In The

United States Court of Appeals

for the

Third Circuit

Case No. 17-1161

RENA C., Individually and on behalf of A.D.

v.

COLONIAL SCHOOL DISTRICT,

Appeal from an Order entered from the United States District Court for the Eastern District of Pennsylvania

BRIEF ON BEHALF OF *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF RENA C, INDIVIDUALLY AND ON BEHALF OF A.D

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
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No. 17-1161 Caption: *Rena C. Individually and on Behalf of Minor, A.D. v. Colonial School District*
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/s/ Ellen Saideman
Ellen Saideman

Counsel of Record
Amicus Curiae
Council of Parent Attorneys and Advocates

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INTEREST OF AMICUS CURIAE[1]

The Council of Parent Attorneys and Advocates, Inc. (COPAA) is an independent, nonprofit national organization with membership comprised of parents, attorneys, advocates, and related professionals. Although COPAA does not provide direct representation, it provides resources, training, and information to assist its members in protecting the rights of children with disabilities and their families, particularly rights under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* Accordingly, COPAA brings to the Court the unique perspective of parents as well as their advocates and attorneys for children with disabilities.

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

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

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.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In enacting the Handicapped Children's Protection Act (HCPA) in 1986,[2] Congress provided for attorneys' fees for prevailing parents.[3] Congress also sought to promote settlement by adopting a provision modeled on Rule 68 of the Federal Rules of Civil Procedure, encouraging schools to make written offers more than ten (10) days before the administrative hearing begins. Parents retain their right to fees after rejecting a settlement offer if the relief obtained is more favorable to the parent than the settlement offer *or*, even if not more favorable, if they were otherwise substantially justified in rejecting the offer. 20 U.S.C. § 1415(i)(3)(D)(i) & (E).

[2] The HCPA amended the Education of the Handicapped Act, IDEA's predecessor statute.

[3] For the purpose of brevity, "attorneys' fees" includes both fees and costs.

Here, the district court wrongfully denied Rena C. recovery of attorneys' fees incurred after Colonial School District's (Colonial) ten-day settlement offer expired.

First, Rena C. obtained final relief more favorable than the offer by Colonial in three aspects, as it: 1) provided for pendency of the private placement; 2) was in the form of a consent decree; and 3) had the judicial imprimatur that entitled her to attorneys' fees. None of these three elements was explicitly included in Colonial's settlement offer, as the district court acknowledged. Nonetheless, the court concluded Rena C. did not obtain more favorable relief by improperly imputing missing terms into the written offer, by speculating that Rena C. could have obtained those terms if only she had engaged in post-offer settlement discussions, and by assuming IDEA's pendency protection applied to Rena C. even though the offer by Colonial did not say so.

Second, the court erroneously determined Rena C. was not justified in rejecting Colonial's settlement offer, even though it did not include significant procedural protections, *i.e.*, pendency for the private placement and attorneys' fees, and even though these protections are essential to implementation of IDEA. The district courts incorrectly found those

protections were offered, again by relying upon imputed, unwritten terms rather than the written terms of the offer.

Precisely because the stakes are so high, the terms of the offer must be explicit and clear. A parent should not be required to guess how a court might interpret ambiguous language or whether a court might impute missing terms into the offer. Basic principles of contract law require that any ambiguity in the offer must be construed against the drafter, *i.e.*, the school. The district court erroneously found obvious omissions ambiguous and then construed the offer in favor of the school.

A parent is substantially justified in rejecting an offer that does not include pendency and attorneys' fees. As *Amicus* demonstrates, the majority of parents of students with disabilities already are unable to afford legal representation, leaving many parents to proceed *pro se* or to forego seeking a legal remedy entirely. This Court's endorsement of a school's tactical maneuver of using the ten-day offer to deny reasonable pre-offer attorneys' fees for meritorious cases and simultaneously cut off post-offer fees would undermine the essential purposes of IDEA and have an extraordinary chilling effect on the willingness of parents to vindicate their children's rights and their ability to obtain legal counsel to do so.

Accordingly, the district court's decision should be reversed.

ARGUMENT

I. BECAUSE THE PREVAILING PARENT OBTAINED MORE FAVORABLE RELIEF THAN THE OFFER, THE DISTRICT COURT WRONGFULLY DENIED POST-OFFER ATTORNEYS' FEES

A parent who prevails in proceedings conducted pursuant to the IDEA may recover attorneys' fees from the school. 20 U.S.C. §1415(i)(3). However, if the parent rejects a "written offer of settlement" made more than ten days prior to the administrative hearing and "the relief finally obtained is not more favorable to the parents than the offer of settlement," the parent may be denied post-offer attorneys' fees. 20 U.S.C. § 1415(i)(3)(D)(i). A parent who does not obtain more favorable relief may still be entitled to attorneys' fees if she was "substantially justified in rejecting the settlement offer." 20 U.S.C. § 1415(i)(3)(E).

The school bears the burden of demonstrating that its offer was more favorable to the parents than the final relief. *Latoya A. v. San Francisco Unified Sch. Dist.*, No. 3:15-cv-04311-LB, 2016 U. S. Dist. LEXIS 11048, at *17 (N.D. Cal. Jan. 28, 2016); *Hawkins v. Berkeley Unified Sch. Dist.*, No. C-07-4206 EMC, 2008 U.S. Dist. LEXIS 94673, at *60 (N.D. Cal. Nov. 20, 2008). *See also* 12 Charles Alan Wright, et al., *Federal Practice & Procedure* § 3006.1, 127 (2d ed. 1997).

A. In Comparing Final Relief with the 10-Day Offer, the Court Must Evaluate the Specific Written Terms of the Offer and Construe Any Ambiguity Against the Drafter

IDEA directs courts to compare a "written offer of settlement" with the final relief to determine whether the relief obtained is more favorable to the parents than the offer. 20 U.S.C. § 1415(i)(3)(D)(i). Because the statute itself requires that the offer be "written," a court may not impute unwritten terms into the offer in making this comparison.

The district court acknowledged that Colonial's ten-day offer letter did "not explicitly mention pendency," "did not mention attorney's fees," and did not explicitly offer to reduce the agreement to a consent decree. *Rena C. v. Colonial Sch. Dist.*, #15-1914, 2016 U.S. Dist. LEXIS 175591, at *10, *21 (E.D. Penn. Dec. 20, 2015). By contrast, the parent obtained relief in the form of a consent decree, thereby making her a prevailing party for purposes of obtaining attorneys' fees, and the decree explicitly included pendency protection.

The court erroneously concluded Rena C. did not obtain more favorable relief by improperly speculating that she could have obtained those missing terms if she had taken the 10-day offer as an invitation for further negotiations. *Id.* at *22-23. Thus, the court imposed an additional requirement not found in the statute: shortly before a hearing, a parent must

actively seek to clarify and negotiate ambiguous or missing terms of a settlement offer or face the harsh sanction of being denied post-offer fees.

"The denial of fees by the district court based on the parents' refusal to accept a settlement offer must be based on the terms of that offer, not on some other offer that could have been made." *T.B. ex rel. Bernaisse v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 476-77 (9th Cir. 2015). Courts must rely on the explicit provisions in the written offer and "should not be required to assume differently in evaluating the offer." *Id.* at 478.

Additionally, "courts should apply the usual rules of contract interpretation to offers of judgment, and these rules dictate that ambiguities be construed against the drafter." *Id.* (internal citation omitted) (applying Rule 68 case law in IDEA case). This Court has held that, in interpreting Rule 68 offers, "courts must not consider extrinsic evidence or the intentions of the parties." *Lima v. Newark Police Dep't,* 658 F.3d 324, 333 (3d Cir. 2011). In construing settlement agreements in special education cases, the district court has declined to consider extrinsic evidence of the parties' intentions. *M.P. v. Penn-Delco Sch. Dist.*, No. 15-2446, 2015 U.S. Dist. LEXIS 1570000, at *14-15 (E.D. Pa. Nov. 20, 2015) (declining to consider extrinsic evidence of parties' intent in assessing whether attorney's fees in prior litigation waived by settlement of subsequent case). The same

rationale applies to ten-day offers that are silent on the subject of attorney's fees.

Colonial, as the drafter, should bear the burden of the ambiguity created by its silence on key terms, not the parent. "[T]he plaintiff should not be left in the position of guessing what a court will later hold the offer means." *Webb v. James*, 147 F.3d 617, 623 (7th Cir. 1998) (applying Rule 68). A parent pressed to accept or reject a settlement offer prior to a hearing does not have the benefit of hindsight.

Further, the "statute specifies that the comparison of the settlement offer versus the result of litigation must be made from the perspective of the parents." *T.B.*, 806 F.3d at 476. While a school might consider the terms of its settlement offer more favorable, the court may only consider the parent's perspective. *Id.* From Rena C.'s perspective, pendency and attorneys' fees were vital components of a settlement agreement.

B. Because Colonial's Offer Did Not Explicitly Include Pendency, the Final Relief that Included Pendency Was More Favorable than the Offer

The court erred in assuming pendency automatically applied and that the District's failure to offer pendency was inconsequential. IDEA's pendency requirement, set out at 20 U.S.C. § 1415 (j), is a unique statutory protection created by Congress to protect students with disabilities from

being unilaterally removed from their current educational placements by schools. As the Supreme Court explained in *Honig v. Doe*, 484 U.S. 305, 324 (1988), pendency "bar[s] schools" from changing a child's educational placement over a "parent's objection until all review proceedings [are] completed." Its purpose is clear: Congress "meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students … from school." *Id.* at 323 (emphasis in original).

Because pendency requires a school to maintain that placement until litigation is concluded, which could be years, pendency is often a sticking point in settlement negotiations. For example, schools prefer to have the prior public school placement rather than the private school as the pendent placement. Thus, rather than agree to an IEP providing for a private school, schools commonly agree only to reimburse tuition for a particular time period, so once that period ends, pendency reverts to the original public school placement.

This Court has not yet addressed what happens when a settlement agreement providing for tuition reimbursement is silent on pendency. More than two years after Colonial's ten-day offer, the district court concluded – after extensive legal analysis — that an "offer to pay private school tuition includes pendency unless the district explicitly conditions its offer to the

contrary." *Rena C.*, 2016 U.S. Dist. LEXIS 175591, at *14. Yet, that conclusion is not settled law now, nor more importantly, was it settled law at the time Rena C. was faced with the offer.

The district court's reliance on *K.L. v. Berlin Borough Bd. of Educ.*, No. 13-4215, 2013 U.S. Dist. LEXIS 111047, at *13 (D.N.J. Aug. 7, 2013) is perplexing because the *K.L.* decision held that a settlement agreement limited to tuition reimbursement does not convert the private placement into a pendency placement absent an explicit agreement from the school that the private placement was the child's appropriate placement, subject to 20 U.S.C. § 1415(j). Indeed, an attorney could reasonably interpret *K.L.* as *requiring* a settlement agreement to provide explicitly for pendency.

Thus, the district court's decision forces a parent to guess how a court might interpret the procedural right of pendency, with substantial risk if her guess is wrong, rather than require a school to include pendency protection explicitly in its settlement offer. From the parent's perspective at the time of the offer, final relief that included pendency was more favorable than an offer that was silent on pendency. *See T.B.*, 806 F.3d at 480 (holding offer providing district's placement was pendency placement was not more favorable than final relief from the parent's perspective).

C. Because Colonial's Offer Did Not Explicitly Include Attorneys' Fees, Final Relief that Included Attorneys' Fees Was More Favorable

The court erred in imputing attorneys' fees into an offer that omitted any provision regarding attorneys' fees. In *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources,* 532 U.S. 598, 603-06 (2001), the Supreme Court held that, to be considered a "prevailing party" entitled to fees, a plaintiff must achieve some material change in the legal relationship of the parties, *and* that change must be judicially sanctioned.

This Court and other federal courts of appeal have extended *Buckhannon* to IDEA and held that parents who obtain a private settlement agreement are not entitled to attorneys' fees. *John T. v. Delaware Cty. Intermediate Unit*, 381 F.3d 545, 561 (3d Cir. 2003); *see also El Paso Indep. Sch. Dist. v. Richard R.,* 591 F.3d 147, 429 (5th Cir. 2009)*; Mr. L. v. Sloan*, 449 F.3d 405, 408 (2d Cir. 2006); *Doe v. Boston Pub. Sch.*, 358 F.3d 2, 30 (1st Cir. 2004); *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 374 F.3d 857, 865 (9th Cir. 2004); *Alegria v. Dist. of Columbia*, 391 F.3d 262, 269 (D.C. Cir. 2004). The law is well settled that a private settlement

agreement, such as that offered by Colonial, excludes attorneys' fees unless attorneys' fees are specifically included.[4]

Thus, because attorneys' fees were not included, the final relief was more favorable than the offer. *T.B.*, 806 F.3d at 477. *See also Latoya A.*, 2016 U.S. Dist. LEXIS 11048, at *15 (final relief with more than $23,000 pre-offer fees is more favorable than a $1,000 offer); *Troy Sch. Dist. v. K.M.*, No. 12-cv-15413, 2016 U.S. Dist. LEXIS 39812, at *7 (E.D. Mich. Mar. 28, 2016) (final relief more favorable than offer that did not include fees). "[I]t is harsh and nonsensical to view a settlement offer as equally favorable to claimants when it contains no fees or an unrealistically low amount of fees and the litigated outcome contains the same relief but will support a full fees award if such a claim is asserted in a subsequent civil action." Mark Weber, *Settling IDEA Cases: Making Up is Hard to Do*, 43 Loy. L.A. L. Rev. 641 (2010).

The court acknowledged Colonial's offer did not explicitly include fees, but it faulted the parent for not responding to "the invitation to discuss

[4] The district court correctly rejected Colonial's preposterous argument that the parents could have sued for fees as a prevailing party after accepting a settlement offer. "Had Rena accepted Colonial's offer without having it incorporated in a consent order, Colonial could have argued that she did not qualify as a prevailing party because the settlement lacked judicial or administrative approval." *Rena C.* 2016 U.S. Dist. LEXIS 275592, at *21.

the offer," and claimed the parent "could have easily requested that the terms of the offer be reduced to a consent decree which would have conferred prevailing party status on her for purposes of seeking attorney's fees." *Rena C.*, 2016 U.S. Dist. LEXIS 175591 at *22. Relying on hindsight, the court focused on the fact that the parties ultimately entered into a consent decree that provided for both pendency and attorneys' fees. *Id.* at **21-22. That Colonial ultimately relented and agreed to both pendency and attorneys' fees does not prove that it would have done so before the 10-day offer expired. Further, such extrinsic evidence is barred from consideration in the similar Rule 68 context and should be barred here. *See e.g., Lima*, 658 F.3d at 333.

The court's speculation about post-offer negotiations is improper because the statute directs the court to compare the written offer, which did not include fees, to the final relief, which did. Colonial's counsel knew the parent had incurred attorneys' fees and would be ineligible for attorneys' fees under *Buckhannon* without a consent order.[5] The school "cannot rationally contend that plaintiffs' counsel accrued no fees in the drafting of the due process complaint or that it anticipated that plaintiffs would voluntarily decline to seek those fees in this Court." *Daniel v. Dist. of*

[5] Counsel's firm boasts of being "one of the preeminent on special education law in Pennsylvania." http://www.sweetstevens.com/practice/special-education (last visited May 22, 2017).

Columbia, 14-cv-1270 (RJL/GMH), 2016 U.S. Dist. LEXIS 43966, at *28 (D.D.C. Feb. 17, 2016). Further, Colonial could have responded to the rejected offer with a better, clearer offer.

The court erred in buying Colonial's argument that it was "implicitly acknowledging it would pay attorney's fees incurred to date" when it said that it was making the offer to "further limit" exposure to attorneys' fees. *Rena C.*, 2016 U.S. Dist. LEXIS 175591, at *21-22. Colonial's expressed intent to limit its exposure to fees does not compel the conclusion that its written offer included anything beyond the tuition reimbursement.

In the context of Rule 68, which is an offer to have a judgment entered, and which, in turn, creates an entitlement to fees, this Court has held that the defendant's offer includes attorneys' fees either explicitly or implicitly unless there is an express waiver. *Lima*, 658 F.3d at 333. Thus, a defendant who does not mention fees and costs in the offer must pay fees. *Id.*; *see also Webb*, 147 F.3d at 622. By contrast, when a school offers a private settlement, which does not create an entitlement to fees, the failure to mention fees logically means the offer excludes an additional payment for fees and a parent's acceptance may be interpreted as a waiver.

Because Colonial's offer explicitly included only tuition reimbursement, it did not include attorney's fees. If Colonial sincerely

intended to offer reimbursement of fees, it could easily have offered $7,438 or more in attorneys' fees or its agreement to a consent decree.

In *Marek v. Chesney*, 473 U.S. 1, 6-7 (1985), the Supreme Court construed Rule 68 to permit offers combining both merits and attorneys' fees, noting, "if defendants are not allowed to make lump-sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers." *Id.* The corollary is that parents need to know whether an IDEA settlement offer includes reasonable attorneys' fees, either separately or as part of a lump-sum, or whether the school will agree to a consent order so a district court may determine the amount of fees to be awarded. [6] Knowing whether fees are included is essential for a parent to make an informed decision whether to accept or reject the offer.

In sum, because the final relief included pendency and was in the form of a consent decree, enabling the parent to obtain attorneys' fees as the prevailing party, Rena C. obtained more favorable relief than the written offer, which did not include either pendency or attorneys' fees. By imputing terms into the settlement offer that were not explicitly stated, by imposing an

[6] To obtain attorneys' fees, parents may file a complaint in federal court for the sole purpose of seeking fees as the prevailing party in the due process proceeding. 20 U.S.C. § 1415(i)(3).

additional, non-statutory duty upon the parent to negotiate for terms not included, and by relying on speculations about what the parent might have obtained in further settlement negotiations, the district court failed to adhere to the legal standard set forth in 20 U.S.C. § 1415(i)(3)(D)(i) and wrongly denied post-offer attorneys' fees.

II. THE COURT'S HARSH DECISION DENYING ATTORNEYS' FEES WHEN THE PREVAILING PARENT REJECTED AN UNFAVORABLE OFFER WITH SUBSTANTIAL JUSTIFICATION UNDERMINES IDEA BY DISCOURAGING ATTORNEYS FROM ZEALOUSLY REPRESENTING CLIENTS WITH MERITORIOUS CLAIMS

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 a judicial misinterpretation of its intent," by enacting the HCPA to permit prevailing parents to recover attorneys' fees. *Fontenot v. La. 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 Cty. 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. D.C.*, 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 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.[7] 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.

[7] 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).

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 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.[8] As the Supreme Court has 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.*, *Winkelman ex rel Winkelman v. Parma City 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.[9]

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[8] 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).

[9] 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.

Unlike parents who are frequently unrepresented and often cannot afford expert witnesses,[10] schools are represented by counsel[11] with expertise in special education law, and schools can draw on the expertise of school staff (without incurring additional expense) as well as paid experts.[12] This imbalance is perpetuated by the fact that schools often have insurance and other funding sources to pay fees; thus, 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,[13] whereas parents often lack the resources to

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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. 1807, 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).

[10] *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).

[11] 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.

[12] 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).

[13] 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

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."[14] Thus, even *pro se* parents with obviously meritorious claims lose because they lack attorneys.

C. Parents Are Substantially Justified In Rejecting Offers If They Have A Good Faith Belief Their Final Relief Will Be Better Than The Offer

IDEA's 10-day offer provision is not designed to discourage parents from seeking full relief available under the law. A parent is substantially justified in rejecting the offer, if she has a "good faith, reasonable belief that [her] eventual recovery would be higher than the offer." *J.P. v. Cty. Sch. Bd. of Hanover Cty.*, 641 F. Supp. 2d 499, 508 (E.D. Va. 2009). Further, her belief may be reasonable if the law on the matter is unsettled. *See, e.g., B.L. through Lax v. D.C.*, 517 F. Supp. 2d 57, 61 (D.D.C. 2007) (parents substantially justified in rejecting offer without expert fees when it was "by

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benefit to a disabled child, knowing that it can incur up to $100,000 in legal fees at no marginal cost." *Id.* at 456.

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

no means settled law that expert fees could not be recovered").

Regarding pendency, Rena C. had case law to support her belief that final relief would be more favorable than an offer without pendency. She could reasonably have read *K.L*, 2013 U.S. Dist. LEXIS 111047, at *13, as providing that an explicit provision in the settlement agreement was required to make the private placement a pendency placement. As a result, she was substantially justified in rejecting the offer. *See also M.M. v. Sch. Dist. of Phila.*, 142 F. Supp. 3d 396, 412 (E.D. Pa. 2015) (rejection substantially justified in part because offer did not provide that private school would be pendent placement).

Significantly, the district court's approach would require a parent to expend additional resources on negotiations or accept the agreement without pendency in the hope that a future court would find that pendency was implicitly included. There is no guarantee that a school district, having obtained a parent's acceptance of an offer without an explicit pendency provision, might not later assert that, pendency was waived. In that event, , the parent would be required to expend additional resources in litigation in the hopes a court would find that pendency applied by operation of law. In this case, only after the decree with the explicit pendency provision was entered, to support its claim that post-offer fees should be denied, did

Colonial contend it would have been bound by law to maintain pendency. *Rena C.*, at *14. Comparing relief obtained with the explicit terms of the offer is the only means of fairly assessing whether final relief was more favorable at the time the parent had to decide to accept or reject the offer.

Regarding attorneys' fees, there is ample case law to support Rena C. in believing her final relief would be more favorable than an offer without fees, *see, e.g., T.B.,* 806 F.3d at 480, and that she had substantial justification to reject an offer that did not include pre-offer fees, *see* part II C below.

D. Because Attorneys' Fees Are Essential to Enforcing IDEA, Parents with Meritorious Claims Are Substantially Justified In Rejecting Settlement Offers that that Exclude Reasonable Attorneys' Fees

Allowing schools to use the settlement offer in 20 U.S.C. § 1415(i)(3)(D)(i) to deny pre-offer attorneys' fees to parents with meritorious cases would frustrate the purpose of the IDEA and have an extraordinary chilling effect on the availability of counsel for students with disabilities and their parents. Therefore, parents are substantially justified in rejecting offers that exclude attorneys' fees.

Because attorneys' fees are part of the final relief available, the amount of attorneys' fees offered is necessarily part of the equation in evaluating a settlement offer. *See Marek,* 473 U.S. at 4 (considering $32,000 in pre-offer attorneys' fees in evaluating an offer of $100,000).

Final relief that includes attorneys' fees is superior to a settlement offer that excludes fees. *T.B,* 806 F.3d at 484.

Many courts have held that parents are substantially justified in rejecting settlement offers that do not include pre-offer fees. *See e.g.*, *Woods v. Northport Pub. Sch.*, 487 F. App'x 968, 981 (6th Cir. 2012) (parents were substantially justified in rejecting offer that did not include attorneys' fees); *Daniel v. D.C.*, 14-cv-1270 (RJL/GMH), 2016 U.S. Dist. LEXIS 43966, at *28 (D.D.C. Feb. 17, 2016) (rejection substantially justified because offer did not include attorneys' fees); *M.M. v. Sch. Dist. of Phila.*, 142 F. Supp. 3d 396, 412 (E.D. Penn. 2015) (rejection substantially justified in part because no sum certain offered for fees); *Adams v. Compton Unified Sch. Dist.*, CV 14-04753 BRO, 2015 U.S. Dist. LEXIS 175811, at *15 (C.D. Cal. July 16, 2015) (rejection substantially justified where offer did not include any fees and over $9,000 in fees had been incurred). The district court's reliance on *Gary G. v. El Paso Indep. Sch. Dist.*, 632 F.3d 201, 201 (5th Cir. 2011) is misplaced as the court made clear it did not hold that parents are never substantially justified in rejecting an offer because it excluded attorneys' fees.

A holding that parents are not substantially justified in rejecting offers that exclude fees would coerce parents to accept fee waivers, which would

be profoundly inimical to IDEA. While a defendant may request that a plaintiff waive attorneys' fees, *Evans v. Jeff D.,* 475 U.S. at 737-38, there is nothing in IDEA or its legislative history that would require a parent to accept such an agreement.[15] In *Jeff D.*, the Court was "cognizant of the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases," and that, "[I]f this occurred the pool of lawyers willing to represent plaintiffs in such cases might shrink, constricting the 'effective access judicial process' for persons with civil rights grievances which the Fees Act was intended to provide." *Id.* at n. 34.

Fee waivers pose particular difficulty for IDEA claims because monetary damages are unavailable to pay a lawyer's fee. Most cases involve securing educational services or school compliance with procedural requirements. Monetary relief is awarded either to reimburse parents for, or to pay the cost of, educational expenses.[16]

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[15] Fee waivers are a significant problem for public interest organizations as well as the private bar as fees are typically used to help other clients. Attorneys' fees are important for special education litigation because experts are required and reimbursement for those costs is unavailable under IDEA.

[16] In unilateral placement cases, some private schools forego collecting tuition pending resolution of due process, and the tuition reimbursement is paid to the school, not the parents. *See, e.g., D.A v. New York City Dep't of Educ.,* 769 F. Supp. 2d 403, 427-28 (S.D.N.Y. 2011) (holding parent without

For most families with a child with a disability, even the $7,438 in pre-offer fees here is an onerous burden. If parents learn they will not recover fees even for meritorious cases in which they secure a settlement, many will be discouraged from pursuing their claims altogether. And depriving attorneys of reasonable fees for meritorious cases that are settled will discourage lawyers from take such cases on contingency even though HCPA's statutory purpose was to expand the availability of attorneys.

The vast majority of IDEA claims are settled. There is a chilling effect on access to counsel when government defendants decide only "to offer a decent settlement on the merits of the case -- without-attorneys' fees – and insist that the settlement not be presented to the court for signing." [17] Many parents will either be deterred from pursuing claims or elect to represent themselves. Schools have an obvious interest in deterring attorneys from undertaking special education litigation, as they are more likely to be successful when parents are *pro se*. It undermines the essential purpose of IDEA and acts as a disincentive to settling IDEA claims to

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funds to front cost of unilateral placement may get payment for tuition owed to a school).

[17] Hyman, supra, at 142; Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory,* 48 Hastings L.J. 197, 215 (1997).

endorse a practice of denying fees when a parent's meritorious claims yielded an offer of settlement.

When schools comply with the requirements of IDEA, parents have no need to hire attorneys to vindicate their children's rights. A school district has multiple opportunities to resolve differences regarding the child's placement or program before substantial attorneys' fees are incurred. Prior to unilaterally placing their child, parents are subject to the statutory stricture to provide advance notice, either at an IEP meeting or in a written notice ten business days before the placement. 20 U.S.C. § 1412(a)(10)(C)(iii). Consequently, even before a hearing request is filed, the school has the opportunity to agree to the parental placement or provide an appropriate alternative. Once the complaint is filed, there is an immediate, mandatory resolution process that again gives the district an opportunity to reach agreement and reduce liability for the parent's attorneys' fees. 20 U.S.C. § 1415(f)(1)(B).

Having been forced to retain counsel, parents are substantially justified in rejecting an offer of settlement that does not provide for attorneys' fees. Moreover, putting the parent in the position of "[i]ncurring unnecessary legal fees is, of course, a form of prejudice that denies a student and his parents an educational benefit." *M.C. v. Antelope Valley Union High*

Sch. Dist., No. 14-56344, 2017 U.S. App. LEXIS 5347, at *113 (9th Cir. Mar. 27, 2017).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of this Court in good standing.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE 29(a)(4)-5); 32(a)(5)-(7);(g)(1) AND L.A.R. 28.3(d); 32.1

The undersigned certifies that this brief is presented in Times New Roman font 14, in compliance with the Court's Rules, including that the undersigned is a member of the bar of this Court.

The undersigned also certifies that the sections of the brief application to the length requirements contain 6,446 words and 611 lines in compliance with the Court's Rules, as measured by Word 2015, the word processing program used to create the brief. It is certified that the text of the e-brief and hard copies are identical.

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CERTIFICATION OF VIRUS CHECK

It is certified that a virus check was performed using MalwareBytes anti-virus software.

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CERTIFICATE OF SERVICE

I certify that on the 6th of June, 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. I also identify that I have sent the primary counsel for Appellants and Appellees a courtesy and supplemental copy in paper form to these addresses:

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