DOCKET NO. 16-16882

United States Court of Appeals

for the

Eleventh Circuit

JEFFERSON COUNTY BOARD OF EDUCATION, an agency of the State of Alabama,

Plaintiff/Appellant,

v.

BRYAN M., DARCY M., individually and as parents, guardians, next friends and legal representatives of R.M., a minor,

Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
CASE NO: 2:14-cv-01064-MHH
(Hon. Madeline H. Haikala)

BRIEF *AMICUS CURIAE* OF COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, IN SUPPORT OF DEFENDANTS/APPELLEES AND AFFIRMANCE OF THE DECISION BELOW

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

***Amicus* certifies that the "Joint Certificate of Interested Persons and Corporate Disclosure Statement" previously filed by the appellant, the Jefferson County Board of Education, is correct to the best of their knowledge and belief, but the following additional persons and corporation needed to be added:**

1. **Council of Parent Attorneys and Advocates, Inc.**
2. **Almazan-Altobelli, Selene, counsel for Amicus**
3. **Nelson, Alice K., counsel for Amicus**
4. **Saideman, Ellen, counsel for Amicus**

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 Council of Parent Attorneys and Advocates who is Amicus Curiae, makes the following disclosure:

1. Amicus is not a publicly held corporation or other publicly held entity;

2. Amicus has no parent corporations;

3. Amicus does not have 10% or more of stock owned by a corporation.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Council of Parent Attorneys and Advocates ("COPAA") is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates.[1] 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 represent children 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 ("IDEA" or "Act"), 20 U.S.C. § 1400, *et seq*. Our attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, 42 U.S.C. §1983, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*

COPAA brings to the Court the unique perspective of parents and

[1] Pursuant to this Court's Rule 29(4)(E), no part of this brief was authored by counsel for any party, and no person or entity other than the *Amicus* listed here or its members made any monetary contribution to the preparation or submission of the brief.

advocates for children with disabilities. Many of these children experience significant challenges. For students entitled to services under IDEA, their success depends on the right to secure the IDEA's guarantee of a FAPE, and, as Congress recognized, both the stay-put requirement set out in 20 U.S.C § 1415 (j) and attorneys' fees are essential for parents and their children to vindicate their rights under IDEA.

The parties have consented to the filing of this *Amicus* brief.

Amicus adopts the Statement of Facts contained in Appellee's Brief at 2-14.

STATEMENT OF THE ISSUES

Amicus adopts the Statement of the Issues contained in Appellee's Brief at 2.

SUMMARY OF ARGUMENT

The district court correctly held that the parents in this case were entitled to attorneys' fees for the work done both to secure the favorable rulings in the final due process decision and also for the work entailed in obtaining an order requiring the Jefferson County Board of Education (Board) to comply with the mandate of 20 U.S.C. § 1415(j), known as the "stay-put" requirement. As *Amicus* demonstrates, attorneys' fees are

essential if parents are to be able to obtain enforcement of IDEA's mandates. Further, parents are not required to maintain their children in the public school system to obtain relief under IDEA, including attorneys' fees. Thus, there can be no dispute that this case was not moot at the administrative hearing; the student resided in the Board's jurisdiction and her parents sought relief to benefit her, including compensatory education.

When parents prevail at a due process hearing, school districts have a choice: they can comply with the decision and pay the parents' attorneys' fees as provided by IDEA or they can seek review of the decision to obtain a judicial order reversing the hearing officer's decision. IDEA does not permit a school district to implement a hearing officer's decision and then seeking to vacate that decision as moot. Further, parents are entitled to fees when they prevail in obtaining an order requiring a school district to comply with the IDEA's stay-put mandate. *See* 20 U.S.C. § 1415(i)(3) & (j).

ARGUMENT

I. THE AWARD OF ATTORNEYS' FEES TO PREVAILING PARENTS FURTHERS THE ESSENTIAL PURPOSE OF THE IDEA.

The IDEA has a broad remedial purpose: "to ensure that all children with disabilities are provided with a free appropriate public education . . .

[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, 238 (2009) (internal quotation omitted).

The IDEA requires the development and implementation of an Individualized Education Program ("IEP") tailored to the individual needs of a qualifying child to ensure such a child received FAPE. Parents play a "significant role" in the IEP process. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 523 (2007) (internal quotation omitted). "Congress repeatedly emphasized throughout the [IDEA] the importance and indeed necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness." *Honig v. Doe*, 484 U.S. 305, 311 (1988).

The IDEA goes to great lengths to provide an extensive set of procedural safeguards, including the right to seek administrative review of school district determinations that impact a child's IEP and the right to FAPE. The IDEA requires these safeguards, deemed to be the "core of the statute," be exercised by parents in order to protect the substantive rights provided to their children. *Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (internal citation omitted); *Honig*, 484 U.S. at 311. The procedural requirements of 20 U.S.C. § 1415 are to ensure that parents "are full

participants in the process." *K.A. ex rel. F.A. v. Fulton County Sch. Dist.*, 741 F.3d 1195, 1202 (11th Cir. 2013). 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)(D) &1414(d)(1)(B).

To further the purpose of the IDEA and to ensure all parents who desire to challenge the appropriateness of the educational plan offered for their child, even those without economic means, Congress specified that prevailing parents would be entitled to an award of attorneys' fees:

> In general in an action or proceeding brought under this section, 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)(I). *See Cobb Cty. Sch. Dist. v. D.B.*, 2016 U.S. App. LEXIS 20383, at *2, n.2 (11th Cir. Nov. 14, 2016).

The parental right to recover attorneys' fees is one of the IDEA's most important procedural safeguards. As COPAA knows firsthand, without the availability of fees, parents would find it very difficult to obtain representation. Congress considered it so important that when the Supreme Court found that attorneys' fees could not be awarded to prevailing parents under IDEA's predecessor statute in *Smith v. Robinson*, 468 U.S. 992

(1984), Congress acted "swiftly, decisively, and with uncharacteristic clarity to correct what it viewed as misinterpretation of its intent," by enacting the Handicapped Children's Protection Act ("HCPA") to permit parents to recover attorneys' fees if they prevail. *Fontenot v. Louisiana Bd. of Elementary & Secondary Educ.*, 805 F.2d 1222, 1223 (5th Cir. 1986).

When Congress added the statutory fee provision to IDEA, now codified at 20 U.S.C. § 1415(i)(3), it provided that the fee provision was retroactive and specified that parents were entitled to attorneys' fees for work in administrative hearings. *Mitten v. Muscogee County Sch. Dist.*, 877 F.2d 932, 935 (11th Cir. 1989). IDEA thus allows a "court, in its discretion, [to] award reasonable attorneys' fees … to a prevailing party who is the parent of a child with a disability." 20 U.S.C. § 1415(i)(3). Courts have consistently held that fees should "ordinarily" be awarded to prevailing parents "unless special circumstances make such an award unjust." *Borengasser v. Arkansas State Bd. of Educ.*, 996 F.2d 196, 199 (8th Cir. 1993). *See also Cobb Cty*, 2016 U.S. App. Lexis 20383 at *2, n. 2 (prevailing parents are "entitled to 'reasonable attorneys' fees'" (internal citations omitted)). Thus, absent special circumstances, it is an abuse of discretion to deny prevailing parents attorneys' fees. *See Borengrasser*, 996

F.2d at 199.

The attorneys' fee provision specifically provides that parents may file a complaint in federal court for the sole purpose of seeking fees as the prevailing party in the due process proceeding. *Id.* To receive an award of attorneys' fees, parents need to prevail in an action under 20 U.S.C. § 1415, either as plaintiffs or as defendants. 20 U.S.C. § 1415(B)(i)(I).

Based on the record before the district court, there was no finding of special circumstances that would render the award of attorneys' fees to the prevailing parents unjust. The district court correctly held that the parents should be awarded their reasonable attorneys' fees.

II. ATTORNEYS' FEES ARE CRITICAL TO VINDICATING RIGHTS UNDER IDEA, INCLUDING THE STATUTORY STAY-PUT PROVISION.

Most families of children entitled to special education services have limited resources, both because of family income and the strain raising a child with a disability can have on a family's finances. One-quarter of students with IEPs have families with incomes below the poverty line and two-thirds have family incomes of $50,000 or less.[2] Congress understood

[2] 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, 112-13 (2011). *See*

that, absent a fee-shifting framework as part of the IDEA's due process procedures, many families would be unable to access counsel to undertake special education cases, and, without counsel, would face the nearly insurmountable to resolve IDEA disputes.

Senator Weicker explained that, without access to attorneys' fees, "the economic resources of parents become crucial to the protection of their children's rights regardless of the merits of the claim." 130 Cong. Rec. S9079 (daily ed. July 24, 1984). Senators specifically cited the example of Mary Tatro, She spoke about her family's experience in litigating *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). That case was a "clear example of [a] school district extending judicial proceedings for more than 5 years in an attempt to force the Tatro family to drop their case due to the exorbitant cost of attorneys' fees." S. Rep. No. 99-112, 99th Cong., 1st Sess. at 17-18 (1985). *See also Handicapped Children's Protection Act of 1985: Hearing Before the Subcomm, on the Handicapped of the Senate Comm. on Labor & Human Resources*, 99th Cong., 1st Sess. at 24-25 (May 16, 1985). Her family was fortunate to be able to obtain *pro bono* assistance for the appeal to the Supreme Court in which they obtained a unanimous favorable

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also Kelly D. Thomason, Note, *The Costs of a "Free" Education*, 57 Duke L.J. 457, 483-84 (2007).

decision.

Recent studies have confirmed that, without counsel, parents usually do not have 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 who were represented by counsel were far more likely to be successful in their IDEA claims.[3]

III. PARENTS ARE NOT REQUIRED TO MAINTAIN THEIR CHILD IN THE PUBLIC SCHOOL SYSTEM TO OBTAIN RELIEF UNDER IDEA, INCLUDING ATTORNEY'S FEES.

The Supreme Court long ago rejected the proposition that a parent is required to maintain a child in a public school placement during IDEA proceedings to obtain relief under the statute. *Sch. Committee of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 373 (1985). The Court rejected the Town of Burlington's reading of the statute to provide "the parents are

[3] Lisa Lukasik, *Special Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. Va. L. Rev. 735, 775 (2016). For example, the data from twelve years of North Carolina IDEA due process hearings showed that *pro se* parents only prevailed on at least one issue in only 11.1% of the cases, and in full in only once, for 2.2% of the cases, and that was with the help of a non-attorney advocate. *Id.* In contrast, when represented by counsel, parents prevailed on at least one issue more than half the time (51.3%) and prevailed on the entire claim nearly one third of the time (30.8%). *Id.*

forced to leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement." *Id.* at 372. The Court noted that "parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Id.* at 370.

The Court observed that "conscientious parents who have adequate means and who are reasonably confident of their assessment normally would" pay for the appropriate placement. *Id.* "The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." *Id.* at 372. Thus, the Court held that a parent who changes the placement of a child unilaterally during the pendency of review proceedings is entitled to relief under IDEA, such as tuition reimbursement, if the court ultimately determines that the school district's placement was inappropriate. *Id*. at 375**.** As this Court has noted, "If the parents believe that the IEP does not comply with the IDEA's requirements, they may unilaterally withdraw their child from the school system and pursue alternative placement options." *R.L. v.*

Miami-Dade Cty. Sch. Bd., 757 F.3d 1173, 1177 (11th Cir. 2014).

Therefore, it is not surprising that the Board here cites no authority for the proposition that a due process hearing decision in favor of parents should be vacated as moot because the parents determined to homeschool the student or send the student to another school several months into the hearing process. (Appellant's Br. at 45-47.) The Board has not cited a single case that held that a parent, who continued to reside in the school district and had claims for compensatory education, declaratory, and injunctive relief, mooted the due process proceeding by withdrawing their child from the public school. Instead, the Board principally relies on special education cases in which the parents lost the due process hearing and appealed, only to find that their claims had become moot subsequent to the due process hearing. (Appellant's Br., at 20-21, n.15.) *See, e.g.*, *T.P. ex rel T.P.*, 792 F.23d 1284 (11th Cir. 2015)(claim moot after parents lost at due process and no reimbursement claim made); *Moseley v. Bd. of Educ. of Albuquerque Pub. Schs.*, 483 F.3d 689, 693-94 (10th Cir. 2007) (claim moot in federal court after student lost at second level of state review); *Russsman v. Board of Educ. of Enlarged City Sch. Dist. of City of Watervliet*, 260 F.3d 114, 118, 121 (2d Cir. 2001) (claim moot where parents lost due process proceeding

and subsequent legal proceedings, and student had accepted IEP diploma and had no interest in returning to school); *Bd. of Educ. of Oak Park v. Nathan R.*, 199 F.3d 377, 381 (7th Cir. 2000) (claim moot after parents lost in district court where student had graduated and had received compensatory education); *S.N. v. Old Bridge Twp. v. Bd. of Educ.*, 2006 U.S. Dist. Lexis 83469 (D.N.J. Nov. 14, 2006) (claim moot where parents lost due process proceeding, filed in federal court and subsequently moved out of state while the case was pending and no compensatory relief available).[4] Cases that were mooted after the parents lost at due process are inapplicable as those parents had not won a decision and, therefore, were not entitled to IDEA attorneys' fees.

In any event, the Board's own actions belie its position; it never made the argument that the student's withdrawal from the school during the hearing mooted the claim to the hearing officer nor in the complaint filed in this case. (Doc. No. 1). Claims not raised below will not be considered by

[4] Similarly, a case in which the parents' due process victory was overturned on the merits and then found moot (Appellant's Br., at 21, n.15). is inapplicable. *Bd. of Educ. of Downers Grove Grade Sch. Dist. No. 58 v. Steven L.*, 89 F.3d 464, 467 (7th Cir. 1996) (claims moot on appeal from favorable decision for school district although parents had prevailed at the due processing hearing).

this Court. *BUC Intern. Corp. v. International Yacht Council Ltd*., 489 F.3d 1129 (11th Cir. 2007). If, at the time the hearing officer entered his order, the Board thought Appellee's claims were moot, it could have simply refrained from implementing the hearing officer's order, which, among other things, required the Board to train its staff. Instead, the Board complied with the order and provided staff training in July 2014. (Doc. 31, at 6.) Moreover, the Board does not dispute that the student continues to reside in its jurisdiction and its legal obligations to her continue. *See* 34 C.F.R. § 300.200; *see also* 20 U.S.C. § 1412(3)(A).

Indeed, courts have routinely held that IDEA claims are not moot where compensatory relief, tuition reimbursement, or other relief is available, even if students move from a district or graduate. *See, e.g., E.D. ex rel Doe v. Newburyport Pub. Schs.*, 654 F.3d 140, 143 (1st Cir. 2011) (tuition reimbursement claim not mooted by move to different school district); *Mr. R.,* 321 F.3d at 20 (compensatory education claim not mooted by graduation); *J.P.E.H. v. Hooksett Sch. Dist*., 2008 WL 4681827 (D.N.H. Oct. 22, 2008) (tuition reimbursement claim not moot after student enrolled in private school). *Cf. Moseley,* 483 F.3d at 693-94 (claim moot when student moved because injunctive relief claims mooted and no plea for

compensatory damages, compensatory education, or tuition reimbursement).

IV. 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.*, 654 F.3d at 143 ("eligibility for a fee award is not lost even when subsequent developments render claim moot overall"); *Doe v. Eagle-Union Community Sch. Corp.*, 2 Fed. Appx. 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*, 127 F. Supp. 2d 1103, 1116-17 (D. Hawaii 2000) (mootness of school district's appeal does not affect prevailing party status of parent who prevailed at due process hearing).

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., Cobb Cty.*, 2016 U.S. App. LEXIS 20383, at *3 (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.

In the experience of *Amicus*, school districts that have lost due process proceedings often determine not to seek review, and implement the decisions; in many cases, the fees claims are settled although in some cases parents must file complaints under § 1415(i)(3) to obtain them. *See, e.g.*, *Howard v. Achievement Preparatory Acad. Pub. Charter Sch*., No. 15-cv-199 (CKK/GMH), 2016 U.S. Dist. Lexis 40184 (D.D.C. Mar. 8, 2016); *Latoya A. v. San Francisco Unified Sch. Dist*., No. 3:15-Civ.-04311-LB, 2016 WL 344558 (N.D. Cal. Jan. 28, 2016).

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. School districts should not be permitted to deprive a parent of attorneys' fees by appealing while implementing a hearing officer's decision and thereby mooting their own appeal. By implementing the hearing officer's order, the Board "voluntarily forfeited [its] legal remedy by the ordinary processes of appeal." *United States Bancorp Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994). To allow a school district to escape its liability for attorneys' fees by implementing the hearing officer's order would frustrate the HCPA's purpose, to provide prevailing parents attorneys' fees.

Here, the district court correctly held that the parents had prevailed at the administrative hearing and obtained a decision that provided them with significant relief, entitling them to attorneys' fees, and that the Board had implemented some of the relief.

V. PARENTS WHO ARE FORCED TO LITIGATE THE STATUTORY RIGHT TO "STAY PUT," AND WHO PREVAIL ARE PREVAILING PARTIES ENTITLED TO ATTORNEYS' FEES.

IDEA's Section 1415(j) provides a statutory right to the stay-put placement. Here, it is undisputed that the Board did not comply. Instead, the parents were forced to litigate the issue and obtain an order from the hearing officer before the Board complied. Because the parents obtained a decision enforcing an IDEA statutory, they are entitled to attorneys' fees.

As discussed above, the statute provides that parents are entitled to reasonable attorneys' fees in "any action or proceeding brought under this section," 20 U.S.C. § 1415(i)(3)(B)(i). The 2004 statute's amendment carefully delineates exceptions to the general rule, such as for time spent at IEP meetings the meeting is convened as a result of an administrative or judicial proceeding or in a resolution session. *See, e.g.,* 20 U.S.C. § 1415(i)(3)(D)(ii) & (iii). The statute does not provide any exception for time spent vindicating the parents' right to stay-put placement under § 1415(j).

IDEA's explicit statutory authority provides for attorneys' fees to prevailing parents. Here, the parents obtained judicial decisions that enforced stay-put and a final order that altered the legal relationship of the parties. The Board's characterization of the order obtained in a contested

stay-put order as legally insufficient because it is not "merits-based" (Appellant's Br., at 35) is incorrect for two reasons: first, there is no absolute bar to any award of attorneys' fees for interim relief in civil rights attorneys' fees cases,[5] and, second, because § 1415(j) is an independent statutory right, an order enforcing § 1415(j) after an adversary order is a decision on the merits of an IDEA claim, and not interim relief.

Congress clearly contemplated that interim fee awards would be available 'where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues.'" *Texas State Teacher's Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1988). All that is required is that the party "succeed[] on any significant claim" in the proceeding, "affording it some of the relief sought." *Id.* at 791. The only exception to this "generous formulation" is where a "technical victory" is "insignificant" or "*de minimis*." *Garland*, 489 U.S. at 792; *Farrar v. Hobby*, 506 U.S. 103, 113-114 (1992).

Here, the district court correctly held that the Supreme Court's

[5] It has long been held that civil rights fee shifting statutes are to be interpreted in a similar manner. *Northcross v. Memphis Bd. of Education*, 412 U.S. 427, 428 (1973). *See also Mitten*, 877 F.2d at 936 (*applying Hensley v. Eckerhart*, 461 U.S. 424 (1983) to an attorneys' fee claim brought under 20 U.S.C. § 1415).

decision in *Sole v. Wyner*, 551 U.S. 74 (2007), does not bar attorneys' fees for the stay-put proceeding and rejected the school district's effort to rely on that case for the proposition that a victory on stay-put cannot support a fee award. (Doc. 31, at 18; *see also* Appellant's Br., at 41-42.) In that case, the Supreme Court only held that "[p]revailing party status . . . does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." *Sole*, 551 U.S. at 86. The Court specifically stated that it had not taken any "view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." *Id.*

Further, the issue of fees related to preliminary injunction under Rule 65 is not the same as that of fees for orders granting enforcement of § 1415(j). The statutory right to stay-put is a separate legally enforceable right. Thus, the Second Circuit held a student was entitled to compensatory education for violation of stay-put even when the school district prevailed on the underlying claim. *See Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 454 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2022 (2016) ("Section 1415(j) represents Congress' policy choice that all handicapped children, regardless

of *whether their claim is meritorious or not*, are to remain in their current educational placement until the dispute with regard to their placement is resolved")(internal citation omitted)(emphasis in original).

IDEA's stay-put requirement is a unique statutory protection created by Congress to protect students with disabilities from being unilaterally removed from their current educational placements by school districts.. Specifically, § 1415(j) ensures that when a parent objects to a proposed change in placement and files a "due process complaint," "the child *shall remain* in the then-current educational placement" until the due process proceeding is complete ("unless the [school district] and the parents otherwise agree"). Thus, as the Court explained in *Honig*, the right to stay put "bar[s] schools" from changing a child's educational placement *over a "parent's objection* until all review proceedings [are] completed." 484 U.S. at 324 (emphasis added). The purpose of the provision is clear: Congress "meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students … from school." *Id.* at 323. A parent who enforces his child's right not to be unilaterally excluded from school vindicates one of the IDEA's principal purposes. As the Court observed in *Honig*, "one of the evils Congress sought to remedy was the unilateral

exclusion of disabled children by schools, not courts," and, therefore, one purpose of stay-put was "to prevent school officials from removing a child . . . over the parents' objection pending completion of the review proceedings." 484 U.S. at 327. Thus, the Court emphasized that Congress enacted this provision to "deny school officials their former right to 'self-help,' and directed that in the future removal of students could be accomplished only with the permission of the parents or, as a last resort, the courts." 484 U.S. at 323-24.

Here, the district court properly held that the hearing officer's determination was not on a preliminary issue but rather on a threshold issue that needed to be resolved at the outset of the case. Further, the hearing officer ordered the student to remain in what had been the stay-put placement for the remainder of the academic year. (Doc. 31, at 19.) Thus, unlike the preliminary injunction in *Sole*, 551 U.S. at 86, which was reversed, here, the relief provided by stay-put order was continued by the final decision on the merits.

"The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Garland*, 489 U.S. at 792-93. Here

there was such a material alteration: the Board violated the student's right to be served in the least restrictive environment and that it violated the student's procedural rights by predetermining the student's placement, and ordering related relief. And that is precisely and correctly the district court's holding. (Doc. 31, at 20.)

A party is entitled to attorneys' fees if the party has prevailed on a "significant claim" in the litigation. *Garland*, 489 U.S. at 790. Vindicating the statutorily granted right for a student to "stay put" is just such relief. The merits of a due process claim are separate and distinct from a stay-put claim. To resolve a due process challenge to an IEP, the hearing officer asks whether the IEP will provide the child with a "free appropriate public education" in the "least restrictive environment." 20 U.S.C. § 1412. By contrast, when faced with a motion to enforce the right to stay put, "a district court should simply determine the child's then-current educational placement and enter an order maintaining the child in that placement." *Wagner v. Bd. of Educ.*, 335 F.3d 297, 301 (4th Cir. 2003). Such a determination "fully adjudicate[s] … the merits" of the stay-put dispute. *Douglas v. District of Columbia*, 67 F. Supp. 3d 36, 42 (D.D.C. 2014).

There is no stay-put claim when the school district agrees to comply

with the stay-put requirement. However, when, as here, a school district violates this provision and forces litigation over the "then-current educational placement," a student or parent who prevails has won a claim. This is no mere "procedural" or Pyrrhic victory; it is a decisive one. A prevailing parent in a stay-put proceeding may win not only the battle but also the war. As the Court has recognized the IDEA "review process is ponderous" and often lasts several years. *Burlington*, 471 U.S. at 370. No amount of compensatory education could make up for a student missing *several years* of school.

As the district court correctly observed, the Board's argument that the stay-put was automatic fails in the facts of its litigation of the issue of the student's proper placement during the administrative hearing. (Doc. 31, at 17.) Had the Board immediately complied with the stay-put that went into effect when the due process complaint was filed, the parents would have no claim for attorneys' fees. But it did not comply and instead litigated the issue, requiring the parents to expend attorney time to secure the stay-put order. As the district court found, the parents "prevailed in a legal dispute concerning the application of a provision of the IDEA," and, therefore, "they are prevailing parties for the purposes of an award of attorney's fees. (Doc.

31, at 18.) This case is quite different from *Robert v. Cobb Cty. Sch. Dist.*, 279 Fed. Appx. 798, 801 (11th Cir. 2008), relied on by the Board. (Appellant's Br., at 35, n.27.) In *Robert,* the due process hearing decision was based state law contract and not the IDEA; there is nothing in the decision to indicate that there was an adversary hearing on the stay-put claim. *See Robert*, 279 Fed. Appx. at 801.

The First and Ninth Circuits have permitted fee awards for successfully vindicating a student's stay-put rights in an administrative or judicial proceeding. *Termine ex rel. Termine v. William S. Hart Union High Sch. Dist.*, 288 F. App'x 360, 362 (9th Cir. 2008); *Mr. R.*, 321 F.3d at 17. In addition, district courts in the Second, Sixth, Tenth, Eleventh, and District of Columbia Circuits likewise allow attorneys' fees for successfully obtaining a stay-put order.[6] The courts that have denied fees for stay-put have not addressed the fact that stay-put was not included in the exceptions to

[6] *See A.P. v. Bd. of Educ.*, 160 F. Supp. 3d 1024, 1025-26 (E.D. Tenn. 2015); *A.D. ex rel. L.D. v. Dep't of Educ.,* 2014 WL 692910, at *3 (D. Haw. Feb. 20, 2014); *Taylor F. ex rel. Jon F. v. Arapahoe Cty. Sch. Dist. 5*, 954 F. Supp. 2d 1197, 1204 (D. Colo. 2013); *Laster v. District of Columbia*, No. 05-1875 (RMU), 2006 WL 2085394, at *3 (D.D.C. July 25, 2006); *K.R. v. Bd. of Educ.*, 66 F. Supp. 2d 444, 450 (E.D.N.Y. 1999); *Burke ex rel Burke v. Keenum*, Civ. A 288-067 ,1989 WL 14681, at *3 (S.D. Ga. Feb. 21, 1989).

attorneys' fees in 20 U.S.C. 1415(i)(3)(D) or that a school district's failure to comply with stay-put violates the IDEA.[7]

The better reasoned cases properly recognize that winning a stay-put order against a school district that refuses to abide by the statutory requirement grants "relief that change[s] the legal relationship between the parties with respect to a significant issue." *Termine*, 288 F. App'x at 362; *Mr. R.*, 321 F.3d at 16 ("Defeating" the school's attempt to dodge stay-put "gave the appellants solid ground on which to base prevailing party status.").

The stay-put right is a critical part of the IDEA; it was included in the first iteration of the IDEA, the Education of the Handicapped Act of 1975 (EHA). *See Honig*, 484 U.S. at 324. As the Court recognized in *Honig*, "Congress passed the EHA after finding that school systems across the country had excluded one out of every eight disabled children from classes." *Id*. The stay-put right remains an essential safeguard. Because the review

[7] The Third, Fifth, and Seventh Circuits have denied attorneys' fees in stay-put claims. *Tina M. v. St. Tammany Parish Sch. Bd.*, 816 F.3d 57, 61 (5th Cir.), *cert. denied*, 137 S. Ct. 371 (2016); *Bd. of Educ. v. Nathan R. ex rel. Richard and Nancy R.*,199 F.3d at 379, 383; *J.O. ex rel. C.O. v. Orange Twp. Bd. of Educ.*, 287 F.3d 267, 270, 274 (3d Cir. 2002). But the Third Circuit observed that the parents may be entitled to attorneys' fees "as long as the interim relief is granted derived from some determination on the merits." 287 F.3d at 274.

process often lasts several years and sometimes lasts longer, the dispute in *Honig* lasted almost eight years, for example, a student who is forced out of school pending a decision on the merits of the due process proceeding may never catch up to her peers. No amount of compensatory education can make up for the harms that this exclusion can impose on a student's educational and social development.

Adhering to the principles that underlie IDEA's stay-put and attorneys' fee provisions, the First and Ninth Circuits recognize that IDEA's stay put provision, Section 1415(j), is an independent statutory guarantee. When parents are forced to obtain an administrative or judicial determination to override the unilateral decision of a school district to remove a student from his then-current placement constitutes a material alteration of the legal relationship of the parties. These decisions also recognize that, as a practical matter, when school districts obdurately refuse to comply with Section 1415(j), and exclude children from their then-current placement unilaterally, parents often need legal assistance to vindicate their child's stay-put rights. The IDEA's provision authorizing courts to award attorneys' fees is an important protection that levels the playing field.

Further, as COPAA knows well, many parents of students with

disabilities do not have the education or the skills needed to represent themselves nor do they have the resources to hire an attorney or access to free legal assistance. Without the ability to recover attorneys' fees for litigating and winning stay-put disputes, many parents will not be able to vindicate their children's statutory rights.

Moreover, a categorical rule against attorneys' fees for stay-put litigation gives school districts would give a green light to violate the stay-put right. As Congress recognized in enacting 42 U.S.C. § 1988, "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." S. Rep. No. 94-1011, at 2, *reprinted in* 1976 U.S.C.C.A.N 5908, 5910.[8]

When parents file for due process, the stay-put provision requires school districts to maintain the child "in the then-current educational placement." 20 U.S.C. § 1415(j). School districts can avoid liability for attorneys' fees for stay-put proceedings by complying with the automatic stay-put. Thus, attorneys' fees for parents who prevail in an adversary proceeding to enforce their rights to the statutory right for stay-put provided by 1415(j) provides

[8] *See* note 5, *supra.*

school districts with a powerful incentive to comply with the statutory stay-put.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and it contains 6,016 words, excluding the parts of the brief exempt by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2017, I electronically filed the foregoing Brief of Appellant with the Clerk of Court using the Court's document filing system, which will send notification of such filing to counsel of record. I also placed copies of this brief for delivery to the Court by Federal Express within three days and delivered a copy of the brief to counsel as follows:

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