20-10197

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

P. P., a Minor Student with Disabilities, by and Through her Parents/Guardians/Next Friends; JENNIFER MCCANN PINAULT; RAY PINAULT,

Plaintiffs-Appellants Cross-Appellees,

—v.—

NORTHWEST INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee Cross-Appellant.

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

BRIEF FOR A*MICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF THE AMICUS 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. COMPENSATORY EDUCATION IS AN ESSENTIAL IDEA REMEDY FOR STUDENTS WHO HAVE BEEN DEPRIVED OF A FREE APPROPRIATE PUBLIC EDUCATION 5

II. COMPENSATORY EDUCATION AWARDS SHOULD COMPENSATE STUDENTS FOR THE LOSS THEY SUFFERED FROM BEING DEPRIVED OF FAPE BASED ON THEIR INDIVIDUALIZED NEEDS 10

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING P.P. COMPENSATORY EDUCATION 12

CONCLUSION 16

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) 17

CERTIFICATE OF CONFERENCE 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

PAGE(S)

Cases

Anderson v. Thompson,
658 F.2d 1205 (7th Cir. 1981) 6

Board of Education. of Oak Park & River Forest High School District 200 v. Ill. State Board of Education,
79 F.3d 654 (7th Cir. 1996) 7

Burr v. Ambach,
863 F.2d 1071 (2d Cir. 1988), *vacated & remanded sub nom Sobol v. Burr*, 492 U.S. 902 (1989), *re aff'd on reconsideration*, *Burr v. Sobol*, 888 F.2d 258 (1989): Third Circuit 7

Capital Films Corp. v. Charlies Fries Productions, Inc.,
628 F.2d 387 (5th Cir. 1980) 15

Draper v. Atlanta Indep. Sch. Sys.,
518 F.3d 1275 (11th Cir. 2008) 11

Erickson v. Albuquerque Public Schools,
199 F.3d 1116 (10th Cir. 1999): Eleventh Circuit 8

Ferren C. v. Sch. Dist. of Phil.,
612 F.3d 712 (3rd Cir. 2010) 11

Florence Cty. Sch. Dist. Four v. Carter,
510 U.S. 7 (1993) 13

G. v. Fort Bragg Dependent Schools,
343 F.3d 295 (4th Cir. 2003): Fifth Circuit 7

Hall v. Knott County Board of Education,
941 F.2d 402 (6th Cir. 1991) 7

Honig v. Doe,
484 U.S. 305 (1988) 5

Jefferson County Board of Education v. Breen,
853 F.2d 853 (11th Cir. 1988) 8

Lester H. v. Gilhool,
916 F.2d 865 (3rd Cir. 1990) 7

PAGE(S)

M.C. v. Central Regional Sch. Dist.,
81 F.3d 389 (3d Cir. 1996) 10

Miener v. Missouri,
498 F. Supp. 944 (E.D. Mo. 1980), *aff'd in part and rev'd in part*, 673 F.2d 969 (8th Cir. 1982) 6

Miener v. Missouri,
800 F.2d 749 (8th Cir. 1986) 8, 9

Parents of Student W. v. Puyallup School District, No. 3,
31 F.3d 1489 (9th Cir. 1994) 8

Pihl v. Mass. Dep't of Education,
9 F.3d 184 (1st Cir. 1993): Second Circuit: 7

Powell v. Defore,
699 F.2d 1078 (11th 1983) 6

Preciado v. Board of Educ.,
No. 19-cv-0184, 2020 U.S. Dist. LEXIS 42229, 2020 WL 1170635 (D. N.M. Mar. 11, 2020) 14

Reid v. District of Columbia,
401 F.3d 516 (D.C. Cir. 2005) ..... *passim*

School Committee of Burlington v. Department of Education,
471 U.S 359 (1985) 6, 7

Somberg v. Utica Cmty. Schs.,
908 F.3d 162 (6th Cir. 2018) 11

Spring Branch Independent School District v. O.W.,
938 F.3d 695 (5th Cir. 2019) 7, 9, 12

Statutes

20 U.S.C. § 1400 et seq., Individuals with Disabilities Education Act ("IDEA" or "Act") ..... *passim*

20 U.S.C. § 1412(a)(1) 5

20 U.S.C. § 1415(i)(1)(2)(C)(iii) 6

20 U.S.C. § 1415(e) 5

PAGE(S)

20 U.S.C. § 1415(f)(1)(A) 5

20 U.S.C. § 1415(f)(1)(B)(i) 5

STATEMENT OF INTEREST OF THE AMICUS

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.

COPPA'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, § 1,17 Stat. 13 (codified as amended at 42 U.S.C. § 1983), Section 504 of the Rehabilitation Act of 1973, (codified at 29 U.S.C. §794) and the Americans with Disabilities Act (codified at 42 U.S.C. § 12101 *et seq*. [1]

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*.

COPAA brings to this 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 Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017); *Forest Grove Sch. Dist. v. T.A*., 557 U.S. 230 (2009); *Winkelman v. Parma City Sch. Dist*., 550 U.S. 516 (2007); *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); and *Schaffer v. Weast*, 546 U.S. 49 (2005); 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 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." 20 U.S.C. § 1400(d)(1)(A).

COPAA 's interest in this case stems from its deep commitment to all children with disabilities to obtain needed special education services. Crucial to the remedies available under the IDEA is compensatory education: It aims to provide "services prospectively to compensate for a past deficient program." *Draper v. Atlanta Indep. Sch. Sys*., 518 F.3d 1275, 1280 (11th Cir. 2008). Such awards "should place children in the position they would have been in but for the violation of the Act." *Id*. at 1289 citing *Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005).

Amicus has moved for permission to file this brief. Counsel for both parties have consented.

Amicus adopts the Statement of the Cases contained in Appellant's Brief at 3-20. *Amicus* adopts the Statement of the Issues contained in Appellant's Brief at 2.

SUMMARY OF THE ARGUMENT

This Court and all other circuits have recognized that IDEA provides for compensatory education as a remedy when a school district is found to have violated IDEA and denied a student the FAPE to which he that he was entitled. "Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." *Reid,* 401 F.3d, 523

Compensatory education's goal is to put the student in the place he would have been had he received FAPE and not been deprived of special education. It is determined based on a student's individual needs and compensates for the loss of special education that the student should have received.

In this case, the district court erred by denying P.P. any compensatory education at all even though it held that P.P. had been deprived for FAPE for a full school year. Such a serious harm requires an appropriate remedy. For a student with a learning disability, the specialized instruction requested is clearly an appropriate remedy. This Court should reverse the district court and held that P.P is entitled to compensatory education that will remedy the harm he suffered.

ARGUMENT

I. COMPENSATORY EDUCATION IS AN ESSENTIAL IDEA REMEDY FOR STUDENTS WHO HAVE BEEN DEPRIVED OF A FREE APPROPRIATE PUBLIC EDUCATION

The IDEA requires States to provide a free appropriate public education (FAPE) to all eligible students by providing each eligible student with an Individual Educational Program (IEP) designed to meet that student's unique needs in return for federal funds. 20 U.S.C. § 1412(a)(1).

IDEA confers upon eligible students "an enforceable substantive right to public education…." *Honig v. Doe,* 484 U.S. 305, 310 (1988). That right is premised on the student receiving a free appropriate public education (FAPE) which is delivered pursuant to an individual education program (IEP).

When parents disagree with school districts, "they may turn to the dispute resolution procedures established by the IDEA," where they "may resolve their differences informally, through a '[p]reliminary meeting,' or, somewhat more formally, through mediation." 20 U.S.C. §§ 1415(e), (f)(1)(B)(i). If those measures do not resolve the matter, the parties may proceed 'due process hearing' before a state or local educational agency." 20 U.S.C. §§ 1415(f)(1)(A),

When a school district is found to have violated IDEA and denied a student the FAPE to which he that he was entitled, IDEA provides equitable relief, including compensatory education to remedy the deprivation of FAPE.

"Compensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." *Reid,* 401 F.3d at 523.

IDEA provides that a district could "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(1)(2)(C)(iii). This is the only statutory guidance given to a district court as to relief.[2] The Supreme Court interpreted this provision and addressed the remedies for deprivation of FAPE in *School Committee of Burlington v. Department of Education,* 471 U.S 359, 369 (1985). Faced with the question of whether parents could obtain reimbursement for a unilateral placement, the Court held that "the only possible interpretation" of that provision is "that the relief is to be 'appropriate' in light of the purpose of the Act," namely to provide children with disabilities "with 'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.'" *Id.* The Court focused first on the section's "ordinary meaning" and held a court has board discretion to determine relief. *Id.* The Court held that appropriate relief would include "a prospective injunction directing the

[2] From the very early days of the Act, it has been held that there is no right to damages under the IDEA. *See, e.g. Miener v. Missouri*, 498 F. Supp. 944, 949 (E.D. Mo. 1980), *aff'd in part and rev'd in part*, 673 F.2d 969 (8th Cir. 1982). *See also Anderson v. Thompson*, 658 F.2d 1205, 1210-11 (7th Cir. 1981); *Powell v. Defore*, 699 F.2d 1078 (11th 1983).

school officials to develop and implement at public expense an IEP placing the child in a private school." *Id.* at 370.

Prospective relief would be sufficient "[i]f the administrative and judicial review under the Act could be completed in a matter of weeks, rather than years." *Id.* But because the process is "ponderous," often taking years, the Court held that appropriate relief also includes retroactive reimbursement. *Id.* Retroactive reimbursement "merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Id.* at 371-72. Compensatory education likewise requires the school district "to belatedly pay expenses that it should have paid all along." *Id*

Over the years, every circuit has recognized that compensatory education is an appropriate remedy to redress a school district's denial of FAPE: First Circuit, *Pihl v. Mass. Dep't of Education*, 9 F.3d 184, 188 (1st Cir. 1993): Second Circuit: *Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988), *vacated & remanded sub nom Sobol v. Burr*, 492 U.S. 902 (1989), *re aff'd on reconsideration*, *Burr v. Sobol*, 888 F.2d 258 (1989): Third Circuit, *Lester H. v. Gilhool*, 916 F.2d 865, 868-69 (3rd Cir. 1990); Fourth Circuit, *G. v. Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4th Cir. 2003): Fifth Circuit, *Spring Branch Independent School District v. O.W.*, 938 F.3d 695, 712 (5th Cir. 2019); Sixth, *Hall v. Knott County Board of Education*, 941 F.2d 402, 406 (6th Cir. 1991): Seventh, *Board of Education. of*

Oak Park & River Forest High School District 200 v. Ill. State Board of Education, 79 F.3d 654, 656 (7th Cir. 1996); Eighth, *Miener v. Missouri,* 800 F.2d 749, 753-54 (8th Cir. 1986); Ninth Circuit, *Parents of Student W. v. Puyallup School District, No. 3*, 31 F.3d 1489, 1496 (9th Cir. 1994).; Tenth Circuit, *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116, 1123 (10th Cir. 1999): Eleventh Circuit, *Jefferson County Board of Education v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988); and D.C. Circuit, *Reid,* 401 F.3d 516. The courts have explained that compensatory education is necessary to remedy the harms caused by the deprivation of FAPE. For example, the Eighth Circuit held that compensatory education fell squarely within the framework provided by *Burlington*; "imposing liability for compensatory education services on the defendants 'merely requires [them] to belatedly pay expenses that [they] should have paid all along.'" *Miener,* 800 F.2d at 753, quoting *Burlington,* 471 U.S. at 371-72. The appeals court stated that, "as in *Burlington*, recovery is necessary to secure the child's right to a free appropriate public education." *Id.* It then observed, "[w]e are confident that Congress did not intend the child's entitlement to a *free* education to turn upon her parent's ability to 'front' its costs." *Id.* (emphasis in original).

As the Second Circuit explained: without compensatory education, the right to FAPE is illusory; the student "cannot go back to his previous birthdays to recover and obtain the free education to which he was

younger." *Id.* It noted, that "[i]t is well settled that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done," citing *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted)."

Further, the D.C. Circuit Court stated: "Given the availability of reimbursement for compensatory education were it impossible to obtain an award of compensation itself, children's access to appropriate education could depend on their parents' capacity to front its costs – a result manifestly incompatible with IDEA's purpose of 'ensuring that *all* children with disabilities have available to them a free appropriate public education.'" *Id.* at 522-23, quoting 20 U.S.C. § 1400(d)(1)(A)(emphasis in original).

This Court has held that compensatory education is available as a remedy and that "compensatory awards…are designed to provide 'services prospectively to compensate for a past deficient program.'" *Spring Branch Ind. Sch. Dist. v. O.W.*, 938 F.3d 695, 712 (5th Cir. 2019), citing *Draper v. Atlanta Indep. Sch. Sys.* 518 F.3d 1275, 1280 (11th Cir. 2008). Compensatory education is only available for periods when the school district has failed to provide a FAPE. *Id.* Thus, the purpose of the award is to "place children in the position they would have been in but for the violation of the Act." *Id.,* citing *Draper*, 518 F.3d at 1289.

II. COMPENSATORY EDUCATION AWARDS SHOULD COMPENSATE STUDENTS FOR THE LOSS THEY SUFFERED FROM BEING DEPRIVED OF FAPE BASED ON THEIR INDIVIDUALIZED NEEDS

All circuits agree that compensatory education is the appropriate remedy for students who are deprived of FAPE. There are two basic approaches have for determining the specific awards of compensatory education to be provided. The first and early approach is called the "quantitative approach." It is based on determining how much education was lost. The Third Circuit articulated the standard: "a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem." *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3d Cir. 1996).

The second approach, called the "qualitative approach," was first developed by the D.C. Circuit. In *Reid*, the court rejected a purely quantitative approach and instead adopted a qualitative approach to provide that a student with the educational benefit he would have received if he had not been deprived of FAPE. 401 F.3d at 518. Its view was that "this cookie-cutter approach [qualitative] runs counter to both the 'broad discretion' afforded by IDEA's remedial provision and the substantive FAPE standards that provision is mean to enforce." *Id*. at 523. Awards should be based on individualized assessments, leading to different results

depending on the differing needs of students. It concluded: "the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculate to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Id*. at 524. The court reasoned that there must be evidence regarding the child's specific education deficits and the specific compensatory measures required to correct them. *Id.* at 526. These awards, by contrast to ordinary education programs which need only provide 'some benefit' compensatory education awards "must do more – they must compensate." *Id*. at 518. The award should be "reasonably calculated to provide the educational benefits that like would have accrued from special education services the school district should have supplied in the first place. *Id*. at 524. *See also Somberg v. Utica Cmty. Schs.,* 908 F.3d 162, 176 (6th Cir. 2018) (adopted the D.C. Circuit's qualitative approach).

This approach has led to very individualized awards. *See, e.g., Somberg,* 908 F.3d at 167 (school district ordered to pay for 1,200 hours of tutoring and one year of transition planning); *Ferren C. v. Sch. Dist. of Phil.*, 612 F.3d 712, 179-20 (3rd Cir. 2010)(funding a trust fund and providing an IEP beyond age 21); *Draper*, 518 F.3d at 1283, 1285 (provision of a private school placement to last until the

student received a high school diploma or until a date specific (extending the time for eligible services) whichever came first).

The Fifth Circuit apparently favors the qualitative approach as it has cited with approval *Draper* and has relied on *Reid*. *See Spring Branch*, 938 F.3d at 712, quoting *Draper*, 518 F.3d at 1280 & 1289 and its reliance on *Reid.*.

Regardless of whether courts take a quantitative approach or a qualitative approach, they agree that, when students are deprived of FAPE because school districts have violated the substantive requirements of IDEA, including Child Find, students are entitled to a remedy.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING P.P. COMPENSATORY EDUCATION

In this case, the district court held that P.P. had been deprived of FAPE for an entire school year, 2016-2017,[3] and nonetheless denied P.P. any compensatory education at all. *See generally* ROA.402-419; RE at Tab 20. The district court held that the School District violated IDEA's Child Find mandate by unreasonably delaying in finding that P.P. was eligible for special education services under IDEA. ROA.464; RE at Tab 46. The district court stated, "there ought to be some remedy for any ongoing detrimental effects of Defendant's violation." ROA467;

[3] On appeal, P.P. argues that the district court erred in holding that P.P. received FAPE during the 2017-2018 academic year as well. *Amicus* agrees and urges this Court to reverse the district court on that issue as well and hold that P.P. is entitled to compensatory education for the 2017-2018 second year.

RE at Tab 46. The district court specifically rejected the hearing officer's determination that no remedy was required because the school district subsequently provided FAPE. As the district court stated, "Defendant's eventual provision of a FAPE does not itself remedy the initial deprivation." ROA.468; RE at Tab 46.

Yet, although the district court stated, "there ought to be some remedy," for the district's violation of its Child Find mandate, which deprived the student of FAPE for at least a year, it provided no remedy at all. *Amicus* respectfully submits that the loss of a year's special education services is a serious harm for a student with a learning disability or any other disability, and that compensatory education is required.

In recognizing compensatory education, courts have emphasized the need for a remedy for those students whose families cannot afford to front the cost of a private school. Families who have the means to pay for private schools and other educational services in advance of a decision from a hearing officer or court benefit from the remedy provided in *Burlington*. All such families need to obtain reimbursement is to prove "both that the public placement violated IDEA and that the private placement was proper under the Act." *Cf. Florence Cty. Sch. Dist. Four v. Carter,* 510 U.S. 7, 15 (1993) (IDEA did not bar reimbursement for a school that was not on a state's list of approved placements.) The standards for

obtaining appropriate compensatory education for students with disabilities should not be more arduous than for those students who obtain reimbursement for parentally paid placements.

The district court's concern about overstepping its role by rejecting the school district's opinion about compensatory services is misplaced. *See* ROA 461; RE at Tab 46. Rather, because the school district denied the student FAPE, the issue is whether the remedy proposed by the parent is appropriate. Here, the compensatory education sought by the parents – Orton-Gillingham programming for the student's reading and writing needs as a student with dyslexia and tutoring for her math needs – is clearly appropriate for students with her disabilities.[4] When a student with a learning disability misses important instruction in reading, writing, and math, Orton-Gillingham instruction has been recognized as appropriate compensatory education services. *See Preciado v. Board of Educ.,* No. 19-cv-0184, 2020 U.S. Dist. LEXIS 42229, at *43, 2020 WL 1170635, at *11 (D. N.M. Mar. 11, 2020) (affirming award of one year of compensatory education with a licensed special education teacher trained in Orton-Gillingham or a similar program).

[4] *Amicus* agree with Appellant that her expert provided sufficient evidence regarding compensatory education. Appellant's Br. at 16-17, 36-37.

The district court denied compensatory education because the school district had offered some additional services that could provide "a potential educational benefit" ROA468. This was error. The IDEA entitles a student to a FAPE, not merely "a potential educational benefit." Therefore, the deprivation of FAPE requires that additional services be provided to correct the denial; merely potential educational benefit is inadequate. *See, e.g., Reid,* 410 F3d at 524. The district court pointed to three services and said they might provide such benefit: a psychological examination to evaluate her need for additional accommodations; a dyslexia class; and tutoring services. ROA468. But, as indicated, potential benefits are not sufficient. There must be actual compensatory education to remedy the wrong.

Thus, the district court erred in denying P.P. any remedy after affirming the denial of the provision of FAPE. To find a wrong without a remedy is to violate the well-established equitable maxim; there is no wrong without a remedy. *See Capital Films Corp. v. Charlies Fries Productions, Inc.*, 628 F.2d 387, 394 (5th Cir. 1980) (quotation omitted).

CONCLUSION

For the foregoing reasons, COPAA respectfully requests that the Court reverse the judgement of the district court and grant judgment in favor of P.P.

Dated: May 4, 2020

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

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 3,403 words.

/s/ Selene Almazan-Altobelli
Selene Almazan-Altobelli

CERTIFICATE OF CONFERENCE

In accordance with 5th Cir. R. 27.4, the undersigned certifies that on April 29, 2020, consent to file an amicus curiae brief was sought from parties' counsel. Both parties provided consent.

/s/ Selene Almazan-Altobelli
Selene Almazan-Altobelli

CERTIFICATE OF SERVICE

I certify that on May 4, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF.

/s/ Selene Almazan-Altobelli
Selene Almazan-Altobelli