17-16210

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARIS QUATRO,

Plaintiff-Appellee,

—v.—

TEHACHAPI UNIFIED SCHOOL DISTRICT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the following disclosure is made on behalf of Council of Parent Attorneys and Advocates (COPAA). COPAA is not a publicly held corporation or other publicly held entity, has no parent corporations and does not have 10% or more of stock owned by a corporation.

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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 does not undertake individual representation but provides resources, training, and information for parents, advocates and attorneys to assist in obtaining the free appropriate public education (FAPE) such children are entitled to under the Individuals with Disabilities Education Act (IDEA or Act), 20 U.S.C. § 1400, *et seq*. 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 Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq*. (ADA).

[1] Pursuant to Fed. R. App. P. 29, *Amicus* certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *Amicus* and its members and counsel contributed money intended to fund the brief's preparation or submission.

COPAA offers a unique perspective on the Appellant's efforts to reduce the hourly rate awarded to an experienced special education attorney who took on a contingent case in an underserved area since such efforts will have dire consequences for the many families of students with disabilities who live in underrepresented areas. A fundamental goal of COPAA is to ensure that all students with disabilities who are not receiving a free appropriate public education or otherwise require legal assistance have adequate access to qualified attorneys with the requisite knowledge to pursue meritorious claims successfully. Appellant's efforts to slash the court-awarded hourly rate in this case, if successful, would have a chilling effect on the willingness of qualified and experienced education attorneys to travel outside of their home market into underserved areas and, therefore, will hinder the ability of families of children with disabilities to obtain qualified counsel in IDEA actions. Both Appellants and Appellees have given consent to the filing of this amicus brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Here, Appellant Tehachapi Unified School District (District or Appellant) seeks an outcome with potentially far-reaching and dangerous consequences for students with disabilities. It seeks to slash the court-awarded hourly rate of $450 for an experienced special education attorney, by as much as two-thirds because it claims that $150-300 is the prevailing rate in

Tehachapi without any proof that there was another equally qualified attorney in that underserved area willing to serve R.P. on a contingent basis. App. Brief at 12.

Essentially, the District is asking this Court to hold that, *even when families cannot find local counsel willing and able to capably represent students in special education matters*, attorneys who leave their own (more remunerative) markets to provide much needed legal support in underrepresented communities should never receive awards at their standard hourly rate. Such a precedent would require attorneys working outside their standard markets to take on matters in underrepresented markets at a rate dramatically lower than they could command in their own markets, where attorneys are already in high demand. Such a precedent would have a chilling effect on the willingness of qualified special education attorneys to take cases on in underrepresented markets. This result is contrary to the IDEA's fee-shifting statutory scheme as well as this Court's holding under a related civil rights attorney's fee statute in *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992). There this Court upholding San Francisco hourly rates for Sacramento work because attorneys with the necessary experience and abilities were not available in the local community. A ruling in the District's favor would only serve to further limit the access of students

with disabilities to qualified attorneys able to litigate their meritorious claims successfully.

FACTUAL BACKGROUND

The Appellee here is the parent of a student, R.P., who has a disability and lives in Tehachapi, a city in Kern County, California. R.P. receives special education services through his local educational agency (LEA), the Tehachapi Unified School District, pursuant to the Individuals with Disabilities Education Act and related state law. Appellant and Appellee disagreed over whether the District was providing R.P. with a free and appropriate public education (FAPE) as mandated under IDEA. Appellee ultimately prevailed after a multiday due process hearing dealing with complex legal and factual issues. The hearing officer found that R.P. been denied FAPE and awarded a substantial remedy.

Obtaining this victory was far more difficult than Congress intended. As ample evidence in the record below indicated, Kern County lacks attorneys with expertise in IDEA-related matters.[2] Beyond an attorney with the

[2] Indeed, Appellant's Interrogatory responses conceded that 31 of the 35 attorneys it listed as being available to represent students in Kern County were located outside of Kern County. Of the four attorneys listed by Appellant located in Kern County, two had been members of the California Bar Association for less than five years and had no discernable special education experience, one had resigned from the bar with charges against her pending, and the last attorney, who had little experience with special

necessary expertise in special education, the family needed one willing to take the case on a contingency, given the family's financial situation. As is the case for so many families across the country, no such attorney existed in their community, and so the Appellee had to seek out assistance from attorneys outside of Kern County. Appellee identified Ms. Marcus—an attorney who has nearly twenty-years of experience practicing disability-related special educational matters—to represent him. Ms. Marcus took Appellee's case on a contingent basis, quite a risky proposition given prevailing rates of success for students in IDEA due process hearings, and the high costs of litigation. In special education cases, contingent cases are particularly risky because the most significant cost in many cases, expert fees, cannot be recovered in a fee award. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006).

Pursuant to IDEA's fee-shifting provisions, and after a hearing, as set out in 20 U.S.C. § 1415(i)(3)(B)(i)(I), the district court awarded Appellee attorney fees and set an hourly rate of $450 for Ms. Marcus. ER 000018, Appellant now seeks dramatic reduction by way of this appeal, and, if it

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education, worked for a non-profit public interest organization, California Rural Legal Assistance, that rarely handles special education matters. Further, when California Rural Legal Assistance prefers to co-counsel with attorneys who possess IDEA expertise when it takes on such matters.

prevailed, such a decision would not only reduce the costs associated with the underlying litigation but also dissuade other attorneys from entering underrepresented communities to provide much-needed legal assistance to students with disabilities.

ARGUMENT

I. As Congress Recognized, the Right of Prevailing Parents to Obtain Attorneys' Fees Is Essential for Enforcing Their Rights Under IDEA

IDEA provides for informed parental involvement, guaranteed through procedural protections, so that parents can ensure that appropriate educational services are provided to their students. To enable parents to vindicate their rights under IDEA, Congress provided for attorney's fees if they prevailed in administrative proceedings.

A. IDEA Secures Appropriate Educational Services for all Students Through Informed Parental Involvement and Procedural Protections

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 Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quoting *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 367 (1985)). In 2004, Congress found one purpose for the Act was "to ensure that the rights of children with disabilities and parents of such children are protected," 20 U.S.C. § 1400 (d)(1)(A), and "to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities." *Id.*, § 1400(d)(3). Under the Act, a party aggrieved by a decision in the impartial due process hearing may seek review in federal court. 20 U.S.C. § 1415(i)(2).

The Act contemplates that parents, on behalf of their children with disabilities, will "protect the substantive rights provided to their children" through the various procedures the IDEA provides. *Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (internal citation omitted); *Honig v. Doe*, 484 U.S. 305, 311 (1988); *see also* 20 U.S.C. § 1415. IDEA "rest[s] on the premise 'that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.'" *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1995 (9th Cir. 2013). 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).

Parental advocacy to ensure the protection of the rights of children with disabilities is a central tenet of the IDEA. For this reason, IDEA is replete with references to the role and rights of parents in the overall statutory scheme to ensure FAPE. [3] As demonstrated below, the procedural protection of

[3] Consistent with the practice of parents and school districts in special education meetings and administrative hearings:

- In its findings, Congress acknowledged the economic and other hardships parents have experienced in order to obtain an appropriate education for their children with disabilities. 20 U.S.C. § 1400(c)(2), (3) and (5).
- In the statement of purposes, Congress noted that the statute ensures the protection of both the rights of children with disabilities and their parents. 20 U.S.C. § 1400(d)(1)(B).
- Congress included definitions of "parent," "parent organization," and "parent training and information center." 20 U.S.C. §§ 1401 (23), (24), and (25).
- Congress also mandated that an appropriate education be provided to children with disabilities at "no cost to parents." 20 U.S.C. §§ 1401 (9) and (29).
- Congress placed parents in a prominent role in the creation of an Individualized Education Program (IEP) for each child with a disability. 20 U.S.C. § 1414.
- The IDEA forbids narrowing by rule the rights of parental consent to the specific programs developed. 20 U.S.C. § 1406(b).

attorney's fee reimbursement must be available to all parents, even those in underrepresented areas, for them to be able to advocate for their children.

B. Because Congress Recognized that Attorneys' Fees Are Integral to IDEA's Functioning, Congress Provided for Attorneys' Fees for Prevailing Parents and Students

Congress considered the protection of fee-shifting to be critical to IDEA's functioning. Thus, when *Smith v. Robinson*, 468 U.S. 992 (1984) held that parents enforcing rights under IDEA's predecessor statute had no access to fees, Congress immediately responded the following session by enacting the Handicapped Children's Protection Act ("HCPA"). *See Fontenot v. Louisiana Bd. of Elementary & Secondary Educ.*, 805 F.2d 1222, 1223 (5th Cir. 1986) (Congress acted "swiftly, decisively, and with uncharacteristic clarity to correct what it viewed as misinterpretation of its intent" to permit prevailing parents the right to receive an award of attorneys' fees under the IDEA).

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*

- Congress required states to reimburse parents for private school tuitions if such placement is the appropriate educational setting under the IDEA. 20 U.S.C. § 1414.

Education of the Handicapped Act: of Carey, Crest Street and Congressional Intent, 60 Temple L.Q. 599, 612 n. 91 (1987) (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 legislative history of the HCPA establishes the critical importance 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. 99-372, at 2 (emphasis supplied). 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. *Id.* at 14.

The Senate bill originally limited the fees that could be awarded to publicly funded attorneys. Several Committee members objected, stating that publicly funded attorneys, just like private attorneys, should be paid based on prevailing market rates. The Senators stated, in relevant part:

> [I]t should be noted that money awarded to publicly funded attorneys is recycled back into the organization for which the attorney works to expand services to low income individuals. Under our present system, offices which provide legal assistant to indigent handicapped children encounter an overwhelming demand for their services, and unfortunately have very limited resources to meet this demand. It is our feeling that any additional funds made available to expand legal services to our Nation's disabled poor citizens, is money well spent.

Id. at 17. Likewise, the House Report states that the Committee drafted the HCPA 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.

The legislative history of the HCPA also establishes that Congress recognized the importance of fees for administrative hearings being recoverable. *See* S. Rep. No. 99-112 at 14. The parental right to recover attorney's fees as a prevailing party has, since its establishment, been held as fundamental a procedural protection under the Act. *Schaffer*, 546 U.S. at 54. For students without financial means, and particularly for those living in underrepresented areas without access to attorneys with experience handling special education matters, the parental right to recover attorneys' fees is one of the most important procedural safeguards in the IDEA.

C. 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 with 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.[4] Many parents, desperate to help

[4] Elisa Hyman, *et al*., *How IDEA Fails Families without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 Am.

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.

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 that without counsel, families would face nearly insurmountable odds to succeed with meritorious IDEA claims. 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 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 Independent School. District 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

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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).

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 scarcity of attorneys available to assist families with children with disabilities is well established, particularly for families unable to pay for attorneys and experts.[5] Even with IDEA's fee-shifting provisions,[6] it is, more than with other civil rights fields, increasingly difficult for families to find

[5] 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).

[6] The fee-shifting provision in the HCPA, like all other fee-shifting provisions, "are thought 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." Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 Notre Dame L. Rev. 1413, 1424-25 (2011). *See also* Kathryn A. Sabetha, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 Denv. U.L. Rev. 441, 467 (2014) (Congress wanted aggrieved persons to pursue certain categories of cases, and wanted lawyers to represent plaintiffs in those cases). "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." *Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (quoting 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney)).

(and afford) attorneys to handle these special education cases.[7] It is even more difficult for low income parents to obtain legal counsel to assist with IDEA matters. "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."[8] This problem is only compounded when low-income families live in areas that lack qualified attorneys able to handle the complex multidisciplinary nature of a special education matter. As *Winkelman* points out, when Congress requires States to provide FAPE at no cost to parents, it did not intend "that only some parents would be able to enforce that mandate." 550 U.S. at 533.

As the Supreme Court recognized, this shortage has led some parents to resort to representing themselves *pro se* in federal court as well as in administrative proceedings. *See, e.g., id.,* at 535 (holding parents could proceed pro se on their independent IDEA claims). But 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

[7] 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 number of IDEA disputes brought in different states, in urban vs. rural districts, and by socioeconomic status).

[8] Pasachoff, *supra,* 86 Notre Dame L. Rev. at 1417-18.

process on their own. *See, e.g.*, Kelly D. Thomason, Note, *The Costs of a "Free" Education*, 57 Duke L.J. 457, 483-84 (2007).

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." [9] Recent studies confirm that parents who were represented by counsel were far more likely to be successful in their IDEA claims than those without counsel.[10]

Special education law has been recognized by this court to be a "complex web of federal and state statutes and regulations," *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993). Nationally, there are not enough attorneys practicing this highly technical and specialized area

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[9] Lisa Lukasik, *Special Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. Va. L. Rev. 735, 775 (2016).

[10] *Id.* (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%)); *see also* 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), *available at* http://journals.sagepub.com/ doi/pdf/10.1177/2158244015577669, at 13 (over an eight-year period in Massachusetts, parents with attorneys were much more likely to win than *pro se* parents); Hoagland-Hanson, *supra*, 163 U. Penn. L. Rev. at 1820 (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).

of law, and the shortage is felt acutely in more rural areas.[11] Practitioners who handle special education matters must be competent in evaluating educational policy and practices, interpreting complex and highly sensitive psychological, medical, and other assessment data completed by experts in psychology and neuropsychology, speech and language, occupational therapy, physical therapy, orientation and mobility, behavioral, audiology, and education. An attorney should have experience with navigating educational records, psychoeducational and other highly-specialized assessments, and in navigating the "complex web" of procedural processes and rules that exist across the various state and federal statutes and regulations that govern special education law.

Moreover, the statutory framework creates an ongoing relationship between parties that must be continually navigated. As a result, attorneys handling these matters need experience in working with school districts in negotiating not only the litigation of IDEA claims, but also the other procedural aspects of educational planning so as to ensure that the aftermath

[11] Indeed, COPAA is well aware of this difficulty in access to qualified special education counsel. COPAA seeks out, and provides targeted trainings in an effort to increase the knowledge-base, and increasing the number of attorneys capable of handling special education matters is a central goal of COPAA.

of a special education decision is properly handled and the educational-services order can be implemented in accordance with the relevant statutes. An appropriate level of experience and specialization is necessary to provide adequate representation to families.

Unlike parents who are frequently unrepresented and often cannot afford expert witnesses,[12] schools are represented by counsel[13] with expertise in special education law, and schools can draw on the expertise of school staff without incurring additional expense and have the resources to retain paid experts.[14] For example, in this case, the school district was represented by a law firm, Schools Legal Service, with five full-time special education attorneys that represents dozens of California school districts.[15]

This imbalance is perpetuated by the fact that schools often have insurance[16] and other funding sources in addition to their budgets to pay

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[12] *See Arlington*, 548 U.S. at 304 (holding IDEA did not provide for expert fees as part of attorneys' fees and costs).

[13] 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.

[14] Debra Chopp, *School Districts & Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. Nat'l Ass'n Admin. L. Jud. 423, 453 (2012).

[15] *See* http://schoolslegalservice.org (last viewed Dec. 10, 2017).

[16] 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. Payment to school attorneys is not contingent on victory and not delayed until a final court decision on a fee award, perhaps years after the case was filed. Indeed, protracted litigation provides school attorneys additional income while at the same time delaying an adverse decision for their clients, whereas parents often lack the resources to withstand protracted litigation.

The school, armed with an attorney zealously representing its 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."[17] Thus, even *pro se* parents with obviously meritorious claims lose because they lack attorneys.

Most families are not able to afford the costs that typically come with hiring experts, creating evidence packets for hearing, and litigating their IDEA claims. Further, because monetary damages are not available under IDEA, contingent arrangements based on splitting monetary awards are not available. Thus, without the ability to obtain *reasonable fees* after prevailing

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fees at no marginal cost." Chopp, *supra*, 32 J. Nat'l Ass'n Admin. L. Jud. at 456.

[17] Lukaski, *supra*, 118 W. Va. L. Rev. at 775.

in IDEA due process matters, families would find it difficult if not impossible to obtain the type of contingent arrangement that the Appellee was able to in this case, and, therefore, would not be able to obtain legal representation.

D. A Decision Limiting Hourly Rates in Underserved Areas Will Disproportionately Harm Children with Limited Economic Means

Any interpretation of the IDEA that limits the ability of families to recover their fees will prompt attorneys to be unable or unwilling to take cases in underserved areas where there are no special education attorneys and lower hourly rates. Any precedent that arbitrarily discourages attorneys from aiding underrepresented areas will limit the ability of families to enforce the IDEA's protections, and will undermine the statutory purposes of achieving an appropriate education for *all*:

> The wealth-based disparities in private enforcement raise troubling questions about the IDEA's effectiveness for children in poverty. Nothing in the statute suggests that it is intended to privilege comparatively wealthy children. 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. As a matter of history, the statute grew out of lawsuits brought by civil rights attorneys and poverty lawyers, who went on to be instrumental in drafting the original statutory provisions in ways that they thought would benefit their clients.[18]

[18] Pasachoff, *supra,* 86 Notre Dame L. Rev. at 1430.

The disparity in access that would be 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." [19]"Studies have identified links between poverty and adverse outcomes for children in numerous areas, including: physical health; mental, emotional, and behavioral health; cognitive development; language development; and educational attainment and academic achievement."[20] As can be seen by the evidence collected by Appellee's counsel here, children who live in areas that lack adequate access to representation are forced to confront educational environments that fall short of the IDEA's mandate because schools have been left unchecked for so long.

II. Consistent with Other Civil Rights Attorney's Statutes, Local Hourly Rates Should Not Apply When Local Attorneys with the Comparable Expertise and Experience Are Not Available to Vindicate Parents' Rights Under IDEA

As this Court has noted, the attorney's fees provision of IDEA is nearly identical to 42 U.S.C.§ 1988, and, therefore, case law governing § 1988 applies. Thus, this Court held that the degree of success standard set out in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) for § 1988 cases applied equally

[19] *Id.* at 1432.
[20] Jennifer Rosen Valverde, *A Poor IDEA: Statute of Limitations Decisions Cement Second-Class Remedial Scheme for Low-Income Children with Disabilities in the Third Circuit*, 41 Fordham Urb. L.J. 599, 608 (2013).

to IDEA. *Aguirre v. L.A. Unified Sch. Dist.*, 461 F.3d 1114, 1121 (9th Cir. 2006). For the same reason, case law governing the district court's discretion in determining the hourly rate in § 1988 cases also apply here.

The Supreme Court has held that attorneys' fees are to be calculated according to the prevailing market rates in the relevant legal community. *Blum v. Stetson*, 465 U.S. 886, 896 (1984), but that begs the question of "the relevant legal community." Although, as a general rule, the reasonable hourly rate is based on the rates of attorneys practicing in the forum district, that rule does not apply when there are few if any attorneys available in the forum district. *Compare Davis v. Mason County*, 927 F.2d 1473, 1488 (9th Cir. 1991) (upholding fees at local rate when three local attorneys participated in the case) *with Gates*, 987 F.2d at 1405 (upholding San Francisco hourly rates for Sacramento work).

In *Gates*, this Court held that the district court acted within its discretion in awarding San Francisco hourly rates for work done in Sacramento in a complex civil rights case involving unconstitutional treatment of inmates. *Id.* This Court noted that "prison civil rights cases are extremely complex and thus require experienced and sophisticated counsel." *Id.* The Court found overwhelming the plaintiffs' evidence that "Sacramento firms could not have provided the expert representation required to effectively represent the

litigants in this case." *Id.* This Court thus adopted the position of many other circuits that, under 42 U.S.C. §1988, "rates, other than those of the forum, may be employed if local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case." *Id.*, *citing McDonald v. Armontrout*, 860 F.2d 1456, 1459–60 (8th Cir.1988); *Polk v. New York State Dep't of Correctional Servs.*, 722 F.2d 23, 25 (2d Cir. 1983); *Louisville Black Police Officers Org., v. Louisville*, 700 F.2d 268, 278 (6th Cir.1983); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768–69 (7th Cir.1982); see also *National Wildlife Federation v. Hanson*, 859 F.2d 313, 317–18 (4th Cir.1988); *Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir.1983).

Similarly, special education is an area where an attorney must have expertise and experience for parents to prevail. Thus, the district court acted well within its discretion in awarding fees to Ms. Marcus at a rate of $450 per hour. The district court specifically found that "Qualified and experienced attorneys in the area of special education law are limited, especially in the rural geographical areas of the Central District of California." (Tr. at 157). The court noted that the District did not provide any expert evidence regarding the hourly rates, and, instead provided testimony by one of its own attorneys, who obviously had "an interest in the outcome of the case." (Tr. at 159).

Further, Appellant's counsel testified about hourly rates negotiated in settlement agreements, which are not comparable to hourly rates in contested litigation. As COPAA knows well, attorneys are often willing to compromise their hourly rates to obtain as speedy settlement, but then insist on their regular hourly rates when they are forced to litigate to obtain their clients' objectives.

The Second Circuit very recently affirmed the district court's use of out-of-district hourly rate, noting "that no lawyers with primary offices in the Eastern District of New York have obtained a successful jury verdict in a [Section] 1983 wrongful conviction suit, as [counsel] did here." *Restivo v. Hessemman*, 846 F.3d 547, 590 (2d Cir. 2017). Similarly, here the district offered no evidence of any attorney with a primary office in Kern County having obtained a successful decision in a similar due process proceeding, much less one willing to take on such a case on a contingency.

Appellant's reliance on *Ontiveros v. Zamora*, 303 F.R.D 356, 374 (E.D. Cal. 2014) is misplaced because that decision held that a $400 hourly rate was reasonable for an experienced attorney in the Eastern District of California in 2014. It offers no support for Appellant's top rate of $300, and the decision is entirely consistent with the district court's award of $450 three years later for an experienced special education attorney working on a contingency. The district court, familiar with the hourly rates awarded in

contested proceedings in federal court, found that the relevant hourly rate was $260-650, and that, by virtue of her experience, Ms. Marcus was entitled to the $450 hourly rate. As the district court acted well within her discretion based on the record before her, her decision should be affirmed.

CONCLUSION

For the reasons stated above**,** this Court should affirm the decision of the district court.

Dated: December 21, 2017,

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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) and Fifth Circuit Rule 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 4,706 words.

Dated: December 21, 2017

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CERTIFICATE OF SERVICE

I certify that on December 21, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF if they are registered users, or if they are not, by serving a true copy and correct copy at the addresses below.

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