25-2780

United States Court of Appeals

for the

Second Circuit

THE LAW OFFICE OF PHILIPPE J. GERSCHEL,

Plaintiff-Appellant,

– v. –

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., NEW YORK STATE COUNCIL OF CATHOLIC SCHOOL SUPERINTENDENTS, AND SAM SUTTON, NEW YORK STATE SENATOR IN SUPPORT OF PLAINTIFF-APPELLANT AND REQUEST FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

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

Council of Parent Attorneys and Advocates
New York State Council of Catholic School Superintendents
Sam Sutton, New York State Senator

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

Respectfully submitted,

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STATEMENT OF INTERESTS OF AMICI CURIAE[1]

Council of Parent Attorneys and Advocates (COPAA) is a national not-for-profit organization for parents of children with disabilities, their attorneys, and advocates. 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) that children are entitled to under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA).[2] COPAA also supports its members in their efforts 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).

COPAA brings the unique perspective of parents, advocates, and attorneys for children with disabilities. COPAA has filed as *amicus curiae* in the United States

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[1] Pursuant to Fed. R. App. P. 29(5), *Amici* affirm that (1) counsel for amicus authored the brief in whole with comments from COPAA members; and (2) no other person contributed money that was intended to fund the preparation or submission of the brief.

[2] The statute was originally named the Education of the Handicapped Act or EHA; it was renamed IDEA in 1990. *See Fry v. Napoleon Cmty. Schs*., 580 U.S. 154, 160 n.1 (2017). For the sake of simplicity, we refer only to IDEA in this brief. *Id.*

Supreme Court, including in*A.J.T. v. Osseo Area Schs.*, 605 U.S. 335 (2025)); *Perez v. Sturgis Public Schs.,* 598 U.S. 142 (2023); *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386 (2017); *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154 (2017); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Bd. of Educ. v. Tom F.*, 552 U.S. 1 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007), and in the twelve United States Courts of Appeal that routinely hear special education appeals.

The New York State Council of Catholic School Superintendents (NYSCCSS) comprises the Superintendents of Schools and their respective staffs of the eight Roman Catholic Dioceses in the state. NYSCCSS has responsibility for serving or overseeing the overwhelming majority of the state's 400 Catholic schools educating approximately 175,000 students.

Education is one of the core ministries of the Catholic Church. Motivated by faith, Catholic schools integrate academic excellence and spiritual growth rooted in the Gospel to prepare children as loving, responsible, and productive adults. Central to this ministry is the Church's on-going struggle to ensure that a Catholic education is accessible to all families that seek it for their children, including children with special needs. NYSCCSS also provide scholarships so that low-income families can afford a Catholic education. Statewide, approximately 10 percent of Catholic school

children have IESPs, with some schools having as many as twenty percent of students with IESPs. Nearly every Catholic school currently has some students with IESPs.

Far too often, NYSCCSS have seen children with IESPs be denied necessary services or have their services delayed. NYSCCSS has seen families struggle with the due process hearing process, which is very intimidating, particularly for low income families and for parents who are not college graduates. NYSCCSS has found that families require legal assistance to obtain and then maintain IESP services. NYSCCSS believes it is vital that federal courts enforce New York law providing procedural safeguards, including attorney's fees, for children with IESPs.

Sam Sutton is the New York State Senator representing New York Senate District 22, which includes thousands of families in Boro Park and Midwood whose children with disabilities attend nonpublic schools and receive services through Individualized Education Service Plans (IESPs). Although the New York City Department of Education is legally obligated to deliver these services at no cost to families, it routinely fails to do so. He has spoken directly with many parents who have been through this system, and he has reviewed hearing transcripts. He believes unrepresented parents would not be able to navigate the due process administrative hearing process and, even if they prevail, get the hearing officer decisions implemented. Access to federal courts and attorneys' fees for prevailing parents is

essential for these families to get the services that their children require. *Amici's'* interest in this case stems from their shared commitment to ensuring that students with disabilities have access to a free appropriate public education in all areas of disability with programming reasonably calculated to result in academic and functional progress. *Amici* know firsthand that IDEA's procedural safeguards, including the fee-shifting provision, are critical in enabling parents and their children with disabilities to enforce IDEA. Without the protections of procedural safeguards, including pendency, relief from denial of FAPE (typically compensatory education or reimbursement), and attorney's fees, New York school districts may feel free to violate their rights with impunity. Both parties have consented to this filing.

SUMMARY OF ARGUMENT

This case raises the question of whether New York children with disabilities who have Individualized Education Service Programs (IESPs) are protected by IDEA's procedural safeguards and have access to federal courts to enforce their rights. While this case addresses the important issue of attorney's fees, the District Court's decision, if upheld, would logically lead to denying children with IESP's access to federal courts entirely to enforce their rights, including pendency, compensatory education and reimbursement, and enforcement of administrative due process decisions by both Impartial Hearing Officers and State Review Officers (SROs). For nearly two decades, federal courts have been available to enforce

children's rights under New York's IESP program. This case could result in closing the federal court door to these children even though federal courts have been indispensable in enforcing children's rights under IDEA.

ARGUMENT

I. FEDERAL COURTS PLAY A VITAL ROLE IN ENFORCING IDEA IN NEW YORK CITY

New York City has a long history of noncompliance with the requirements of the IDEA, and federal courts have long played a vital role in getting New York City to comply with IDEA. In 1982, this Cour upheld class certification and a detailed remedial plan to accomplish timely evaluation and placement of children with disabilities. *Jose P. v. Ambach*, 669 F.2d 865 (2d Cr. 1982). Since then, there have been numerous class actions resulting in consent orders to remedy serious violations of IDEA. And some of those consent orders have been applied to children with IESPs.

For example, in *L.V. v. N.Y. City Department of Education*, filed in 2003, parents claimed that even when parents received favorable orders in due process proceedings, DOE failed to implement the orders and did not even have a system of tracking and monitoring the ordered remedies." *L.V. v. N.Y. C. Dep't of Educ., 3-civ-9917*(RJH)(KNF) (S.D.N.Y. Sept. 15, 2005).The district court certified a class of "all persons (1) who have obtained, or will in the future obtain, for the benefit of a child with a disability, a favorable order by an IHO against, or stipulation of

settlement placed on the record at an impartial due process hearing with, the New York City Department of Education, or who are children with disabilities who are the beneficiaries of such order or stipulation of settlement, and (2) who fail to obtain, or at risk of failing to obtain, full and timely implementation of such order or settlement." *Id.* This class clearly includes those students with IESPSs who have obtained favorable orders or stipulations of settlement.

In *J.S.M. v. N.Y.C. Dep't of Education*, No. 20-cv-705-EK-SJB (E.D.N.Y.), parents claimed that New York City had not timely resolved due process complaints. The class was defined as "Individuals who file or have filed due process complaints and the children on whose behalf due process complaints are filed, when due process complaints are unresolved and the decisions have not been timely provided under applicable federal and state law."

Amici are deeply concerned that the consequence of affirming the district court's decision would be to deprive many thousands of New York City children with disabilities of the protection of the federal courts, which have proven to be indispensable for more than forty years.

II. FEDERAL COURTS HAVE JURISDICTION OVER IESP CASES BECAUSE IDEA INCORPORATES HIGHER STATE STANDARDS

A. New York State Has Provided Greater Protections for Parentally Placed Children than the Minimum Required by Federal Law.

IDEA sets out a minimum requirement for states to services children enrolled in private schools by their parents. 20 U.S.C. § 1412(a)(10(a). States are required to devote "a proportionate amount of Federal funds made available" under IDEA to serving these students. 20 U.S.C.§ 1412(a)(10)(a)(i)(I). IDEA requires states to conduct "a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency." 20 U.S.C. § 1412(a)(10)(a)(i)(II). It provided that such services may be provided on the premises of private, including religious, schools. 20 U.S.C. § 1412(A)(10)(a)(i)(III).

Congress recognized that some states and localities would want to do more to serve parentally placed children than the bare minimum. It provided that state and local funds could supplement the federal funds serving this group. 20 U.S.C. § 1412(a)(10)(a)(i)(II). There is nothing in the statute that bars states from providing IDEA's procedural safeguards to this group of children.[3]

[3] The statute did provide for complaints by private school officials that local educational agencies did not comply with the requirements for consultation and did not consider their views. 20 U.S.C.§1412(a)(10)(v).

New York State has provided greater protections for parentally placed students and also extended the protections to home-schooled students. N.Y. Educ. Law § 3602-c(2)(c). On July 18, 2007, New York Education Law §3602-c was signed into law. It provides that the Committees on Special Education shall develop an IESP "in the same manner and with the same contents as an individualized education program." (b)(1). It also provided that "Review of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of § 4404" N.Y. Educ. Law §3602-c(2)(b)(1). New York Education Law 4404 provides for the due process proceedings set out in IDEA, 20 U.S.C. § 1415. Thus, under New York state law, IDEA's due process proceedings are available to children with IESPs, including review in federal court.

As a result of the 2007 statute, since the 2007-2008 school year, IDEA's due process rights and federal courts have been available to enforce the rights of children with IESPs. As a result, children with IEPs have enjoyed the right to pendency and have been awarded compensatory education, reimbursement, and attorneys' fees. Until recently, parents' attorneys have received attorney's fees, either in stipulations of settlement or in court decisions. *See, e.g., A.G. v. NYC DOE,* 20 cv-7577, 2021 U.S. Dist. LEXIS 201748, 2021 WL 4896227 (S.D.N.Y. Oct. 19, 2021), *aff'd sub nom H.C. v. NYC DOE, 71 F.4th 120 2d Cir. 2023)* (awarding attorneys' fees in case

where parent obtained decision that DOE denied FAPE and ordered compensatory services to remedy FAPE denial of IESP services). *Amici* understand that it was not until this case that DOE argued in federal court that the federal courts lack jurisdiction over IESP cases.

B. When State Law exceeds the Minimum Standards for Receiving Federal Funds, the State Law Standard Is Enforceable in Federal Courts.

As the Supreme Court explained in *Board of Education v. Rowley*, 458 U.S. 176, 179 (1982), IDEA "provides federal money to assist state and local agencies in educating [disabled] children, and conditions such funding upon a State's compliance with extensive goals and procedures." It noted that IDEA "leaves to States the primary responsibility for developing and executing programs for [disabled] children." Id. at 183. And IDEA sets out the minimum federal standards. The Court also noted that IDEA requires that the instructions and services must not only meet federal standards but must also meet the state educational standards. Id. at 203. And states may impose higher standards than the bare minimum required by federal law.

But, since *Rowley,* federal courts have recognized that states may apply higher standards than the minimum federal standard, and, when they do, federal courts apply and enforce the higher standard. Thus, when state law required more than the minimum substantive standard of an appropriate education set out in *Rowley*

and instead required more, federal courts enforced the higher standard.

Thus, in *David D. v. Dartmouth School Committee*, 775 F.2d 417 (1985), the First Circuit rejected the school district's argument that, the Massachusetts state law requiring special education to "assure the maximum possible development of a child with special needs," could not be enforced in federal courts because it was higher than the minimum standard set in *Rowley*. The First Circuit explained that IDEA explicitly incorporates some of a state's substantive law into IDEA pointing to the requirement that each contracting state enact "policies and procedures" that are consistent with IDEA to guarantee that a FAPE is provided to each student with a disability in the state, pointing to 20 U.S.C. §1412(2); § 1413(a)(1)-(11). The First Circuit stated that is holding that the right to a FAPE "incorporates substantive rights authorized by state special education law which become part of the federal core right is bottomed on both statutory language and authoritative legislative history." *Id.* at 418-19. The court stated that there was "no intention that the federal Act preempt and reduce all state standards to the federal minimum. This would conflict with the cooperative federalism courts have found to be structural principle undergirding the Act." *Id*. at 419 (citations omitted).

Similarly, in *Board of Education of East Windsor Regional School District v. Diamond*, 808 F.2d 987, 992 (3d Cir. 1996), the Third Circuit held that federal law incorporated New Jersey's higher standard of service under IDEA, which required

school boards "to provide educational services according to how the student can best achieve success in learning." The Fourth Circuit has recognized that "a federal court must determine whether an IEP meets the requirements of state law if the state requires a level of substantive benefit great than that required under federal law." *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982-83 (4th Cir. 1990). The Eighth Circuit has stated, "When a state provides for educational benefits exceeding the minimum federal standards set forth under *Rowley*, the state standards are thus enforceable through the IDEA." *Blackmon v. Springfield R-XII Sch. Dist*., 198 F.3d 648, 658 (8th Cir. 1999) (citation omitted). The Tenth Circuit in *Johnson v. Independent Sch. Dist. No. 4*, 9212 F.2d 1022 (10th Cir. 1990), observed, "If state legislation implementing the Act grants a broader entitlement than that found in the federal statute, the state statute defines the parameters of the program which must be extended to children living in that state." *Id*.

This Court addressed state standards in *Bryant v. New York State Education Department*, 692 F.3d 202 (2d Cir. 2012). Parents in that case challenged a New York state regulation barring the use of aversive techniques on students with disabilities as violating IDEA. This Court stated that "the IDEA 'incorporates state substantive standards as the governing federal rule' if they are consistent with the federal scheme and meet the minimum requirements set forth by the IDEA." *Id.* at 214, citing *Taylor v. Dep't of Educ.,* 313 F.3d 768, 777 (2d 2002). This Court found

that the ban on aversives "conforms to the IDEA's preference for positive behavioral intervention" and rejected the parents' claim. *Id*. at 214-16.

Amici know of many instances in which state law provides greater protections for children with disabilities, both in the substantive requirements for education and in the procedural safeguards. And federal courts routinely enforce state laws as long as they are consistent with federal law and meet the minimum standards set out in IDEA.

C. New York's Guarantee of IDEA's Procedural Safeguards to Students with IESPs Is Enforceable in Federal Court.

New York guarantees IDEA's procedural safeguards, including pendency, relief such as compensatory education and reimbursement, and attorney's fees to children on IESPs. This guarantee easily satisfies the two-part test set out in Bryant, that IDEA incorporates state states standards if (1) they are consistent with the federal scheme and (2) minimum requirements set for by the IDEA. First, there is nothing inconsistent with the federal scheme in extending due process protections to those children with disabilities parentally placed in private schools. Second, the IDEA requires as a minimum that procedural safeguards be extended to all children with disabilities in the state for the purpose of child find and to children with disabilities in the public schools or placed in private schools by public agencies. Providing procedural safeguard to children parentally placed in

private schools exceeds the minimum requirements of federal law and is consistent with IDEA.

The Eighth Circuit held that federal courts had jurisdiction to hear disputes regarding a free appropriate public education for parentally placed children with disabilities under Minnesota law. *Special Sch. Dist. No. 1 v. R.M.M.*, 861 F.3d 769 (8th Cir. 2017). The court noted that the Minnesota statute "clearly states that 'a parent . . . is entitled to an impartial due process hearing . . . when a dispute arises over . . . the provision of a free appropriate public education to a child with a disability.'" *Id*. at 778, quoting Minn. Stat. §125A.091, subd. 12. The court found that federal law offers a due process hearing to settle the dispute as to a free appropriate public education. *Id*.

New York, like Minnesota, provides children with disabilities who are parentally placed with an individual right to special education and with the procedural safeguards of IDEA. That expansion of rights under IDEA to parentally placed children with disabilities is clearly in excess of IDEA's minimum requirements and is consistent with federal law.

The District Court's reliance on *Bay Shore Union Free School District v. Kain*, 485 F.3d 730 (2d Cir. 2007) is misplaced because the court did not hold that IDEA's due process procedures were unavailable for all cases involving parentally placed students. In that case, the court noted that the student would receive FAPE

regardless of whether New York Education Law permitted the school district to dictate where the student would receive the services of a one-to-one aide. The court stated, "We cannot discern a strong federal interest in adjudicating whether the School District must provide a one-to-one aide in the school of his choosing." *Id*. at 735. Thus, *Bay Shore* was limited to its facts and not a broad holding that federal court doors were closed to students with IESPs who had been denied the FAPE promised by New York state law. There is strong federal interest in ensuring that New York students with IESPs, having been granted an individual right to FAPE by New York state, have their rights to FAPE enforced in federal court.

Further, the Court's reliance on 34 C.F.R. § 300.140 is also misplaced as that regulation does not address the situation of parentally placed students who have been granted an individual right to a FAPE by their states. As *Rowley* recognized, IDEA sets a floor, but, as this Court has recognized, that floor is not at the same time a ceiling, and states may provide greater protections than the federal minimum. There is no dispute that New York has provided greater rights to parentally placed children than federal law, and, granting those students a FAPE is not inconsistent with IDEA.

Congress stated that the purpose of IDEA was "to ensure that *all children* with disabilities have available to them a free appropriate 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)(emphasis added). Given that IDEA's purpose applies to *all children*, enforcing New York State's guarantee of a free appropriate public education, including the procedural safeguards, for those children parentally placed in private schools is entirely consistent with federal law.

III. AS CONGRESS RECOGNIZED, THE RIGHT OF PREVAILING PARENTS TO ATTORNEYS' FEES IS ESSENTIAL FOR ENFORCING IDEA

IDEA provides for informed parental involvement, guaranteed through procedural protections, so that parents can ensure appropriate educational services are provided to their students. *See* 20 U.S.C. § 1415. Congress realized families would need support to invoke these procedural rights. When *Smith v. Robinson,* 468 U.S. 992 (1984), held that prevailing parents under IDEA's predecessor statute had no right to fees, Congress acted "swiftly, decisively, and with uncharacteristic clarity" 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).

The HCPA's legislative history establishes the importance of the fee provision. The Senate Report emphasized the importance of fee-shifting to ensure compliance with IDEA:

> Congress' original intent was that due process procedures, including the right to litigation if that became necessary, be

> available to *all parents*. . . . The effect of this decision [*Smith*]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 added). The committee intended to provide parents of children with disabilities with the same right to recoup fees as other civil rights plaintiffs suing under similar 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 prevailing market rates:

> [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 assistance 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 [n]ation's disabled poor citizens, is money well spent.

Id. at 17.

Senator Lowell Weicker explained that, 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. S20598 (July 24, 1984). Senators cited the example of Mary Tatro, who testified at a Senate hearing about her family's experience in litigating *Irving Indep. Sch. Dist. v. Tatro,* 468 U.S. 883 (1984). 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). The Tatro family was fortunately able to obtain *pro bono* assistance for the appeal to the Supreme Court which resulted in a unanimous decision in their favor.

For families without financial means, the right to recover attorneys' fees is essential for IDEA to fulfill its purpose. *See Ector Cnty. Indep. Sch. Dist. v. V.B.*, 420 Fed. App'x 338, 345 (5th Cir. 2011) (fee award "foster[s] IDEA purposes by . . . ensuring [student] would receive the [FAPE]" that student had been denied).

A. Many parents cannot afford legal fees, and, without attorneys, they cannot succeed in IDEA proceedings.

Without attorneys, many families find it impossible to challenge school district action or inaction.[4] As the Supreme Court recognized, some parents represent themselves in IDEA cases. *See, e.g., Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 535 (2007) (holding parents could proceed *pro se* on their independent IDEA claims). But *pro se* parents are far less likely to succeed in their IDEA claims than

[4]*See, e.g.,* 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%)

represented parents.[5]

Although IDEA provides a detailed framework to safeguard the interests of *all* children, children in low-income households face significant challenges in accessing those rights. Many families lack the resources to navigate the complex IDEA process on their own.[6] Children whose families fall in the bottom 20% of household income distribution have a disproportionately high rate of disability.[7] 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."[8]

One-quarter of students with IEPs have family incomes below the poverty line and two-thirds have family incomes of $50,000 or less.[9] Many have parents without

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[5] *See, e.g.*, Eric Emerson, *Poverty and People with Intellectual Disabilities*, 13 Mental Retardation & Developmental Disabilities Res. Rev. 107, 109 (2007); *see also* Carla A. Peterson et al., *Meeting Needs of Young Children at Risk for or Having a Disability*, Early Childhood Educ. J. 509, 512 (2010).

[6] *See, e.g.,* Kelly D. Thomason, Note, *The Costs of a "Free" Education*, 57 Duke L.J. 457, 483-84 (2007). *See generally* 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, 605-24 (2013) (summarizing research on intersections of poverty, disability, and education).

[7] *See* Natalie A. E. Young, *Childhood Disability in the United States: 2019*, ACSBR-006, American Community Survey Briefs, U.S. Census Bureau (2021).

[8] Valverde, *supra* n. 4, 41 Fordham Urb. L.J. at 608.

[9] Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *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*

even a high school education or who do not speak English. While many parents, desperate to help their children, mortgage their homes and raid their retirement funds to fund attorneys and experts, others do not have those options.

That families find it difficult to find attorneys to help with special education cases is well established.[10] Congress recognized that non-profits could use attorneys' fees "to expand services to low income individuals." S. Rep. No. 99-372, at 17. *Amici* know that nonprofits use attorneys' fees to fund both individual representation of children with disabilities and systemic reform efforts, as Congress intended. Even so, non-profits can handle only a fraction of the need.[11] Because monetary damages are not available under IDEA, contingent arrangements based on splitting monetary awards are not available.

B. Unrepresented families face great difficulties in challenging school districts' denials of FAPE.

Special education law has been recognized by courts 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). Besides expertise in special education law, attorneys

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also Thomason, *supra* n. 4, at, 483-84.

[10] *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).

[11] For example, New York Legal Assistance Group's 2020 annual report notes it represented 330 students with disabilities in special education matters. http/s/nylag.org/wp-content/uploads/2021/10/NYLAG_2020AnnualReport.pdf, at 9.

require proficiency in evaluating educational policy and practices and in interpreting complex assessment data obtained by experts in neuropsychology, behavior, speech and language, and other fields.

Unlike parents, who often cannot afford attorneys and experts,[12] schools are represented by staff or attorneys[13] with expertise in special education law and can use school staff for experts (without incurring additional expenses) and can afford to pay experts.[14] That schools have resources for their defense creates an imbalance between parents and school districts. DOE employees typically represent DOE in administrative hearings, and the New York City Law Department represents DOE in court. These employees get paid, on time, regardless of the outcome of their cases. In contrast, fee awards are contingent on victory and often delayed, perhaps for years, until a final court decision on fees and payment by the Comptroller's office. Indeed, for school districts, protracted litigation simply delays adverse

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[12] *See* Richard D. Marsico, *The Intersection of Race, Wealth, and Special Education: The Role of Structural Inequities in the IDEA*, 66 N.Y. L. Sch. L. Rev. 207, 229-30 (2021-2022); *see also Arlington Cent. 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).

[13] A Massachusetts study found that schools were always represented, but parents were only represented in 40.3% of the cases, 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 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. 42, 453 (2012).

decisions—and the need to pay for FAPE. In contrast, parents usually cannot afford 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. For example, if a parent brings a letter from her child's treating specialist to submit as evidence at the hearing, the school district's attorney might succeed in barring the letter with a hearsay objection when an attorney would have known a witness or affidavit was necessary. Even when DOE representatives are not presenting witnesses, they conduct cross-examinations with parents among the witnesses. Cross examinations are daunting for parents, who need preparation by an attorney.

Impartial hearing officers (IHOs) cannot assist *pro se* litigants out of fear that doing so "would unfairly "favor a *pro se* parent when they are not following the required procedures."[15] Thus, *pro se* parents may lose even clearcut claims.

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 who had counsel were far more likely to succeed in IDEA claims.[16] "There is growing

[15] Lukasik, *supra* n.2, 118 W. Va. L. Rev. at 775.
[16] *See* n.2, *supra*.; *see also* Blackwell, s*upra* n.12, at 7 (over an eight-year period, Massachusetts parents who had counsel won 30.8% of the cases, lost 39.4%, and had

literature on the problem of economic disparities in the implementation and enforcement of IDEA, including the fact that wealthier parents use the private enforcement mechanisms more than poor parents do."[17]

As Representative George Miller observed in support of passing IDEA's fee-shifting statute, "without the ability to pay, parents' ability to exercise the due process rights which are the heart of [IDEA] becomes meaningless. A right which is unaffordable is no right at all." 131 Cong. Rec. H31376 (Nov. 12, 1985).

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mixed decisions in 29.8%*se* parents prevailed in 10.7% of the hears, lost 68.7% and had mixed decisions in 20.4%); 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, 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.

[17]Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 Notre Dame L. Rev. 1413, 1417-18 (2011).

CONCLUSION

For the reasons stated above and in appellants' brief, COPAA respectfully requests that this Court reverse the Order of the district court.

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Respectfully submitted,
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