents are prevailing parties entitled to recover fees.

C. The Individuals with Disabilities Education Act Requires Parents to File Claims for Attorney's Fees Awards in Federal Court.

The district court discredited the experience of Rena C.'s counsel—and reduced his hourly rate— in part because a significant number of his federal court appearances were "exclusively fee petitions." 2020 WL 1059684, at *5 ("Berney's litigating a multiplicity of fee petitions does not translate into a testament to his expertise and success."). But any "multiplicity of fee petitions" results directly from Congress's intent to protect the right to attorney's fees by assigning jurisdiction over fee awards to federal district courts, not to hearing officers. 20 U.S.C. § 1415(i)(3)(a) ("The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy."); *see also* S. Rep. No. 99-112, at 1804 ("The committee intends that [this amendment to allow the award of attorney's fees] will allow the Court, but not the hearing office, to award fees for time spent by counsel in mandatory . . . administrative proceedings. This is consistent with the committee's position that handicapped children should be provided fee awards on a basis similar to other fee shifting statutes when securing the rights guaranteed to them by [the Act]"). By design, then, parents look to district courts to uphold and

enforce their entitlement to attorney's fees awards. Courts that look suspiciously at parents' actions to enforce attorney's fee awards, as the district court did here, undermine the safeguards established by Congress.

D. The Individuals with Disabilities Education Act Protects Attorney's Fees Awards By Delineating A Narrow Set of Circumstances to Limit Awards.

The plain language of the IDEA provides only a few grounds on which a court may reduce an attorney's fee award. Most relevant to this case, the IDEA provides that parents may not recover attorney's fees for work performed after a school district makes a valid ten-day settlement offer if the relief ultimately obtained through an administrative proceeding is not more favorable than the original settlement offer. 20 U.S.C. § 1415(i)(3)(D(i)(I)-(III). That provision may *not* prevent the award of fees, however, if the parents were "substantially justified in rejecting the settlement offer." *Id.* at § 1415(i)(3)(E) ("Notwithstanding subparagraph (D), an award of attorneys' fees and related cost may be made to a parent who is a prevailing party and who was substantially justified in rejecting the settlement offer."). Because this Court has ruled that Appellant was substantially justified in rejecting the District's settlement offer, the district court erred by employing Section 1415(i)(3)(D) to further reduce the attorney's fee award. *Compare Rena C. v. Colonial Sch. Dist.*,890 F.3d 404, 420 (3d Cir.) ("Because she was substantially justified in rejecting Colonial's offer, Rena C. is eligible for attorneys' fees accrued after Colonial's ten-day offer.") *with* 2020 WL 1059684, at *10 (relying on Section 1415(i)(3)(D)(i) to reduce the attorney's fee award by 50%). The

district court used Section 1415(i)(3)(D) as an absolute limit on the award of fees, while failing to apply the express exception set forth in Section 1415(i)(3)(E).

Had Congress wanted to universally prohibit attorney's fees where the final relief obtained is no more favorable than the settlement offer, it would not have included the exception in Section 1415(i)(3)(D).[4] Indeed, Congress considered and rejected another type of limitation on attorney's fees when it enacted the Handicapped Children's Protection Act of 1985, which provides for attorney's fees as a remedy in special education cases:

> Further, the cap on publicly funded attorneys' fees would deter schools from settling cases expendiously [sic]. Schools not faced with having to pay more substantial attorneys' fees at the fair market rate will have an incentive to draw judicial proceedings out in an attempt to force plaintiffs to abandon their cases.

[4] Not all fee-shifting provisions are intended to encourage private litigants to pursue their claims. In direct contrast to the IDEA, the Prison Litigation Reform Act of 1995 (the "PLRA") was enacted to curb purportedly frivolous lawsuits filed by prisoners. 141 Cong. Rec. S14,413 (1995) (statement of Senator Dole that the PLRA responds to "the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners"). One of the strategies Congress employed in the PLRA to prevent prisoner civil-rights lawsuits was to impose limits on the attorney's fees that courts may award to a prevailing party. 42 U.S.C. § 1997e(d). Congress adopted a number of provisions that reduce attorney's fees awards, including a cap on the hourly rate recoverable by a prisoner's attorney and a cap on the total attorney's fee award. *Id.* The combined effect of these measures is to significantly limit the potential attorney's fee award, and thereby disincentivize attorneys from representing prisoners in civil rights actions. *See* Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech Centered Theory of Court Access*, AM. U. L. REV. 835, 890 (2002).

S. Rep. No. 99-112, at 1806. The Senate Subcommittee noted a concerning example of this gamesmanship, during which a school district extended judicial proceedings for more than five years, causing the parents to incur exorbitant legal fees. *Id.* Here, Rena C. was substantially justified in rejecting the settlement offer, and Colonial School District was the party that unreasonably protracted the litigation by failing to offer Rena C. her reasonable attorney's fees.

* * *

In sum, the district court's skeptical and restrictive approach to Rena C.'s attorney's fee request here defies and undercuts the attorney's fee provision Congress adopted in the IDEA and contravenes this Court's ruling in this case that the Parents were substantially justified in rejecting the school district's ten-day offer.

II. THE DISTRICT COURT'S DISALLOWANCE OF TIME SPENT ON UNSUCCESSFUL ARGUMENTS IS CONTRARY TO LAW, DISCOURAGES ZEALOUS ADVOCACY, AND COULD IMPEDE THE DEVELOPMENT OF THE LAW.

The district court halved Rena C.'s requested fees, basing that reduction not on whether Rena C. had actually achieved the relief she sought, but on how many of Rena C.'s arguments in support of that relief succeeded. This ruling defied both this Court's prior decision in this case and the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), which barred the reduction of an attorney's fee award based on a plaintiff's failure to prevail on alternative grounds. Moreover, beyond its disregard of precedent, the district court's decision discourages attorneys' zealous

advocacy on behalf of their clients, and impedes the development of new and promising legal theories to carry out the IDEA's remedial goals.

The district court stressed several times that it reduced Rena C.'s attorney's fees based on whether she succeeded on specific arguments, and not based on whether she had succeeded in obtaining the relief she sought:

> After the expiration of the ten-day offer, Rena's attorneys spent a significant amount of time pursuing ***several issues***. Rena ***prevailed on one*** – entitlement to attorney's fees. ***She did not prevail on the rest***. Consequently, applying these two principles requires us to reduce the time spent on ***those issues on which Rena did not prevail*** or had been included in Colonial's ten-day offer.
>
> Colonial asks us to strike time entries for ***issues on which Rena did not prevail***, specifically her contentions about the validity of Colonial's settlement offer and the recovery of expert and attorney's fees under section 504 of the Rehabilitation Act and the Americans with Disabilities Act. In our previous opinion, we held that Colonial's ten-day offer was valid and that Rena could not circumvent the IDEA's restriction on expert fees by merely pleading violations under section 504. *Rena C.*, 221 F. Supp. 3d at 651. Although Rena did not appeal our ruling on expert fees, she continued to challenge the validity of the offer. On appeal, as she did in the district court, she argued that the offer was invalid because it lacked the school board's approval. The Third Circuit disagreed, finding that the offer was valid because "[n]either Pennsylvania law nor the IDEA ... required Colonial to secure school board approval prior to extending a ten-day offer of settlement under 20 U.S.C. § 1415." *Rena C.*, 890 F.3d at 413. Therefore, the 16.1 hours ***spent on the issues*** of expert fees and the validity of the offer are not compensable.

2020 WL 1059684, at *9–10 (emphasis added).

As noted above, the district court's *issue*-focused approach to an attorney's fee award flies in the face of the *result*-focused analysis the Supreme Court adopted in *Hensley*. The *Hensley* Court expressly forbade courts from using a plaintiff's failure to

prevail on alternative arguments to justify reducing a fee award where the plaintiff had achieved the substantive relief sought:

> ***Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.*** Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances ***the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit***. *See Davis v. County of Los Angeles,* 8 E.P.D. ¶ 9444, at 5049 (CD Cal.1974). Litigants in good faith may raise alternative legal grounds for a desired outcome, and ***the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee***. The result is what matters.

461 U.S. at 435 (emphasis added).

Here, through the consent decree and the Court of Appeals decision, Rena C. obtained all the substantive relief she sought under the IDEA, specifically:

1. Payment of tuition;
2. Payment for one-on-one instructional support;
3. Transportation reimbursement; and
4. Pendency at Delaware Valley.

Rena C., 890 F.3d at 412. In addition, she obtained from this Court confirmation of her entitlement to attorney's fees incurred after the ten-day offer, which the district court had earlier denied her. *See id.* at 420.

As this Court noted in its previous decision, Rena C. made five alternative arguments in support of her claims for relief. *See id.* at 412–13. Although this Court rejected two of those arguments (no valid offer, greater relief), it granted Rena C. the full relief she sought—entitlement to post-offer attorney's fees—based on her third

argument, substantial justification. *See id.* Based on this ruling, the Court did not need to reach Rena C.'s final two arguments (ADA, defense of counterclaim). *Id.* Given Rena C.'s "excellent results," the district court's denial runs directly counter to the *Hensley* Court's admonition that "the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." 461 U.S. at 465.

Courts have applied this *Hensley* rule to IDEA attorney's fee requests like the request here. For example, in *L.H. v. Hamilton Cty. Dept. of Educ.*, 356 F. Supp. 3d 713 (E.D. Tenn. 2019), a defendant objected to the portion of the plaintiff's attorney's time devoted to pursuing ADA and section 504 claims, which the court did not need to reach because it granted Plaintiff the full relief he sought under the IDEA claim. *Id.* at 725. The court rejected the defendant's objection, quoting and citing *Hensley* and a plethora of other precedent to the same effect:

> "[A] civil-rights plaintiff need not succeed on every claim in order to recover attorney's fees. Success on a single claim is sufficient to become a prevailing party." *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 552-53 (6th Cir. 2014). So long as the claims are in common with successful claims, a prevailing party's full fee is recoverable. *EEOC v. Dolgencorp, LLC*, No. 3:14-CV-441-TAV-HBG, 2017 WL 9517513, at *9 (E.D. Tenn. Aug. 7, 2017), *report and recommendation adopted sub nom. EEOC v. Dolgencorp, LLC*, 277 F.Supp.3d 932 (E.D. Tenn. 2017), *aff'd*, 899 F.3d 428 (6th Cir. 2018). "[T]he seminal opinion in *Hensley v. Eckerhart*, 461 U.S. 424, 435 [103 S.Ct. 1933, 76 L.Ed.2d 40] (1983) explained that when claims 'involve a common core of facts' or are 'based on related legal theories,' the district court's rejection of certain grounds is not a sufficient reason for reducing a fee." *Jordan v. City of Cleveland*, 464 F.3d 584, 603 (6th Cir. 2006).

Id.[5]

Not only does the district court's ruling here defy precedent, but the penalty it imposes on pursuit of alternative theories of relief discourages zealous advocacy by attorneys. Both personal and professional ethics require attorneys to be strong and eager advocates for their clients. *See, e.g.*, Pa. R. Prof. Conduct Preamble ¶ 2 ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *id.* at ¶ 8 ("These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law…"). This obligation requires attorneys to explore every avenue in support of a client's claims or defenses, and to make novel and alternative arguments as long as those arguments are not frivolous. As one court noted, "a lawyer may not be able to meet her ethical obligations if she does not pursue reasonable, alternative claims." *Goos v. Nat'l Ass'n of Realtors*, 68 F.3d 1380, 1386 (D.C. Cir. 1995) (ordering district court to base attorney's fee award on overall success "without penalizing her for raising and failing to prevail on an alternative theory of recovery"); *see also Nydam v. Lennerton,* 948 F.2d 808, 812 (1st Cir. 1991) (awarding fees for unsuccessful, related

[5] Indeed, some courts have gone further and held that even "a partially prevailing party may recover all reasonably incurred attorney fees, even though the party did not prevail on all claims, as to all defendants, or as to all issues in a matter." *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 822 (S.D. Tex. 2008) (internal citations omitted)

claims "supports the underlying purpose of . . . encouraging attorneys to take civil rights actions in view of the ethical duty of zealous representation").

Viewed another way, the same obligation of zealous representation that binds attorneys representing clients in hourly or contingent fee situations likewise binds private civil rights attorneys in cases like this one. As the District of Columbia Circuit put it, regardless of whether or how the attorney was being paid, the standard is whether, in discharging the duty of zealous representation, the attorney should or would have raised the alternative argument. The court stated:

> The key question is whether the work was reasonably done in pursuit of the ultimate result. In other words, would a private attorney being paid by a client reasonably have engaged in similar time expenditures? *See Grant v. Martinez,* 973 F.2d 96, 99 (2d Cir.1992), *cert. denied,* 506 U.S. 1053, 113 S.Ct. 978, 122 L.Ed.2d 132 (1993). A lawyer who wins full relief for her client on one of several related claims, spending a reasonable overall amount of time relative to the relief awarded, is not apt to be criticized because the court failed to reach some of the grounds, or even ruled against the client on them.

Goos, 68 F.3d at 1386.

The district court's issue-based analysis in *Rena C.* thus sets up a potential conflict between the attorney's interests and the client's: the ethical rules impose a duty on the attorney to pursue every reasonable avenue to prosecute the client's claims, even if they are ultimately unsuccessful, but the district court's approach creates a disincentive for attorneys to pursue new or less-well-established arguments because the attorney will be unable to recover the costs of making such arguments unless they are successful, regardless of the attorney's overall success.

The district court's approach also discourages creative and novel arguments, impeding the development of the law and threatening the vindication of rights under civil rights statutes. *Amici* are civil rights organizations whose mission includes the vindication and expansion of individual rights and liberties through the pursuit of new arguments for extending, restricting, or reversing certain laws. Civil rights cases often present issues on which little or no precedent exists, and the only arguments that can be made are novel and creative.[6] And even in areas in which the law seems settled, attorneys are often successful in persuading courts to fashion new exceptions or extensions. Recognizing this, courts encourage such novel and creative legal arguments, even if those arguments do not ultimately succeed. *Cf.* Fed. R. Civ. P. 11 (permitting attorney to sign pleading where "the claims, defenses, and other legal contentions are warranted . . . by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law").

Amici's goal of developing the law through creative legal argument is reinforced by the *Hensley* rule, which bases attorney's fee awards on overall results rather than

[6] In this very case, this Court noted in its earlier decision that its prior cases "had not squarely addressed whether a school district's private agreement to pay for a parent's unilateral private school placement constitutes an agreement to the placement," and went on to hold that "[w]hen parents and a local educational agency agree on a placement without limitations, that placement becomes the educational setting protected by the "stay-put" provision of 20 U.S.C. § 1415(j)." *Rena C.*, 890 F.3d at 416. Rena C. could not have anticipated how the Court would rule on this novel issue, and should not be penalized for pursuing a legitimate alternative argument on an issue of first impression.

success on particular issues or contentions. That rule "exists because litigation is not an exact science: Lawyers cannot precisely preordain which claims will carry the day and which will be treated less favorably." *L.H.*, 356 F. Supp. 3d at 725 (citing *Goos*). For this reason, "good lawyering as well as ethical compliance often require lawyers to plead in the alternative." *Id.* (citing *Goos*).

The district court's issue-based approach to attorney's fees erects a substantial obstacle to the continuing development of the law through novel or creative legal argument. Measuring success by whether a plaintiff prevails on each individual legal theory, rather than by the overall results obtained, discourages attorneys from presenting novel or creative legal arguments by restricting recovery of attorney's fees to arguments that actually succeed—which novel and creative arguments often do not, at least not the first few times they are offered. The district court's approach also discourages alternative arguments, even if the alternative arguments have sound existing legal bases.

Limiting the recovery of attorney's fees to those incurred in pursuing only successful arguments, as the district court did, will deter attorneys from pursuing all available legal theories, and will ultimately do a disservice both to the clients they serve and to the interests the IDEA is intended to protect. And any decision by this Court endorsing the district court's approach would have serious implications across the range of fee-shifting statutes that these *amici* use to protect and expand the rights and remedies that Congress has granted in civil rights statutes.

CONCLUSION

The district court's order violates both the letter and the spirit of the IDEA's attorney's fee provision, and improperly discourages both zealous representation and the development of IDEA law. *Amici curiae* therefore urge the Court to reverse the district court and to remand for the award of Rena C's full attorney's fees.

Respectfully submitted,

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COMBINED CERTIFICATIONS

Bar membership. I am a member of the bar of the United States Court of Appeals for the Third Circuit.

Word limit. This brief includes 6,236 words as calculated with the word-counting feature of Microsoft Word 2016 and including the parts of the brief specified in Fed. R. App. P. 32.

Typeface and typestyle. This brief complies with the typeface and typestyle requirements of Fed. R. App. P. 32. It has been prepared with Microsoft Word using 14-point Garamond font, which is a proportionally-spaced typeface.

Filing. I electronically filed this brief with the Court in "pdf" format. Paper copies will not be submitted at this time pursuant to the March 17, 2020 Notice Regarding Operations to Address the COVID-19 Pandemic that defers submission of paper copies of briefs.

Virus check. The pdf version of this brief has been scanned for viruses with Malwarebytes Endpoint Agent software, Version 1.2.0.642. The software confirmed that the pdf file contains no viruses.

DATED: July 6, 2020

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CERTIFICATE OF SERVICE

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