UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPEARANCE OF COUNSEL

Case Title: Chad & Tonya Richardson, et al. vs. Omaha School District

The Clerk will enter my appearance as Counsel in Appeal No. 19-2058 for the following party(s): (please specify)

Council of Parent Attorneys and Advocates

☐ Appellant(s) ☐ Petitioner(s) ☐ Appellee(s) ☐ Respondent(s) ☑ Amicus Curiae ☐ Intervenor(s)

Please compare your information below with your information on PACER. Any updates or changes must be made through PACER's Manage my Account.

Attorney Name: Catherine M Reisman s/: Catherine Merino Reisman

Firm Name: Reisman Carolla Gran & Zuba LLP

Business Address: 19 Chestnut Street

City/State/Zip: Haddonfield, NJ 08033

Telephone Number (Area Code): 856.354.0071

Email Address: catherine@rcglawoffices.com

CERTIFICATE OF SERVICE

☑ I hereby certify that on 7.30.2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

☐ I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

No. 19-2058

In The United States
Court of Appeals for the Eighth Circuit

CHAD AND TONYA RICHARDSON, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF L.

Appellants,

v.

OMAHA SHCHOOL DISTRICT

Appellee.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE COUNCIL OF PARENT ATTORNEYS IN SUPPORT OF APPELLANTS

Pursuant to Fed. R. App. P. 29, **Council of Parent Attorneys and Advocates** (**COPAA**), (*Amicus Curiae),* hereby respectfully move for leave to file the attached brief as *Amicus curiae* in support of Plaintiffs-Appellants, Chad and Tonya Richardson, individually and as parents and next friends of L., who have filed this Notice of Appeal. This motion is accompanied by *Amicus'* proposed brief as required by Fed R. App. P. 29(b).

ARGUMENT

A. Interests of Proposed Amicus Curiae

COPAA is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. 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), 20 U.S.C. § 1400, et seq. COPAA's 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, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (ADA).

COPAA brings to this Court the unique perspective of parents and advocates for children with disabilities. COPAA has previously filed as *amicus curiae* in the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017); *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017);

Forest Grove School District. v. T.A., 557 U.S. 230 (2009); *Board of Education of New York v. Tom F.*, 552 U.S. 1 (2007); *Arlington Central School District Board. of Education v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City School District*, 550 U.S. 516 (2006), and in numerous cases in the United States Courts of Appeal.

Because of its work involving education of students with disabilities, COPAA is particularly concerned with importance of attorneys' fees in vindicating the rights of students with disabilities and their parents, the statutory structure that makes the attorneys' fees claim an independent legal claim, and a statute of limitations for personal injury and civil rights claims is most analogous to the IDEA attorneys'' fee claim.

Based upon its experience, *Amicus* offers the Court a unique and important view on these issues. *Amicus* therefore respectfully requests that it be granted permission to submit the attached *Amicus curiae* brief. *Amicus* requested consent to file this Motion and accompanying *Amicus Curiae* brief from counsel for both parties. Appellants consented to this brief; Appellee, Omaha School District, declined to consent.

B. <u>Why An Amicus Curiae Brief from COPAA is Relevant and Desirable</u>

This *Amicus Curiae* brief from COPAA is both relevant and desirable. *See* Fed. R. App. P. 29(b)(2). The legal issues presented in the appeal are of great

importance to COPAA and its members because they work with many children who have disabilities that interfere with their education. Congress recognized that most parents cannot afford the legal expenses required for a due process proceeding, much less additional litigation in federal court. Congress specifically provided for an independent legal claim for attorneys' fees, to be awarded by a judge after the administrative hearing process has been completed. 20 U.S.C. § 1415(i)(3)(B). Congress did not provide a statute of limitations for the attorney's fees claim, and circuit courts are split as to whether the analogous statute of limitations is that used for civil rights claims or for judicial review of administrative proceedings.

Amicus asserts that the issue in this case meriting intervention from this Court is whether the district court the district court below erred in finding that the analogous statute of limitations is the 90-day statute for judicial review of IDEA proceedings.

Amicus offer the Court relevant information not brought to Court's attention by the parties. *See Neonatology Assocs., P.A. v. Comm'r,* 293 F.3d 128, 133 (3d Cir. 2002). *See also Funbus Sys., Inc. v. Cal. Pub. Util. Comm'n*, 801 F.2d 1120, 1124-25 (9th Cir. 1986).

The district court below erred in finding that the analogous statute of limitations is the 90-day statute for judicial review of IDEA proceedings. The

better reasoned decisions have held that the IDEA attorney's fees claim is independent of the administrative proceeding, being a separate legal claim brought in a different legal forum, and analogous to the statute of limitations used for other civil rights claims. This Court has held that the personal injury statute is the analogous statute of limitations for Rehabilitation Act claims, and that same statute of limitations should apply to IDEA attorneys' fees claims. The three-year statute of limitations is consistent with the IDEA's goal of ensuring that parents have access to legal representation.

CONCLUSION

For the foregoing reasons, COPAA respectfully request that the Court grant their motion to file the attached brief *Amicus Curiae* in support of Appellant's Request for Reversal.

Respectfully Submitted,
/s/ Catherine Merino Reisman
Catherine Merino Reisman
Reisman Carolla Gran & Zuba LLP
19 Chestnut Street
Haddonfield NJ 08033
856-354-0071

Selene Almazan-Altobelli
Ellen M. Saideman
Jessica F. Salonus
Council of Parent Attorneys and Advocates
P.O. Box 6767
Towson, MD 21285
(844) 426-7224

Counsel for Amicus Curiae

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 Eighth Circuit by using the appellate CM/ECF system on the 30th of July 2019 I certify that all participants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Catherine Merino Reisman
Catherine Merino Reisman

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

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because:

> This motion contains 866 words, excluding the parts exempted by Fed. R. App. P. 27(a)(2)(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 27(d)(2)(A) and the type style requirements of Fed. R. App. P.27(d)(2)(A) because:

> this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2015 in Times New Roman 14 point typeface.

3. The motion has been scanned for viruses and is virus free.

/s/Catherine Merino Reisman
Catherine Merino Reisman

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

CHAD RICHARDSON, Individually, and as Parents and Next Friends of L; TONYA RICHARDSON, Individually, and as Parents and Next Friends of L,

Plaintiffs-Appellants,

—v.—

OMAHA SCHOOL DISTRICT; JACOB SHERWOOD, SUPERINTENDENT; AMANDA GREEN, PRINCIPAL; DAWN DILLON, TEACHER,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS

CATHERINE MERINO REISMAN
Counsel of Record
REISMAN CAROLLA GRAN
& ZUBA LLP
19 Chestnut Street
Haddonfield, New Jersey 08033
(856) 354-0071

SELENE ALMAZAN-ALTOBELLI
ELLEN M. SAIDEMAN
JESSICA F. SALONUS
COUNCIL OF PARENT ATTORNEYS
AND ADVOCATES, INC.
PO Box 6767
Towson, Maryland 21285
(844) 426-7224

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of these entities:

Council of Parent Attorneys and Advocates

1. No amicus is a publicly held corporation or other publicly held entity;
2. No amicus has parent corporations; and
3. No amicus has 10% or more of stock owned by a corporation.

/s/ Catherine Merino Reisman
Catherine Merino Reisman
Reisman Carolla Gran & Zuba LLP
19 Chestnut Street
Haddonfield NJ 08033
856-354-0071

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

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Other Authorities

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 for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties.

COPAA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in seeking to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (ADA).

COPAA's primary goal is to secure appropriate educational services for children with disabilities in accordance with national policy. COPAA provides resources, training, and information for parents, advocates, and attorneys to assist

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, Amicus states that: (A) there is no party, or counsel for a party in the pending appeal who authored the amicus brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than Amicus and its members.

them in obtaining the free appropriate public education such children are entitled to under the Individuals with Disabilities Education Act (IDEA or Act), 20 U.S.C. § 1400 et seq.[2]

COPAA brings to the Court the unique perspective of parents, advocates, and attorneys for children with disabilities. COPAA has previously filed as *amicus curiae* in the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Fry v. Napoleon Cnty. Sch.*, 137 S. Ct. 743 (2017); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Bd. of Educ. v. Tom F.*, 552 U.S. 1 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007), and in numerous cases in the United States Courts of Appeal.

Many children with disabilities experience significant challenges. Whether these children eventually gain employment, live independently, and become productive citizens depends in large measure on whether they secure their right to the free appropriate public education guaranteed under the IDEA and other educational policies. Indeed, the core of the IDEA is its codified goal that "all

[2] "Improving educational results for children with disabilities is an essential element of [the U.S.] national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1).

children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living .. . .” *Id*. at § 1400(d)(1)(A).

IDEA embodies substantial procedural safeguards for students and their parents, including the right to equal and meaningful participation in the educational planning process. COPAA has found, however, that students and their parents are often unable to exercise these important procedural and substantive rights without legal representation. Access to legal representation for students with disabilities and their parents is limited, as few attorneys practice in this complex, specialized area of law, and even fewer provide such representation without charge. Low income and even middle class families face a dearth of attorneys available to take their cases on a purely contingent basis because, too often, a prevailing parent’s recovery of attorneys’ fees may prove to be elusive even in the most meritorious cases. As Congress has recognized, attorneys’ fees are essential for parents and their children to vindicate their IDEA rights.

Amicus writes to explain the importance of attorneys’ fees in vindicating the rights of students with disabilities and their parents, the statutory structure that makes the attorneys’ fees claim an independent legal claim, and a statute of

limitations for personal injury and civil rights claims is most analogous to the IDEA attorneys' fees claim.

Amicus has moved for permission to file this brief. Counsel for Appellants has consented to this brief, and counsel for Appellee has declined to provide consent for this brief.

SUMMARY OF ARGUMENT

The IDEA, enacted to ensure that students with disabilities obtain a free appropriate public education (FAPE), provides that parents are partners with school districts in developing Individualized Educational Programs (IEP) for their children. The statute provides parents with important procedural protections to secure their children with FAPE, including attorneys' fees for parents who prevail in administrative proceedings to obtain FAPE for their children.

Congress recognized that most parents cannot afford the legal expenses required for a due process proceeding, much less additional litigation in federal court. Congress specifically provided for an independent legal claim for attorneys' fees, to be awarded by a judge after the administrative hearing process has been completed. 20 U.S.C. § 1415(i)(3)(B). Congress did not provide a statute of limitations for the attorney's fees claim, and circuit courts are split as to whether the analogous statute of limitations is that used for civil rights claims or for judicial review of administrative proceedings.

The district court below erred in finding that the analogous statute of limitations is the 90-day statute for judicial review of IDEA proceedings. The better reasoned decisions have held that the IDEA attorney's fees claim is independent of the administrative proceeding, being a separate legal claim brought in a different legal forum, and analogous to the statute of limitations used for other civil rights claims. This Court has held that the personal injury statute is the analogous statute of limitations for Rehabilitation Act claims, and that same statute of limitations should apply to IDEA attorneys' fees claims. The three-year statute of limitations is consistent with the IDEA's goal of ensuring that parents have access to legal representation.

FACTUAL BACKGROUND

Amicus adopts fully by reference herein the Statement of the Case in the Brief of Appellants at pp. 3 to 10.

ARGUMENT

I. IDEA SECURES APPROPRIATE EDUCATIONAL SERVICES FOR ALL STUDENTS THROUGH INFORMED PARENTAL INVOLVEMENT AND PROCEDURAL PROTECTIONS, INCLUDING THE RIGHT TO RECOVER ATTORNEY'S FEES

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. Dep't of Educ. of Mass.*, 471 U.S. 359, 367 (1985)). The IDEA "embodies a strong federal policy to provide an appropriate education" for every child with disabilities.

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

The IDEA confers upon students with disabilities, an enforceable substantive right to public education in participating States, regardless of the nature of the disability. *See Honig v. Doe*, 484 U.S. 305, 310 (1988); *Houston Indep. Sch. Dist. v. V.P.*, 582 F.3d 576, 583 (5th Cir. 2009), *cert. denied*, 559 U.S. 1007 (2010); *cf. Ector County Indep. Sch. Dist. v. V.B.*, 420 F. App'x 338, 343 (5th

Cir. 2011) (hearing officer order requiring provision of FAPE fosters IDEA's purposes, entitling parents to award of attorney's fees). A state must therefore have "policies and procedures in place to ensure that all eligible children receive a FAPE." *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1125 (9th Cir. 2003), *cert. denied*, 544 U.S. 928 (2005).

To that end, the IDEA requires that states provide eligible students with "special education and related services that – (A) have been provided at public expense, under public supervision, direction, and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary school, or secondary education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of [IDEA]." 20 U.S.C. § 1401(9). States provide these required services through an IEP. Ultimately, an IEP is intended to provide a student with a disability with "meaningful educational progress," as defined in the case law interpreting the IDEA. *See Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-207 (1982).

In order to ensure meaningful educational progress through the IEP, parents and guardians must "play a significant role in the IEP process." *Schaffer v. Weast*, 546 U.S. 49, 53 (2005); *Winkelman*, 550 U.S. at 519. Indeed, "one of the central innovations of the special education law, and a key to its success, is that it

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

Those procedural protections include the parental right to recover attorney's fees as a prevailing party. *Id.* at 526; *Schaffer*, 546 U.S. at 54; *see also Ector Indep. Sch. Dist.*, 420 F. App'x at 345 (award of fees to parents who succeed at due process hearing fosters IDEA's purposes). The legislative history of the HCPA also establishes that Congress believed it to be particularly important that fees for administrative hearings be recoverable. *See* S. REP. NO. 99-112, at 14 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 1799, 1804 ("S. REP. NO. 99-112").

II. THE HCPA EVIDENCES CONGRESSIONAL JUDGMENT THAT FEE-SHIFTING WAS ESSENTIAL FOR THE PROPER FUNCTIONING OF THE IDEA

Congress acted promptly in passing 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. The House and Senate Bills

to remedy the *Smith* ruling were both introduced before the end of July, 1984. Myron Schreck, *Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act: of Carey, Crest Street and Congressional Intent*, 60 Temple L.Q. 599. 612 n. 91 (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).

Smith analyzed the interaction among five federal statutory provisions: Section 1983; Section 2 of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("Section 1988"); Section 504; Section 505(b) of the Rehabilitation Act, 29 U.S.C. § 794a(b); and Section 615(e)(2) of the Education for all Handicapped Children Act of 1975, 94 Pub. L. No. 142, 89 Stat. 773 (EHA), a predecessor statute to the IDEA. At the time, the EHA had no provision authorizing the award of attorney's fees to prevailing parties. The Plaintiffs in Smith had challenged Rhode Island's failure to prove a free appropriate to a special education student under the EHA, Section 1983 and Section 504. Because the EHA had no separate provision authorizing an award of attorney's fees, the Plaintiffs could only recover fees if there were claims under Section 1983 and Section 504. *Smith* held that the EHA pre-empted any claims under the other federal civil rights statutes. Consequently, the Court reasoned, the Plaintiffs had no right to attorney's fees for pursuit of the student's right to a free appropriate public education.

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

> In sum, since 1978, it has been Congress' intent to permit parents or guardians to pursue the rights of handicapped children through EHA, section 504, and section 1983. Attorneys' fees could be awarded under section 504 (by virtue of section 505) and under section 1983 (by virtue of section 1988) . . . Congressional intent was ignored by the U.S. Supreme Court when, on July 5, 1984, it handed down its decision in *Smith v. Robinson*. . . . H.R. 1523 is designed to: (10 authorize courts to award reasonable attorneys' fees to parents of handicapped children who prevail in actions or proceedings under EHA; (2) re-establish statutory rights repealed by the US. Supreme Court in *Smith v. Robinson* . . . .

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

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

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

S. Rep. No. 99-112, at 2 (emphasis supplied); *see also* 131 Cong. Rec. S. 10396 ("unless the EHA is to become a mere hollow pronouncement which the financially strapped parents and legal representatives of handicapped children cannot enforce,

Congress must guarantee access to legal counsel to assist parents in obtaining what is guaranteed to them by EHA") (remarks of Sen. Weicker). The committee's intent was to ensure that children with disabilities be provided with fee awards on a basis similar to other fee shifting statutes. S. Rep. No. 99-112, at 14.

III. PARENTS' ABILITY TO RECOVER FEES IS CRITICAL FOR THE PROPER FUNCTIONING OF THE IDEA

A. The Prevailing Parent's Right to Obtain Attorneys' Fees Is Essential for Enforcing their Rights Under IDEA

The Supreme Court has consistently recognized the importance of a fee-shifting statute "to ensure effective access to the judicial process for persons with civil rights grievances" *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Fee-shifting provisions give "the victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights by means of settlement or trial." *Evans v. Jeff D.*, 475 U.S. 717, 741 (1986).

Congress considered attorneys' fees so important that when the Supreme Court concluded fees could not be awarded to prevailing parents under IDEA's predecessor statute, *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 HCPA to permit prevailing parents

to recover attorneys' fees. *Fontenot v. Louisiana Bd. of Elementary & Secondary Educ.*, 805 F.2d 1222, 1223 (5th Cir. 1986).

When Congress enacted HCPA, it made the fee provision 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). 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 Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1037 (9th Cir. 2006) (district court's discretion to deny a request for attorneys' fees is narrow).

Congress included fee-shifting provisions in many federal laws "to address two related difficulties that otherwise would prevent private persons from obtaining counsel. First, many potential plaintiffs lack sufficient resources to hire attorneys . . . . Second, many of the statutes to which Congress attached fee-shifting provisions will generate either no damages or only small recoveries." *City of Burlington v. Dague*, 505 U.S. 557, 568 (1992) (citations omitted). "The strategy of the fee-shifting provisions is to attract competent counsel to selected federal cases by ensuring that if they prevail, counsel will receive fees commensurable with what they could obtain in other litigation." *Id.* at 569; *see also Dicks v. Dist. of Columbia*, 109 F. Supp. 3d 126, 131 (D.D.C. 2015).

B. Because Legal Assistance Is Critical for Success in IDEA Proceedings and Many Parents Cannot Afford Legal Fees, Attorneys' Fees Are Essential for Parents and Students to Vindicate Their Rights Under IDEA

As COPAA knows firsthand, without the availability of fees, parents would find it very difficult to obtain legal representation. Most families of children receiving special education services lack the resources necessary for legal representation, because of low family income or because of the financial strain of raising a child with a disability. 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.[3] Many parents, desperate to help their children, mortgage their homes and raid their retirement funds, to obtain the funds to hire lawyers and pay expert fees. Others do not have those options available to them.

Congress understood that, absent a fee-shifting framework as part of the IDEA's due process procedures, many families would be unable to secure counsel to undertake special education cases, and, without counsel, would face nearly insurmountable odds to resolve their IDEA disputes fairly. As Senator Weicker explained, 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

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

the claim." 130 Cong. Rec. S9079 (daily ed. July 24, 1984).

Senators specifically cited the example of Mary Tatro, who testified at a Senate hearing about her family's experience in litigating *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984), in which the Supreme Court ruled unanimously in the family's favor. 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). The Tatro family was fortunate to be able to retain *pro bono* assistance for the appeal.

The dearth of attorneys available to assist families with children with disabilities is well established, particularly for families unable to pay for attorneys and experts.[4] As the Supreme Court has recognized, this dearth has led some parents to resort to representing themselves *pro se* in federal court as well as in administrative proceedings. *See, e.g., Winkelman ex rel Winkelman v. Parma City*

[4] Hyman, *supra*, at 111. A Pennsylvania study found that, over a five year period, parents were represented by attorneys from nonprofit or legal aid groups in fewer than twenty-five of the 383 cases (6.5%), less than five a year. Kevin Hoagland-Hanson, *Comment: Getting Their Due (Process): Parents And Lawyers In Special Education Due Process Hearings In Pennsylvania*, 163 U. Penn. L. Rev. 1806, 1822 (2015).

Sch. Dist., 550 U.S. 516, 535 (2007) (holding parents could proceed pro se on their independent IDEA claims).

Recent studies confirm that, without counsel, parents left on their own are without the experience or ability to "navigat[e] the intricacies of disability definitions, evaluations processes, the developments of IEPs, the complex procedural safeguards, among other provisions in the statute," and, as a result, parents of students who were represented by counsel were far more likely to be successful in their IDEA claims than those without counsel.[5]

Unlike parents who are frequently unrepresented and often cannot afford expert witnesses,[6] schools are represented by counsel[7] with expertise in special education law and can draw on the expertise of school staff (without incurring

---

[5] Lisa Lukasik, *Special Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. Va. L. Rev. 735, 775 (2016) (over twelve years, North Carolina *pro se* parents prevailed on at least one issue in just 11.1% of the cases, while those with counsel were five times more likely to prevail on at least one issue (51.3%)); William H. Blackwell & Vivian V. Blackwell, "*A Longitudinal Study of Special Education Due Process Hearings in Massachusetts: Issues, Representation, and Student Characteristics*," Sage Open (Jan.-Mar. 2015), http://journals.sagepub.com/doi/pdf/10.1177/2158244015577669, at 7 (over an eight-year period in Massachusetts, parents with attorneys were more likely to win than *pro se* parents); Hoagland-Hanson, *supra*, 163 U. Penn. L. Rev. at 1820 (2015) (over a five-year period, Pennsylvania parents who had legal counsel prevailed 58.75% of the time whereas *pro se* parents prevailed only 16.28% of the time).

[6] *See Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 304 (2006) (holding IDEA did not provide for expert fees as part of attorneys' fees and costs).

[7] The Massachusetts study found that schools were represented in 100% of cases where parents were only represented in 40.3% of the cases, Blackwell, *supra* at 7.

additional expense) as well as paid experts.[8] This imbalance is perpetuated by the fact that schools often have insurance and other funding sources to pay fees; payment to school attorneys is not contingent on victory. Indeed, protracted litigation may provide school attorneys additional income while at the same time delaying an adverse decision for their clients,[9] whereas parents often lack the resources to withstand protracted litigation.

The school, armed with an attorney zealously representing her client, can use the law to bar the *pro se* parent from submitting crucial evidence and otherwise presenting her case. Hearing officers cannot assist pro se litigants. As one hearing officer observed, "[t]o favor a *pro se* parent when they are not following the required procedures would indicate bias in favor of the parent."[10] Thus, even *pro se* parents with obviously meritorious claims lose because they lack attorneys.

---

[8] Debra Chopp, *School Districts & Families Under the IDEA: Collaborative in Theory, Adversarial in Fact,* 32 J. Nat'l Ass'n Admin. L. Judiciary 423, 453 (2012).
[9] Some schools are covered by insurance for special education litigation. Such coverage "allows school districts to avoid internalizing all of the costs of litigation under the IDEA. A school might refuse to provide an expensive benefit to a disabled child, knowing that it can incur up to $100,000 in legal fees at no marginal cost." *Id.* at 456.
[10] Lukaski, *supra*, 118 W. Va. L. Rev. at 775..

IV. BECAUSE IDEA ATTORNEYS' FEES ARE AN INDEPENDENT CIVIL RIGHT FROM THE UNDERLYING ADMINISTRATIVE PROCEEDING, THIS COURT SHOULD HOLD THAT THE ANALOGOUS STATUTE OF LIMITATIONS TO BORROW IS THAT FOR OTHER CIVIL RIGHTS LAWS, AND THEREFORE, IS THREE YEARS

There is a circuit split as to the appropriate statute of limitations for claims for attorneys' fees pursuant to IDEA. *Compare Meridian Jt. Sch. Dist. No. 2 v. D.A.*, 792 F.3d 1054 (9th Cir. 2015); *Zipperer v. Sch. Bd. of Seminole Cty.*, 111 F.3d 847 (11th Cir. 1997) *with King v. Floyd Cty. Bd. of Educ.*, 228 F.3d 622, 625-26 (6th Cir. 2000); *Powers v. Ind. Dep't of Educ.*, 61 F.3d 552, 556-59 (7th Cir. 1995). *Amicus* submits that the better reasoned cases hold that a claim for attorneys' fees is independent from the underlying administrative action and, therefore, the most analogous attorneys' fee provision is that for other civil rights claims.

A. The IDEA Attorneys' Fees Claim Is Independent from the Underlying Substantive Action

That a claim for IDEA attorneys' fees is independent from the underlying action rather than ancillary to it is demonstrated by the structure of the statute. While IDEA substantive claims must be made in the first instance to the administrative law judge in the due process hearing, 20 U.S.C. § 1415(f), the hearing officer does not have authority to award attorneys' fees. Rather, the statute specifically provides that it is the federal district court that has authority to award attorneys' fees. *See* 20 U.S.C. § 1415(i)(3)(B). *See also Zipperer*, 111 F.3d at 851

(noting the statute provides "two distinguishable causes of action," one for attorneys' fees and one for appealing an adverse decision on the substantive legal claim). Thus, the Ninth Circuit observed, " "The fact that the hearing officer may not award fees weighs in favor of holding that a request for attorneys' fees filed in the district court is not ancillary to the judicial review of the administrative decision." *Meridian,* 792 F.3d at 1064. *See also Doe v. Boston Public Schs.*, 80 F. Supp. 3d 332, 340 (D. Mass 2015).

The district court must first determine if the parent is the prevailing party and then may award fees. *Doe*, 80 F. Supp. 3d at 340. While a district court must give substantial deference to the findings of the administrative agency, the IDEA claim for attorneys' fees is "essentially an independent cause of action employing *de novo* fact finding and independent legal analysis uninflected by doctrines of deference to an administrative agency." *Id.*

The district court below appeared to assume that a district court would consider both the claims on the merits and the claim for fees in the same legal proceeding. 2018 U.S. Dist. Lexis 47167, at *14. But a school district that loses a due process hearing has no obligation to appeal that decision. In fact, IDEA discourages districts from appealing if an appeal lacks merit by imposing a sanction (an exception to reduction in the amount of attorneys' fees award to parents) if a court finds that a school district "unreasonably protracted the final resolution of he

action or proceeding." 20 U.S.C. § 1415(3)(i)(G). Thus, there may be no appeal at all on the merits, and the parents' claim for attorneys' fees may be an independent action unrelated to any federal lawsuit under IDEA, as was the case here at the time this claim was filed. *See, e.g., Zipperer*, 111 F.3d at 849 (fee claim filed after district did not appeal hearing decision); *P.M. v. Evans-Prant Cent. Sch. Dist.*, 09-CV-6865, 2012 U.S. Dist. Lexis 2493 at *3 (W.D.N.Y. Jan. 9, 2012)(fee claim filed after district did not appeal state review officer decision); *T.K. v. N.Y.C. Dep't of Educ.*, 11 Civ. 3964, 2012 U.S. Dist. Lexis 43711, at *5 (S.D. N.Y. Mar. 30 ,2012)(same).

Further, the district court judge erred in relying on *B.D. ex rel Doucette v. Georgetown Public School District*, 2012 U.S. Dist. Lexis 139051 (D. Mass. Sept. 27, 2012), because Judge Woodlock, author of that decision, has since reconsidered his decision and instead adopted a three year statute of limitations for IDEA attorneys' fees claims. *See* 2018 U.S. Dist. Lexis at *12-13; 80 F. Supp. 3d at 338.

Judge Woodlock noted that "it is better that the substantive question come first before attorneys' fees are considered, in order that the two issues not be conflated and the attendant potential of conflict of interest between client and attorney in reaping benefits from the litigation be avoided." *Id.* Thus, Judge Woodlock specifically rejected the proposition articulated by the district judge here that the IDEA fee claim should be brought in a single action with the substantive

merits. *Compare* 80 F. Supp. 3d at 339-40 *with* 2018 U.S. Dist. Lexis 47167 at *12. Similarly, another Massachusetts district court observed that an advantage of a longer statute of limitations is that "attorneys will not risk losing the opportunity for compensation if the claim for fees is delayed until multiple substantively-related pending claims are resolved. Otherwise, the attorney must divide attention and energy between the child's substantive educational claims and her own need to obtain payment for services rendered." *Anthony F. v. Sch. Comm.*, 2005 U.S. Dist. Lexis 10158, at *6 (D. Mass. Apr. 22, 2005).

B. The Most Analogous Statute of Limitations Is that Used for Other Civil Rights Claims

The most analogous statute of limitations here is the same statue used for other civil rights claims, the statute for personal injury actions. This Court has made clear that, for the purpose of determining the appropriate statute of limitations, the most analogous statute of limitations for federal civil rights claims is that for personal injury claims. *See Dick v. Dickinson State Univ.*, 826 F3d 1054, 1058 (8th Cir. 2016) (North Dakota statute of limitations for personal injury claims is most analogous statute for Rehabilitation Act civil rights claims); *Gaona v. Town & Country Credit*, 324 F.3d 1050 (8th Cir. 2002)(statute of limitations for personal injury claims is most analogous statute for Rehabilitation Act claims).

In *Meridian*, the Ninth Circuit rejected the state law limitations period for judicial review of administrative agency decisions as analogous, but it did not reach the question of which statute of limitations was most analogous to IDEA's attorneys' fees provision, finding that either the three year statute of limitations for statutory liability actions or the two year statute for personal injury actions might be analogous and that the parents' request was timely under either. Although the First Circuit has not yet reached this issue, three district court judges in Massachusetts have held that the state's three-year personal injury statute of limitations is the appropriate statute of limitations for an IDEA claim for attorneys' fees. *Doe v. Boston Public Schs.*, 80 F. Supp. 3d 332 (D. Mass 2015); *Mary G.-N v. City of Northampton*, 60 F. Supp.3d 267 (D. Mass. 2014); *Anthony F*,. 2005 U.S. Dist. Lexis 10158, at *7. Similarly, the federal district court in the District of Columbia found that a three year "catch-all" statute of limitations was the most analogous statute of limitations for an IDEA attorneys' fees claim. *Wilson v. Gov't of Dist. of Columbia*, 269 F.R.D. 8, 20 (D.D.C. 2010).

Judge Woodlock said that "[c]areful analysis focused on the specific facts of his case now persuades me that a three-year statue of limitations period generally applicable to civil rights actions in Massachusetts – where no statute of limitations has been provided by Congress – is most consistent with the purpose and policy goals of the IDEA." 80 F. Supp. 3d at 340. Judge Woodlock found that he had not

previously adequately considered "that such a short limitations period might 'discourage parents from invoking their rights under the IDEA,' and could conversely encourage schools to engage in foot-dragging that would distract both parents and attorneys from pursuing attorneys' fees within the limitations period." *Id.* at 339 (citations omitted). He found that "[s]uch circumstances undermine the policy of the fee-shifting statute, perversely advantaging the school at the expense of full vindication of the rights of the child with disabilities and his parents in any dispute." *Id.*

Judge Woodlock noted that, whereas the substantive right to education is an urgent matter because delay in obtaining appropriate education is detrimental to the development of students with disabilities, such urgency is missing in an application for attorneys' fees. *Id.* *See also Zipperer*, 111 F.3d at 851; *P.M.,* 2012 U.S. Dist. Lexis 2493, at *16-17. And "attorneys have an interest in pursuing the collection of their fees once their services are no longer required," with the result that they "are unlikely to sit on their hands once the time is ripe to seek attorneys' fees." *Doe*, 80 F. Supp. 3d at 339.

A short statute of limitations period "would have a detrimental impact on the rights of the individuals the IDEA is designed to protect." *Wilson*, 269 F.R.D. at 19. In contrast, a longer limitations period "will promote greater attorney representation of parents in IDEA proceedings, thereby better effectuating the

policy goals of the IDEA by enhanc[ing] the potential that disabled children will receive [a free] appropriate public education' while also ensuring greater protection of the rights of children with disabilities and their parents." *Id.* The Eleventh Circuit noted that a longer statute, there a four year period of limitations, "is likely to encourage the involvement of parents, as represented by attorneys, in securing appropriate public education for their children." *Zipperer*, 111 F.3d at 852.

CONCLUSION

For the reasons stated above and in appellants' brief, COPAA respectfully requests that this Court reverse the Order of the District Court in favor of appellee and hold that the statute of limitations for IDEA attorneys' fees claims is three years.

Date: July 30, 2019

Respectfully submitted,

/s/Catherine Merino Reisman
CATHERINE MERINO REISMAN ,
Counsel of Record
REISMAN CAROLLA GRAN & ZUBA LLP
19 CHESTNUT STREET
HADDONFIELD NJ 08033
856-354-0071

SELENE ALMAZAN-ALTOBELLI
ELLEN M. SAIDEMAN
JESSICA F. SALONUS
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. BOX 6767
TOWSON, MD 21285
(844) 426-7224
Counsel for Amicus Curiae

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 5,566 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 in Times New Roman 14 point typeface.

3. The brief has been scanned for viruses and is virus free.

/s/ Catherine Merino Reisman
Catherine Merino Reisman

CERTIFICATE OF SERVICE

I certify that on 30th of July 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF as they are registered users.

/s/ Catherine Merino Reisman
Catherine Merino Reisman