No. 13-35329, 13-36200

In the United States Court of Appeals
for the Ninth Circuit

MERIDIAN JOINT SCHOOL DISTRICT NO. 2
Plaintiff-Appellant

v.

D.A., MOTHER OF MINOR, M.A. AND J.A., FATHER OF MINOR, M.A.,
Defendant-Appellees

On Appeal from the United States District Court
for the District of Idaho, Boise
D.C. No. 1:11-cv-00320-CWD (Honorable Candy W. Dale)

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEES' PETITION FOR REHEARING EN BANC

ALEXIS CASILLAS
NEWMAN.AARONSON.VANAMAN
14001 Ventura Blvd.
Sherman Oaks, CA 91423
818-990-7722, ext. 250

SELENE ALMAZAN-ALTOBELLI
Legal Director
COUNCIL OF PARENT
ATTORNEYS AND
ADVOCATES
P.O. Box 6767
Towson, Maryland 21285
844-426-7224, ext. 702

Attorneys for *Amicus Curiae,*
Council of Parent Attorneys
and Advocates

CORPORATE DISCLOSURE STATEMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is not required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.
Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.
If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.
No. 13-35329, 13-36200 Caption: MERIDIAN JOINT SCHOOL DISTRICT No.2 v. D.A., MOTHER OF MINOR, M.A. AND J.A. FATHER OF MINOR, M.A.

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.

_____*/s/*_____
Selene Almazan-Altobelli
Legal Director, COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, Maryland 21285
844-426-7224, ext. 702
selene@copaa.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Council of Parent Attorneys and Advocates (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs can only be developed and implemented when students, their families and educators are equally involved. COPAA provides resources and training to help students obtain the free appropriate public education (FAPE) they are entitled to under the Individuals with Disabilities Education Act (IDEA or Act), 20 U.S.C. § 1400, *et seq*., and does not undertake individual representation on behalf of individuals with disabilities. COPAA also safeguards the educationally-related civil rights guaranteed to individuals with disabilities under the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq*.

COPAA offers its perspective on behalf of its membership regarding the Appellees' request for en banc review of the Panel's July 6, 2015 Order.

[1] Pursuant to Federal Rule of Appellate Procedure 29, *Amicus* certifies that no party's counsel authored this brief in whole or in part, or contributed money intended to fund the brief's preparation or submission. Further, no person other than *Amicus* and its members and counsel contributed money intended to fund the brief's preparation or submission.

COPAA was compelled to weigh in since the Order broadly affects the ability of all children with disabilities and their families to seek and be awarded attorney's fees in matters where they were the prevailing party in an IDEA action. Consent was sought, and denied by Appellants, for the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Courts must construe civil rights statutes broadly so as to effectuate the statutory goals. The Panel's creation of a *per se* bar to attorneys' fees and costs when students are ultimately deemed ineligible for special education was in error. The Panel's very narrow interpretation of 20 U.S.C. § 1415(i)(3)(B) conflicts with the plain statutory language, undermines the unambiguous purpose of the Act, and is at odds with well-settled precedent governing the interpretation of federal civil rights laws.

FACTUAL BACKGROUND

Appellees D.A. and J.A. ("Parents") pursued a claim for procedural relief in the form of an Independent Educational Evaluation ("IEE") on behalf of their son, Matthew. At all relevant times, Matthew has had the following diagnoses: expressive-receptive language disorder, central auditory processing disorder, possible dyslexia and dysgraphia, and Autism Spectrum Disorder. Appellant Meridian Joint School District No. 2

("Meridian" or "District") does not dispute that Matthew has these disabilities. Nor does it contest that, at the time the dispute in this matter arose, Matthew was a "child with a disability" as defined by the IDEA. Instead, this case arises out of a disagreement at Matthew's triennial Individualized Education Program ("IEP") meeting in April 2008, when the District suggested Matthew was no longer eligible for IDEA services and proposed ending Matthew's special education services. Parents privately sought an IEE which evidenced that Matthew continued to suffer from an Autism Spectrum Disorder and required special education services. The District ignored these recommendations, which contributed to bad consequences for Matthew.

While the disagreement over the April 2008 assessment and IEP was pending, Matthew set fire to his family's home and was placed in the Ada County Juvenile Detention Center ("ACJDC"). The ACJDC provided a very restrictive educational program, within which Matthew did not require special education and related services. However, the ACJDC reported that Matthew should be assessed again for special education eligibility upon his return to a less-restrictive school setting.

Per ACJDC's advice, when Matthew returned home, Parents sought an evaluation to determine what special education services Matthew required

in the public school setting. Meridian refused to re-evaluate Matthew and, after meeting in October and November 2010, concluded he did "not need specially designed instruction" or "qualify for an IEP." Parents disagreed and asked that the District fund an IEE.

Meridian refused the IEE requests, and pro-actively filed a complaint for due process (the "IEE matter") against the family pursuant to 20 U.S.C. §1415 and 34 C.F.R. §300.502(b)(2)(i) seeking ratification of its decision to deny the IEE request. However, the Special Education Hearing Officer disagreed with the District's position and conduct, finding that Meridian had failed to conduct an appropriate evaluation. The Hearing Officer *agreed with the parents* that the District should have funded an independent educational evaluation as required under 20 U.S.C. §1415(b)(1) and ordered Meridian to fund an IEE. Because the Hearing Officer concluded Meridian was wrong in commencing the IEE matter, Parents were deemed the prevailing party.

Refusing to accept that its conduct violated the IDEA, the District appealed the Hearing Officer's order to the United States District Court for the District of Idaho. The district court, however, also concluded that Meridian had violated the IDEA and affirmed that Matthew had been entitled to an IEE. The district court order meant that Parents were, again, the prevailing party.

With respect to the IEE matter, Matthew has, at every step of the way, proven that Meridian's conduct regarding his assessments was wrong. The family incurred significant expense defending against the IEE matter so as to obtain the IEE Matthew was entitled to as a student challenging the appropriateness of the District's 2010 evaluation. Acknowledging these expenses and the District's illegal conduct, the district court awarded to Parents the fees and costs incurred in defending against the District's lawsuit and appeal.

After completion of the evaluations ordered in the IEE matter, Meridian convened another IEP meeting to determine if Matthew continued to be a "child with a disability," his status as of 2008 through January 2012. In a February 2012 IEP meeting, Meridian determined that he was, as of February 2012, no longer eligible for an IEP. The 2012 determination prompted an entirely separate due process matter brought *by the family* to challenge Meridian's determination. In this *entirely separat*e administrative matter, a *different* Special Education Hearing Officer ruled against the family on issues regarding the February 2012 IEP, upholding that as of

February 2012 Matthew was no longer eligible for an IEP[2]. The family appealed this 2012 decision, but an Idaho District Court Judge upheld it.

In light of the district court's determination on the February 2012 IEP case, Meridian requested that this Court overturn the district court's determination that the school district was responsible for Parents' attorney's fees for the 2010 IEE matter. On July 6, 2015 the Panel ruled that because the 2012 due process hearing (which arose *two years after* the IEE matter) found that Matthew was then ineligible (as of February 2012) for an IEP, his parents were ineligible for fees on the 2010 matter, theorizing they were not the "parent of a child with a disability." *Meridian Joint Sch. Dist. No. 2 v. D.A.*, __ F.3d. ___ *23 (July 6, 2015).

ARGUMENT

I. Federal Courts Must Construe Statutes to Effectuate, Not Frustrate, Legislative Goals

When a federal law is silent on issues before a federal court, it is important that courts "construe the statute to conform to its goals serves democratic values by allowing law to reflect the electorate's desires." David M. Driesen, *Purposeless Construction*, 48 Wake Forest L. Rev. 97, 98 (2013). Statutory goals are the most carefully chosen and important elements

[2] This February 2012 recommendation does not have any retroactive impact on Matthew's status prior to February 2012.

of any piece of legislation, and are bound to pay close attention to the purpose of the Act so as to follow the democratic mandate. *Id.; see also Id.* at 126 ("when courts construe statutes to effectuate their "stated purposes, they [are acting] democratically[and] further[ing] the constitutional project of having statutes reflect public views and values.").

The recent opinion in *King v. Burwell*, 135 S. Ct. 2480, 192 L.Ed. 2d 483 (2015) provides an apt illustration of this type of inquiry into the purpose of a statute to guide interpretation of ambiguous (or somewhat ambiguous language). There, the parties asked the Court to decide whether or not Congress' inartful drafting, which included the phrase "an Exchange established by the State," could refer to both State and Federal Exchanges.

The Court warned that it "must do its best, 'bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." 192 L. Ed.2d at 497-498 (citing *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 189 L. Ed.2d 372, 391 (2014)), and had to "look to the broader structure of the Act to determine wither one of [the] 'permissible meanings produce[d] a substantive effect that is compatible with the rest of the law." *Id.* at 498 (citing *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 371 (1988)). In *King*, because the

petitioners' interpretation would result in a "combination of no tax credits and an ineffective coverage requirement," such that the "individual insurance market [would be pushed] into a death spiral," the Supreme Court rejected the petitioners' arguments about a "plain-meaning." *Id*. The Supreme Court refused to adopt "what would otherwise be the most natural reading of the pertinent statutory phrase" as such a reading was "untenable in light of the statute as a whole." *Id.* at 501 (citing *Dep't of Revenue of Ore v. ACF Industries, Inc.*, 510 U.S. 332, 343 (1994)).

Similarly, in *Kasten v. Saint-Gobain Performance Plastics Corporation*, 131 S. Ct. 1325 (2011) the Court again relied upon the legislative purpose to interpret ambiguous sections of a statue. *Kasten* posed a question about whether ambiguous provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 215(a)(3), covered both oral and written complaints in light of the statute's ambiguity on the issue. The Court concluded that the anti-retaliation provision in the FLSA, *did* prohibit adverse action when an employee made an oral complaint because the broader purpose of the Act was more appropriately accomplished in light of such a reading.

The Court began its reasoning as follows:

> The Act protects employees who have "filed any complaint," 29 U.S.C. § 215(a)(3), and interpretation of

> this phrase "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis," *Dolan* v. *Postal Service*, 546 U.S. 481, 486 (2006). This analysis leads us to conclude that the language of the provision, considered in isolation, may be open to competing interpretations. But considering the provision in conjunction with the purpose and context leads us to conclude that only one interpretation is permissible.

131 S. Ct. 1325 at 1330-1331.

The Court reasoned that a narrower reading of "filed" to mean only a *written* complaint would frustrate the overall purpose of the FLSA—to protect workers from retaliation. As such, the Court held that even if the word 'filed,' considered alone, might suggest a narrow interpretation limited to writings, the phrase 'any complaint' suggests a broad interpretation that would include an oral complaint." *Id.*; *see also Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 92 (2007) (upholding Secretary of Education's calculation formula in light of the history and purpose of the statute).

As discussed more fully in the next section, preclusion of fee recovery when a parent successfully protects a student's procedural rights under the IDEA frustrates the statutory purpose. As such the Panel's interpretation of the IDEA's fee-shifting provision should be overturned.

II. Awarding Fees to Parents in this Case Effectuates the IDEA's Statutory Purpose

A. The Right to Recover Attorney's Fees Is Integral to Protect The Procedural Framework Contemplated By the Act

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 v. T.A.*, 557 U.S. 230, 239 (2009) (*quoting School Comm. of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359, 367 (1985)). "[O]ne 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, the IDEA hearing procedures, designed to allow parents to protect the rights of their children, are integral to the proper functioning of

the statute. *Schaffer v. Weast*, 546 U.S. 49, 52 (2005); *Honig v. Doe*, 484 U.S. 305, 311 (1988); *see also* 20 U.S.C. § 1400 (d)(1)(A)(2004) (IDEA's purpose to protect rights of parents and children); *Id.*, 20 U.S.C.§ 1400(d)(3)(2004) (ensuring that parents and educators have necessary tools to provide FAPE).

Under the Act, procedural protections for parents and students are at the "core of the statute," necessary for parents to be able to protect their children's substantive rights. *Id.* at 53; *Id.* at 311; 20 U.S.C.A. § 1415; *see also Amanda J. v. Clark Cnty. Sch. Dist.*, 260 F.3d 1106 (9th Cir. 2001) (procedural violations that interfere with parental participation undermine *the very essence* of IDEA). Those procedural protections include the right to "examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child." 20 U.S.C. 1415(b). Congress also established a procedural right to mediation, due process hearings, and the right to recover attorney's fees for prevailing parties. 20 U.S.C. § 1415(e)(i); *Id.* at 54.

Congress felt such procedural due process rights were critical to the enforcement of the procedural and substantive mandates under the IDEA.

But Congress also enacted checks and balances to ensure that the due process proceedings were not abused. For example, prevailing parents are barred from obtaining fees and even subjected to covering the school district's fees when they file cases "for any improper purpose." 20 U.S.C. § 1415(i)(3)(B)(i)(III). The Act further authorized courts to use judgment in determining when and how much attorney's fees should be covered in any given case. 20 U.S.C. § 1415(i)(3)(B)(i). But the law also does not clearly limit fees to students who are IEP eligible. 20 U.S.C. § 1415(i)(3)(B)(i)(I).

Here, two separate judges held that Meridian had failed to comply with the Act's procedural requirements, and that Meridian's 2010 evaluation was inappropriate. Judge Dale used discretion and sound judgment, and ordered that the Parents should recover attorney's fees incurred in protecting the procedural mandates of the Act. This determination as based on the relevant factors in the IEE matter. *Hensley v Eckerhart*, 461 US 424, 76 L.Ed.2d 40, 103 S. Ct. 1933 (1983); *See also Aguirre v. Los Angeles Unif. Sch. Dist.,* 461 F.3d 1114 (9th Cir. 2006) (holding what portion of student's fees were reasonably incurred to receive the results obtained and whether, given IDEA's purposes, plaintiffs' counsel's work in representing him was justified by the results obtained). Judge Dale's determination was

appropriate and was owed deference.

However, the District argued that the fees order for the 2010 IEE matter should be overturned because two years *after* IEEs were ordered the District determined Matthew was, as of February 2012, no longer IDEA-eligible. However, relying on the 2012 determination as dispositive of the IEE matter was erroneous and ignored the broader statutory scheme. The 2012 determination was *made with the information provided by* the evaluations obtained via the IEE matter. In fact, absent the IEE matter's resulting assessment, the 2012 IEP team's determinations would have been per se inappropriate. 20 U.S.C. § 1414(d)(1)(A)(I)(i). Parents, in fighting for their procedural right to an IEE, effectuated the statutory goal of parental participation designed to ensure the protection of children's special education rights both for the IEE matter ***and the*** 2012 IEP matter.

Nonetheless, the Panel concluded that the family was not entitled to reimbursement of their attorney's fees for the IEE matter because of the subsequent IEP matter determined Matthew ceased to be eligible as of February 2012. This ruling seriously undermines the effectiveness of the IDEA's procedural protections and should be reversed.

B. Parental Enforcement, Integral to the Effective Functioning of the IDEA, Must Be an Option for All Parents, Including Those with Limited Economic Means

Interpretation of the fee provision must take into account access for families of students with varied economic means. *Winkelman* rejected an interpretation of IDEA limiting recovery to parents who had, in fact incurred, expenses thereby creating a right to reimbursement. *Id.* at 532-533. The Court noted that the "potential for injustice in this result is apparent," suggesting that non-reimbursement remedies were often appropriate. *Id.* at 533. When Congress established the FAPE requirements, it did not intend "that only some parents would be able to enforce that mandate" because of limited financial means. *Id.* The right to recover attorney's fees is no different.

The right to recover attorney's fees is one of the most important procedural safeguards in the IDEA. "There 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, 1417-1418 (2011). This discrepant access to due process protections is antithetical to the purpose of the IDEA: free and appropriate public education for all. Clearly, any interpretation of the IDEA that drastically limits the ability of families to

recover their fees—and thereby hinders their ability to achieve the type of procedural enforcement contemplated by the Act—undermines the statutory purposes of achieving an appropriate education for *all*. *See Id.* at 1430 (The wealth-based disparities in private enforcement raise troubling questions about the IDEA's effectiveness for children in poverty . . . 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.). The legislative history of the IDEA a "statute gr[own] out of lawsuits brought by civil rights attorneys and poverty lawyers" confirms that the IDEA was intended to at least provide equal access to the educational and procedural mandates of the Act, if not provide additional supports to those *without the means* to access self-help in accessing appropriate educational interventions.

Despite the IDEA's fee-shifting provisions, it is increasingly difficult for families to find (and afford) attorneys to handle these special education cases. *See*, Lynn M. Daggett, *Special Education Attorney's Fees*, 8 U.C. Davis J. of Juvenile L. & Pol'y 1, 24-29 (2004)(noting the disparity in IDEA disputes brought in different states, in urban versus rural districts, and by socioeconomic status). Worse still, many children who qualify for services under the IDEA come from underprivileged families who lack the resources

to obtain assistance to navigate the complex IDEA process. *See, e.g.*, Kelly D. Thomason, Note, *The Costs of a "Free" Education*, 57 Duke L.J. 457, 483-84 (2007). 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. These trends are in spite of the clear remedial and protective purpose of the Act. The IDEA, by its plain terms, sought to guarantee informed parental involvement—including involvement of parents with limited economic means—in the due process procedures under the Act. Two judges confirmed that informed involvement in this case required the District funding of an IEE. The family should not be financially harmed for doing what the Act intended.

The Panel's reversal of fee recovery when a child is found ineligible *two years* after parents invoked (and prevailed in) their procedural protections will block access to legal support for these less-moneyed students and render attorneys less willing to take on these cases. Indeed, since special education has its intended consequence of improving the performance of children with disabilities, hopefully to the point of no longer requiring intervention, the idea that effective intervention years in the future could invalidate the successes of prior years it seems entirely unlikely that

attorneys would ever assume the risks associated with representing families in these types of procedural cases. Such an outcome cannot be what Congress, or the Panel, intended.

C. Legislative History Evidences Congressional Judgment that Fee-Shifting Was Essential for Proper Functioning of the IDEA

Congress promptly passed the Handicapped Children's Protection Act (HCPA) in response to *Smith v. Robinson*, 468 U.S. 992 (1984), which denied parents the right to collect attorney's fees in IDEA cases. The Court decided *Smith* on July 5, 1984 and House and Senate Bills to remedy the ruling were both introduced before the end of that month. 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 (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 Senate bill originally limited the fees to publicly funded attorneys, but such limits were removed specifically so that private attorneys could be paid based on prevailing market rates. *Id.* at 17. Likewise, the House Report states HCPA was drafted so as to increase "the possibility that

poor parents will have access to the procedural rights in EHA, thereby making the laws' protections available to all." H.R. Rep. No. 99-296 at 5.

Congress further intended that the IDEA fee provisions be interpreted consistently with 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, ordinarily awarding fees to prevailing parents "unless special circumstances make such an award unjust." *See, Abu-Sahyn v. Palo Alto Unif. Sch. DisT.,* 843 F.2d 1250, 1252 (9th Cir. 1988); *Shelly C. v. Venus Indep. Sch. Dist.,* 878 F.2d 862, 864 (9th Cir. 1989); See also S. Rep. No. 99-112 at 14. (Congress believed it particularly important that fees for administrative hearings be recoverable.)

The fee-shifting provisions in the HCPA exist "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." Pasachoff at 1424-1425; *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 certain categories of cases pursued, and wanted lawyers to represent plaintiffs in those cases). Congress acknowledged that if a student "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)).

No one disputes that the IEE sought by Parents furthered the Act's purposes. The Panel's determination that Matthew's parents cannot recover fees after having successfully defended the 2010 IEE matter is the type of misinterpretation Congress never intended after *Smith*. In fact, it was the IEE obtained through the 2010 due process proceedings *that made it even possible* for the 2012 IEP team to accurately consider Matthew's special education eligibility and needs. Nonetheless, the Panel held Parents must pay for the defense of the 2010 IEE matter even though every judge that has considered the District's conduct in 2010 found it to be wrong, and that the family had been right in asserting their procedural rights. This cannot stand.

CONCLUSION

The decision by the district court to award the Parents' attorneys' fees after Meridian's failed pursuit of a declaratory judgment action against them was consistent with the purpose and intent of the IDEA. Denial of attorney's fees in such cases will chill parental participation as parents will know they will have to bear the cost of defending against a school district's pursuit of judicial remedies. This Court should not permit such tactics that chill a

parent's important right to challenge the appropriateness of the educational plan provided for their child by their local school district. For these reasons, we urge that the issue be taken up en banc, and that the reviewing panel uphold Judge Dale's award of attorneys' fees.

Respectfully submitted,

_____/s/_____
ALEXIS CASILLAS
NEWMAN.AARONSON.VANAMAN
14001 Ventura Blvd.
Sherman Oaks, CA 91423
818-990-7722, ext. 250

_____/s/_____
SELENE ALMAZAN-ALTOBELLI
Legal Director
COUNCIL OF PARENT
ATTORNEYS AND
ADVOCATES
P.O. Box 6767
Towson, Maryland 21285
844-426-7224, ext. 702
Attorneys for *Amicus Curiae*,
Council of Parent Attorneys
and Advocates

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

> this brief contains 4,173 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 2010 in Times New Roman 14 point typeface.

Dated July 30, 2015

Respectfully submitted,

_____/s/_____
ALEXIS CASILLAS
NEWMAN.AARONSON.VANAMAN
14001 Ventura Blvd.
Sherman Oaks, CA 91423
818-990-7722, ext. 250
_____/s/_____
SELENE ALMAZAN-ALTOBELLI
Legal Director
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, Maryland 21285
844-426-7224, ext. 702

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the 30th day of July 2015. I certify that all participants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to:

Elaine Eberharter-Maki
950 W. Bannock Street, Suite 520
Boise, ID 83702
Telephone: (208)331-1800
Facsimile: (208)331-1202
eem@msbtlaw.com

Frank Z. LaForge
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor Reno, NV 89511
775-327-3000
775-786-6179 fax
fzlaforge@hollandhart.com

_____/s/_____
SELENE ALMAZAN-ALTOBELLI
Legal Director
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, Maryland 21285
844-426-7224, ext. 702
Attorney for ***Amicus Curiae***.