Case No. 12-56627

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G.M. and R.M.

Plaintiffs,

v.

Saddleback Valley Unified School District

Defendant.

Appeal from The United States District Court
for the Central District of California
The Honorable David O. Carter, Presiding

Brief of Amici Curiae Disability Rights Legal Center, Disability Rights California, Public Counsel Law Center, Learning Rights Law Center, Children's Rights Clinic at Southwestern Law School, Pepperdine University School of Law Special Education Advocacy Clinic, Loyola Law School Center for Juvenile Law and Policy, and University of San Diego Legal Clinics in Support of Appellants and Reversal of the Fee Award

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INTERESTS OF AMICI CURIAE

Amici Curiae are non-profit organizations dedicated to ensuring that children with disabilities are provided the free and appropriate public education guaranteed by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. Amici represent low-income families in administrative proceedings and litigation against school districts to enforce rights guaranteed under the IDEA. Amici will be unable to pursue these meritorious claims and the IDEA's purpose will be frustrated if courts allow a defendant school district to recover attorneys' fees without a showing that the plaintiff's claims were frivolous, unreasonable, or without foundation. Each amicus and its specific interests are described below. This brief is submitted with the consent of all parties pursuant to Fed. R. App. P. 29(a).

Disability Rights Legal Center: The Disability Rights Legal Center ("DRLC") is a non-profit legal organization that was founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle against ignorance, prejudice, insensitivity, and lack of legal protection in their endeavors to achieve fundamental dignity and respect. The DRLC assists people with disabilities in attaining the benefits, protections, and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, the IDEA, and other state and federal laws. Its mission is to

champion the rights of people with disabilities through education, advocacy, and litigation. The DRLC is a recognized expert in the field of disability rights.

Disability Rights California: Disability Rights California is a non-profit agency mandated under federal law to advance the legal rights of Californians with disabilities, including children enrolled in special education programs. (Protection and Advocacy for Individuals with Developmental Disabilities, 42 U.S.C. §§ 6000 *et seq.*; Protection and Advocacy for Individuals with Mental Illness, 42 U.S.C. §§ 10801 *et seq.*; Protection and Advocacy for Individual Rights, 29 U.S.C. § 794e.) Disability Rights California legal staff provide free referral and advice, as well as representation in individual and class action cases. Its work includes representing youth from low income families in administrative hearings and appeals in state and federal court brought under the IDEA.

Public Counsel Law Center: Public Counsel Law Center ("Public Counsel") is the largest pro bono law office in the nation. The Children's Rights Project at Public Counsel provides legal representation, advocacy, and social work support to low-income children and families, specializing in complex cases involving multiple legal issues. Public Counsel ensures that youth with disabilities, particularly court-involved youth, have access to a free appropriate

public education through court-based legal clinics, direct representation, local and state policy advocacy, and impact litigation.

Learning Rights Law Center: Learning Rights Law Center provides legal services to ensure that all students are provided with equitable access to the public education system, with a focus on low-income children that have learning disabilities, face discrimination, or are involved in the dependency or juvenile justice systems. Learning Rights Law Center enforces the protections under the IDEA by providing direct representation in over 200 legal matters per year, parent training to over 200 families per year, and brief legal services to over 300 families per year.

Children's Rights Clinic at Southwestern Law School: The Children's Rights Clinic ("CRC") was founded with the mission of teaching law students practical lawyering skills while providing high quality legal representation to low-income families in Los Angeles County in the areas of special education and school discipline. The CRC represents children with disabilities and their families to ensure that they receive the free and appropriate public education that they are entitled to under the IDEA and the Rehabilitation Act of 1973.

Pepperdine University School of Law Special Education Advocacy Clinic: The Pepperdine University School of Law Special Education Advocacy Clinic ("PSEAC") has provided free advocacy and legal services to children with

disabilities and their parents in matters related to the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and other state and federal laws for more than ten years. PSEAC also provides free teaching and training services to parents, educational agencies, professional organizations, and others relative to special education law issues, and the development of the knowledge and skills necessary for collaborative decision making in its processes. In addition, PSEAC provides advocacy relative to legal and public policy issues connected to Special Education Law under the IDEA.

Loyola Law School Center for Juvenile Law and Policy: The Loyola Law School Center for Juvenile Law and Policy ("CJLP") is an organization dedicated to reforming the Los Angeles juvenile justice system through research, activism, and advocacy. One of the CJLP legal clinics, the Youth Justice Education Clinic provides direct legal representation for low income families in special education and other education-related matters. CJLP provides a voice for children, many with special education needs, involved in the Juvenile Justice System, and a point of convergence for students, faculty, stakeholders, and community members dedicated to the creation of a more humane and responsive justice and education system for children.

University of San Diego Legal Clinics: The University of San Diego ("USD") Legal Clinics, Education and Disability Clinic, was founded in 2003 with

the dual purpose of training upper division law students in the practice of education and disability law, while providing free legal services to lower income families in San Diego County. It is one of eleven such client clinics at the USD School of Law. These clinics, some of which began over forty years ago, are dedicated to representing clients in diverse areas of law – clients who could not otherwise possibly afford legal representation. The Education and Disability Clinic offers legal advice and representation for claims under the Individuals with Disabilities Education Act, the Rehabilitation Act of 1973 and California's Lanterman Act. At any given time, this clinic has 25-30 open cases, working with the parents of children with special needs.

STATEMENT PURSUANT TO F.R.A.P. 29(c)(5)

No party's counsel authored this brief in whole or in part. No person other than amici curiae, their members, and their counsel contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

The IDEA guarantees every child with a disability the right to a free and appropriate public education. Recognizing that private lawsuits are essential to enforcing this right, and that many parents could not otherwise afford to pursue such lawsuits, the IDEA permits a court to award attorneys' fees to any parent who prevails on a claim against a school district. Without this provision, it would be difficult for public interest organizations like amici to accept IDEA cases and assist parents in vindicating their rights.

As with most civil rights litigation, however, Congress chose to guard against the risk of frivolous lawsuits that by nature would not advance the IDEA's purpose. To that end, the IDEA allows school districts to recover fees against parents and their attorneys in exceptional cases where the litigation was "frivolous, unreasonable, or without foundation" or "presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation."[1] Awarding attorneys' fees to prevailing school districts in anything other than this tightly circumscribed set of cases would deter legitimate claims and make it more difficult for economically disadvantaged parents to secure representation. Parents, public interest organizations like amici, and other

[1]As explained in Appellants' opening brief, an IDEA claim cannot be "presented for an improper purpose" unless it is also "frivolous, unreasonable, or without foundation." (*See* Appellants' Br. at 47.)

attorneys will be less likely to file legitimate claims if they know that doing so comes with the risk of an adverse fee award. This is especially true in cases that test the boundaries of existing law (and therefore carry the greatest risk of losing), which are often the cases most important to protecting and advancing civil rights.

The district court's fee award upsets the careful balance struck by Congress between, on the one hand, deterring truly frivolous lawsuits, and, on the other hand, leveling the playing field to encourage important civil rights litigation. Unless overturned, the fee award will chill legitimate claims that, like the one here, failed because of a difficult, fact-intensive inquiry with little to no guiding precedent. If only those parents with clearly winning cases have the incentive to pursue them, the role of litigation in enforcing the IDEA's substantive protections will go largely unrealized. By reversing the district court's fee award, this Court will send a clear message that district courts must respect the scheme Congress envisioned for enforcement of the IDEA.

ARGUMENT

I. THE IDEA'S FEE PROVISIONS ARE ESSENTIAL TO ENFORCING THE STATUTE.

Congress enacted the IDEA to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). To accomplish this goal, the Act requires

state and local educational agencies to identify and evaluate students who may have disabilities and to create individualized education plans tailored to each such student. *See generally* 20 U.S.C. § 1411. The IDEA also establishes an office within the Department of Education to oversee its implementation. 20 U.S.C. § 1402.

Rather than rely on regulatory oversight alone, the IDEA also provides mechanisms for parents and students to enforce their rights. *See* 20 U.S.C. § 1415; *Board of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982) ("It seems to us no exaggeration to say that Congress placed every bit as much emphasis on compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard."). Most notably, the Act gives parents the right to file an administrative complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). After filing a complaint, the parent has the right to an administrative hearing at which the parent is entitled to be represented by counsel or a non-attorney adviser, to present evidence and cross-examine witnesses, and to receive a public, written decision. 20 U.S.C. § 1415(f), (h). These procedural

safeguards help to "guarantee that the policy [behind the IDEA] is faithfully administered." *Moore v. District of Columbia*, 907 F.2d 165, 166 (D.C. Cir. 1990).

The due process protections for parents do not stop at the administrative level. If the parent loses or otherwise is "aggrieved by the findings and decision" at the administrative hearing, he or she has a right to file a civil action in state or federal court. 20 U.S.C. § 1415(i)(2)(A).

Importantly, the court is authorized to award attorneys' fees to parents who prevail in an action under the statute. 20 U.S.C. § 1415(i)(3)(B)(i)(I). When originally enacted in 1970 as the Education of the Handicapped Act, the IDEA did not provide for attorneys' fees, and courts were divided as to whether parents could recover fees under a separate statute, such as 42 U.S.C. §§ 1983 and 1988 or the Rehabilitation Act of 1973. *See Smith v. Robinson*, 468 U.S. 992, 1004 & n.8 (1984) (collecting cases). When the Supreme Court resolved that split in favor of defendants, *see id.* at 1009-13, Congress responded by passing the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986), which expressly authorized courts to award attorneys' fees "to a prevailing party who is the parent of a child with a disability." 20 U.S.C. § 1415(i)(3)(B)(i).

As the legislative history reflects, Congress viewed lawsuits by families as a crucial means of enforcing the IDEA, and sought to make such litigation a realistic option for those at all income levels by providing for attorneys'

fees to prevailing parents. As Senator Weicker explained, "unless the [IDEA] is to become a mere hollow pronouncement which the financially strapped parents and legal representatives of handicapped children cannot enforce, Congress must guarantee legal counsel to assist parents in obtaining what is guaranteed to them by the [IDEA]." 131 Cong. Rec. S10398 (1985).

In 2004, Congress amended the IDEA to allow attorneys' fee awards to prevailing school districts if the litigation was "frivolous, unreasonable or without foundation," or "presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III). This amendment adopted the well-settled standard for awarding fees to defendants in civil rights litigation established by the Supreme Court in *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). It did not alter the statutory premium on facilitating meritorious IDEA litigation. *See R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1118, 1125 (9th Cir. 2011).[2] As this Court has recognized, the provision allowing fee awards to school districts must yield to "the IDEA's objective of 'ensur[ing] that the rights of

[2] Indeed, it is unclear whether the 2004 amendment even changed the law, as the 1986 Senate Report reflected the committee's view that the rule of *Christianburg* would apply to the IDEA even in the absence of express statutory text. S. Rep. No. 99-112, at 14 (1986).

children with disabilities and parents of such children are protected.'" *Prescott*, 631 F.3d at 1126 (quoting 20 U.S.C. § 1400(d)(1)(B)).

II. A PROPER READING OF THE IDEA FEE PROVISIONS ENSURES ACCESS TO JUSTICE AND ENFORCEMENT OF THE IDEA.

A. The Award of Attorneys Fees to Prevailing Parents Enables Enforcement of the IDEA by Those Who Need Its Protections Most.

The need to enable enforcement of the IDEA has not diminished since Congress first provided for fee awards to prevailing plaintiffs. In a 2008 report to Congress on the implementation of IDEA, the U.S. Department of Education found that *only nine states*—not including California, where the case at bar arose—were "determined to have met IDEA, Part B," which applies to children ages 3 through 21. U.S. Dep't of Educ., *30th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* at 155-163, 164 (Table 44) (2008), *available at* http://www2.ed.gov/about/reports/annual/osep/2008/parts-b-c/30th-idea-arc.pdf . The Department found that the vast majority of states and territories (including) "need[] assistance" in meeting IDEA requirements, while 11 states and territories "need[] intervention." *Id*.[3]

Although most states are not meeting their obligations under the IDEA consistently, relatively few families pursue litigation. In 2000, for example,

[3] Several of these states are in the Ninth Circuit: Arizona, California, Idaho, Montana, Nevada, and Washington.

only about five due process hearings were held per 10,000 students with disabilities, with high-income school districts accounting for *13 times more* due process cases than low-income school districts. *See* U.S. Government Accounting Office, Report No. GAO-03-897, *Special Education: Numbers of Formal Disputes are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts*, at 3, 15 (2003), *available at* http://www.gao.gov/assets/240/239595.pdf. The number of civil actions filed in court is even smaller, averaging between 300 and 400 per year *nationwide*. *Id.* at 1 n.2 (in the 1998-99 school year there were an estimated 301 civil actions nationwide); *see also* Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1423 (2011) (between 3000 and 7000 due process hearings are held each year, about 300 to 400 of which proceed to litigation); Office of Administrative Hearings, Special Education Division, *Second Amended Quarterly Data Report, Fourth Quarter 2011-2012* Fiscal Year, at 18 (2012) ("*OAH 2011-2012 Report*") (only 171 special education administrative decisions have been appealed in California since July 2005).[4] These statistics show that IDEA litigation is a rarity. Creating further obstacles to

[4] *available at* http://www.documents.dgs.ca.gov/oah/forms/2008/SE%20Quarterly%20Report%20Q4%20FY%2011-%2012%20Final%20SECOND%20AMENDED.pdf

pursuing IDEA claims will make litigation even more uncommon, eroding an important check on school districts.

Though rarely used, litigation is recognized as the "most effective means of enforcing the statute." *District of Columbia v. Ijeabuonwu*, 642 F.3d 1191, 1196 (D.C. Cir. 2011). The role of pro bono organizations like amici in protecting the IDEA rights of parents and students through litigation is especially important. As Congress realized in 1986, many parents aggrieved under the IDEA cannot afford counsel. *See S.H. ex rel. A.H. v. Plano Ind. Sch. Dist.*, 487 F. App'x 850, 867 (5th Cir. 2012) (Haynes, J., concurring and dissenting). That remains true today, as a disproportionate number of special education students live in low-income households, many in poverty:

> More than one-third of students with disabilities live in households with annual incomes less than $25,000, and one-quarter of students with disabilities live in poverty. Additionally, only half as many children with disabilities live in households with more than $75,000 in annual income as do other children. This likely occurs because both mothers and fathers of students with disabilities tend to have much lower levels of education than the parents of other students. Finally, approximately one-quarter of students with disabilities receive money from at least one governmental benefit program, such as Temporary Assistance for Needy Families, food stamps, or Supplemental Security Income.

Kelly D. Thomason, Note, 57 DUKE. L.J. 457, 483-84 (2007) (citing Mary Wagner et al., *The Children We Serve: The Demographic Characteristics of Elementary*

and Middle School Students with Disabilities and Their Households 24, 28 (2002), *available at* http://

www.seels.net/designdocs/SEELS_Children_We_Serve_Report. pdf.))

Wealth is highly correlated with education, literacy, and other resources that might make it easier to either hire an attorney or proceed without one. *See* Bureau of Labor Statistics, *Education Pays*, *available at* http://www.bls.gov/emp/ep_chart_001.htm (identifying disparity in earnings and unemployment rate based on level of education). It is therefore no surprise that IDEA disputes are "more prevalent in districts that [are] large, urban, and/or ha[ve] high median family income." Lynn M. Daggett, *Special Education Attorney's Fees: of* Buckhannon*, the IDEA Reauthorization Bills, and the IDEA as Civil Rights Statute*, 8 U.C. DAVIS J. JUV. L. & POL'Y 1, 28 (2004). Significantly, "the parent success rate is about 40 percent higher for parents represented by an attorney." *Id.* at 24-26.

As a result of these socioeconomic realities, those parents with the greatest need are the least likely to be able to afford legal counsel. Parents often must rely on organizations like amici to represent them in IDEA proceedings or else go it alone and face a much lower probability of success. *See* Elisa Hyman, et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. OF GENDER, SOCIAL

POL'Y & THE L. 107, 114 (2011) ("As can be expected families with attorneys prevail more frequently in due process hearings than those who proceed pro se."); Daggett, *Special Education Attorney's Fees*, *supra*, at 28. Amici, in turn, rely on attorneys' fee awards to finance IDEA litigation. *Cf.* Roy D. Simon Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L.J. 1069, 1070 (1989) ("Attorney fees awarded to prevailing plaintiffs by statute are a significant source of funding for nonprofit public interest groups that sponsor litigation.").

The IDEA's fee-shifting provisions are therefore essential to ensuring access to justice for low-income families and enabling the statute's enforcement.

B. Uncertainty Surrounding the Standard for Awarding Fees to School Districts Will Distort Incentives.

The risk of five- or six-figure awards *against* amici and other similar organizations would pose an even greater threat to their ability to represent clients in IDEA proceedings. That is precisely why the *Christianburg* standard reflected in the statute sets a strict and high bar for fee awards to school districts, authorizing such awards only when claims are truly frivolous or unreasonable. If courts misapply or create uncertainty surrounding that standard, the specter of an adverse fee award will have a chilling effect on meritorious IDEA litigation. *See Christianburg*, 434 U.S. at 422 ("To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the

efforts of Congress to promote the vigorous enforcement of [civil rights laws]."); *Prescott*, 631 F.3d at 1126 ("Lawyers would be improperly discouraged from taking on potentially meritorious IDEA cases if they risked being saddled with a six-figure judgment for bringing a suit where they have a plausible, though ultimately unsuccessful, argument.")

The threat that legitimate IDEA claims will be chilled is particularly acute because the likelihood of prevailing is already heavily skewed against the IDEA parent. Over the past five years in California, school districts have won at least a partial victory in 87 percent of administrative hearings under the IDEA. And they have won a complete victory in 56 percent of administrative hearings.[5] Given these statistics, amici cannot reliably expect to win even the most meritorious cases anywhere close to 100 percent of the time. And anytime the school district prevails on a claim, it crosses the threshold to recovering attorneys' fees. With the odds already stacked against them, amici will face substantial

[5] These figures are drawn from annual statistics published by the California Department of Education, available on its website at http://www.dgs.ca.gov/oah/SpecialEducation/Resources/SEReportArchive.aspx. In the last full year available, 2011-2012, the district prevailed 60% of the time and won a split decision 24% of the time. In 2010-11, the numbers were 63% and 22%; in 2009-2010, 63% and 22%; in 2008-09, 48% and 37%; and in 2007-08, 49% and 41%. On average over the five-year period, the district won a complete victory 56% of the time, a partial victory 31% of the time, and, it follows, one or the other 87% of the time.

additional uncertainty and risk in pursuing legitimate IDEA litigation if the *Christianburg* standard is not strictly enforced.

Such uncertainty will also discourage appeals of adverse administrative decisions. Because parents lose so frequently at the administrative level, appeals are necessary to correct errors and protect the fairness of the system. A significant number of cases appealed from administrative hearings—roughly 30 percent in California—settle during the appeal, presumably resulting in at least some form of relief to parents. *See OAH 2011-2012 Report*, *supra*, at 18 (49 of 171 OAH decisions appealed since 2005 have settled). Yet litigants are likely to forego such appeals if the outcome might leave them on the hook for the school district's fees.

The prospect of a chilling effect is not theoretical. Since 2004, when the IDEA was amended to authorize fee awards to school districts, due process hearing requests have declined year after year, reversing what had been a steadily upward trend in due process filings until that time. *See* Stephen Lipscomb, *Resolving Special Education Disputes in California*, Public Policy Institute of California, at 9-10 & Fig. 1.3 (Feb. 2009), *available at* http://www.ppic.org/content/pubs/report/R_209SLR.pdf. In other words, the very availability of a fee award to prevailing school districts correlates with a decline in due process filings under the IDEA. Although this may suggest to some that the statute has been effective in preventing

frivolous litigation, the low number of overall filings indicates that there is not a flood of frivolous litigation in this area and that parents and attorneys are already self-policing. If the standard for fee awards to prevailing school districts is not faithfully administered, even more due process filings are likely to be chilled. Because the number of filings is now so low, the potential of a further reduction presents a serious concern that families with legitimate clams will not be able to find counsel to represent them.

Unfortunately, the chilling effect will be more pronounced in the areas where litigation is needed most. That is, the risk of a fee award will be greatest in the most difficult cases, but those are precisely the cases where school districts are most likely to deny services to families in need.

C. The IDEA Fee Provisions Protect the Need for Risk-Taking to Enforce Civil Rights.

1. Taking Calculated Risks is an Important Means for Advancing the IDEA and Other Civil Rights.

The danger of deterring the most difficult cases should not be underestimated. This is not to say that the courts should welcome all litigants, regardless of motive or the legitimacy of their claims. As the IDEA recognizes, truly frivolous litigation should be deterred. That type of litigation places an unnecessary burden on overworked courts and agencies, as well as school districts. Perhaps more importantly, it generates mistrust and cynicism of legitimate lawsuits

brought by parents like those represented by amici. Because it is in no one's interest to bring truly frivolous claims, amici police themselves and select cases with care.[6]

Within those bounds, however, taking risks on novel or difficult cases is essential to safeguarding the rights protected by the IDEA and effectuating the statute's purpose. "[T]he plaintiff is the chosen instrument of Congress to vindicate" the civil rights laws, which reflect "'a policy that Congress considered of the highest priority.'" *Christianburg*, 434 U.S. at 418 (quoting *Newman v. Piggie Park Enterprises*, 434 U.S. 400, 402 (1968)). "Even when unsuccessful, such suits provide an important outlet for resolving grievances" and "create[] respect for law." *Harris v. Maricopa County Superior Court*, 631 F.3d 963, 971 (9th Cir. 2011). It is for this reason that fees are available in civil rights cases to all *prevailing* plaintiffs, but only to defendants who face *frivolous* suits. *Contrast* 20 U.S.C. § 1415(i)(3)(B)(i)(I) *with id.* § 1415(i)(3)(B)(i)(II), (III). "This policy was adopted expressly in order to avoid discouraging civil rights plaintiffs from

[6] The self-policing is rigorous. For example, Amicus Disability Rights California received over 3,200 requests for legal assistance in proceedings under the IDEA, but has the capacity to represent only 10 to 20 parents in filing administrative or court actions. Similarly, Amicus Public Counsel met with the families of over 900 children with disabilities in 2011 and 2012 and had approximately 100 active special education cases at all times during that period. Despite the capacity to file more often, Public Counsel filed only 12 special education administrative actions and no special education court actions during those two years.

bringing suits, and thus 'undercutt[ing] the efforts of Congress to promote the vigorous enforcement of' the civil rights laws.'" *Harris*, 631 F.3d at 971 (quoting *Christianburg*, 434 U.S. at 422).

Taking calculated risks is a proud tradition in civil rights litigation. As recently as the early 1970s, the Supreme Court had never afforded heightened scrutiny to a law alleged to discriminate on the basis of sex, let alone struck down a law for that reason. Justice Ginsburg, then a law professor and a public interest lawyer, brought a series of cases—on behalf of some male and some female plaintiffs—that directly resulted in heightened scrutiny for gender discrimination and the invalidation of several discriminatory laws. *See* Fred Strebeigh, *Standard Bearer*, LEGAL AFFAIRS (2003), *available at* http://www.legalaffairs.org/issues/September-October-2003/feature_strebeigh_sepoct03.msp. Justice Ginsburg's example demonstrates why Congress places such faith in private litigants to enforce civil rights statutes. It also reflects the zealous advocacy expected of lawyers under the ethical rules. *See* ABA Model Rules of Prof'l Conduct, Preamble. In the civil rights context in particular, the law must "allow for constructive change through the efforts of diligent and conscientious lawyers. It is through legal imagination and ingenuity in pleading that evolution of the law occurs." *Franklin Mint Co. v. Manatt, Phelps & Phillips*, 184 Cal. App. 4th 313, 356 (2010) (quoting *Umansky v. Urquhart*, 84 Cal. App. 3d 368, 372 (1978)).

Amicus DRLC has served this very role in ongoing litigation against the Los Angeles Unified School District ("LAUSD") seeking to guarantee that special education students in the Los Angeles County jail who are 18 to 21 years old receive a free and appropriate education. This Court found that the case presented a "novel" question of statutory and regulatory interpretation for which there was "no controlling precedent," so the panel certified the question to the California Supreme Court. *See Los Angeles Unified Sch. Dist. v. Garcia*, 669 F.3d 956 (9th Cir. 2012). Without the prospect of recovering attorneys' fees to finance what has already been five years of litigation, DRLC could not have afforded to take this important case. It would have been even more difficult to do so if DRLC faced a risk of being ordered to pay the defendants' attorneys' fees simply because this was a question of first impression.

2. The IDEA Fee Provision for Prevailing School Districts Must be Narrowly Construed so as to Protect Calculated Risk-Taking.

For this reason, courts have appropriately recognized that the IDEA fee provision for prevailing school districts must be given a narrow reading. This Court has specifically warned that the IDEA does not permit "post hoc reasoning . . . that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *See Prescott*, 631 F.3d at 1126 (internal quotation marks omitted).

Rather, courts must make a clear distinction between a claim that fails and claim that is frivolous. A claim cannot be frivolous simply because the parent fails to state a claim for relief or because no reasonable jury could find in his favor. *Hughes v. Rowe*, 449 U.S. 5, 15-16 (1980) ("Allegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, 'groundless' or 'without foundation' as required by *Christiansburg*."). That is the minimum required for a school district to prevail on the merits before trial. If that were also sufficient to award the school district fees, the IDEA fee provision could stop at "prevailing party," as it does for parents seeking fees. The statute does not, of course, read that way, and courts regularly reject fee applications from prevailing school districts in IDEA cases. *See, e.g.*, *Prescott*, 631 F.3d at 1121-27 (affirming hearing officer's conclusion that school district did not violate the IDEA but rejecting request for fees because parents' claim was not frivolous); *District of Columbia v. Barrie*, 741 F. Supp. 2d 250, 260-67 (D.D. C. 2010) (rejecting district's request for fees even though district was prevailing party).

Similarly, fee awards against losing plaintiffs are inappropriate where there is no clear law on the issue or there is a reasonable argument for extending or changing existing law. *Int'l Bhd. of Teamsters v. Silver State Disposal Serv., Inc.*, 109 F.3d 1409, 1412 (9th Cir. 1997) (quoting *Parks Sch. of Business, Inc. v. Symington*, 51 F.3d 1480, 1489 (9th Cir. 1995)) (refusing to award attorneys' fees

where the Ninth Circuit had not applied the underlying legal doctrine on which defendant prevailed in a published opinion for more than a decade, and there was a "dearth of case law defining the precise contours of the exceptions to the doctrine"); *Larez v. Holcomb*, 16 F.3d 1513, 1522 (9th Cir. 1994) ("[W]e must exercise extreme caution in sanctioning attorneys under Rule 11, particularly where such sanctions emerge from an attorney's efforts to secure the court's recognition of new rights"). There is good reason for this rule. As this Court has explained, "[f]orceful representation often requires that an attorney attempt to read a case or an agreement in an innovative though sensible way. Our law is constantly evolving, and effective representation sometimes compels attorneys to take the lead in that evolution." *See Operating Engineers Pension Trust v. A–C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988). Sanctioning such conduct would "chill not only the *zeal* but the *creativity* of lawyers who operate on the leading edge of legal development." *Franklin Mint Co.*, 184 Cal. App. 4th at 356.

Protecting that zeal and creativity is especially important in the civil rights arena, where many of the most significant advances have been made by pushing the boundaries of existing law. *See Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363 (9th Cir. 1990) (en banc) ("Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of

individuals seeking to have the courts recognize new rights."). That is how Justice Ginsburg prevailed in her campaign to open the courts to victims of sex discrimination. It is also how the NAACP paved the road to *Brown v. Board of Education* and, more recently, how Lambda Legal brought *Lawrence v. Texas* to the Supreme Court and won. *See* Ahsaki Anokye, *America in Lawyers' Hands: Lawyers as Social Actors*, 23 GEO. J. L. ETHICS 455, 461 (2010) (recounting the NAACP's efforts leading to the *Brown* decision); Dahlia Lithwick, *Extreme Makeover*, THE NEW YORKER (March 12, 2012) (same for Lambda Legal and *Lawrence*).[7] Those cases pushed against, and required the Supreme Court to overturn clear precedent—*Plessy v. Ferguson* in the case of *Brown*, and *Bowers v. Hardwick* for *Lawrence.*

For these reasons, attorneys' fees for prevailing school districts are authorized under the IDEA only in the most egregious cases, where "the result appears obvious or the arguments are wholly without merit," *Galen v. County of Los Angeles*, 477 F.3d 652, 666 (9th Cir. 2007), and there is "no reasonable argument to extend, modify, or reverse the law as it stands." *Strom v. United States.*, 641 F.3d 1051, 1059 (9th Cir. 2011); *see also Am. Fed'n of State, County & Mun. Employees, AFL–CIO v. County of Nassau*, 96 F.3d 644, 652 (2d Cir.

[7] *available at* http://www.newyorker.com/arts/critics/books/2012/03/12/120312crbo_books_lithwick?currentPage=all (last visited Feb. 22, 2013).

1996) (fees may be authorized if the case is based on "an unmitigated tissue of lies," but "[a] claim is not necessarily frivolous because a witness is disbelieved or an item of evidence is discounted, disproved or disregarded at trial.").[8]

III. AN OVERLY BROAD READING OF THE IDEA FEE PROVISION FOR PREVAILING SCHOOL DISTRICTS WILL CHILL A SUBSTANTIAL AMOUNT OF MERITORIOUS LITIGATION.

If courts deviate from the text of the IDEA fee provision for prevailing school districts and the proper reading given to it by this Court, that will leave amici without clear guidance on when they can file IDEA suits without facing a serious risk of an adverse fee award. As the case at bar illustrates, this risk could arise in a number of ways.

First, courts deter legitimate litigation by finding fact-intensive claims frivolous where there is a dearth of case law on point. The relevant legal standards under the IDEA are fact-intensive, and there are relatively few cases—particularly appellate cases—applying those standards. As a result, courts must be especially careful in ruling on requests for fees by school districts and rarely should a fee award be appropriate.

This case is an excellent example of the danger. The district court's finding that the child find claim was frivolous is extremely troubling. The statute

[8] These cases address the similar Rule 11 standard, which this Court has looked to for guidance in interpreting the IDEA fee provision for prevailing defendants. *Prescott*, 613 F.3d at 1125.

requires a fact-intensive analysis of when the school district should have identified a child with a potential disability. The statute itself sets no strict rule, and courts have held that "evaluation should take place within a 'reasonable time' after school officials are put on notice that behavior is likely to indicate a disability." *W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir. 1995), *abrogated on other grounds by A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d Cir. 2007); *see also Sch. Bd. v. Brown*, 769 F.Supp.2d 928, 942 (E.D. Va. 2011) (same). "That is, the child-find duty is triggered when the [school district] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability." *Department of Educ.* v. *Cari Rae S.*, 158 F.Supp.2d 1190, 1194 (D. Hawaii 2001). This standard leaves a great deal of room for lawyers to argue about when the district should have been on notice, and how long after that time it would have been reasonable for the district to wait before taking action.

Amici are aware of no Ninth Circuit authority applying the child find test that would have provided further guidance to the parent or her lawyers in this case. Given the dearth of relevant authority, there was no way for the mother or her counsel to predict that three months was "per se insufficient" for the District to form a suspicion that the child had a disability that could require special education services, as the district court ruled. (Order Affirming Administrative Law Judge's Decision ("Merits Order") at 13.); *Sensations, Inc. v. City of Grand Rapids*, 526

F.3d 291, 303 (6th Cir. 2008) (reversing award of attorneys' fees where plaintiff "could not have known of this hypothetical legal conclusion in advance," and "was not on notice that such a claim could not succeed in district court.")

The child find claim here was not without reasonable factual support. The mother showed the school guidance counselor an email from the student's therapist concerning the student's emotional condition, and followed it up with her own letter requesting an assessment. Whether those facts support a child find claim is a difficult question—indeed, one that took the district court six full pages to address (*See* Merits Order at 9-14)—and the court ultimately found that the child find duty had not been triggered. But there was no clear, let alone binding, authority mandating that result. Finding a claim to be frivolous and awarding fees under such circumstances will deter legitimate child find claims and risk under-enforcement of that important aspect of the IDEA.

Second, courts will deter legitimate IDEA claims if they invite prevailing school districts to move for attorneys' fees simply because the parent loses, or worse, because the court disagrees that the parent should be able to pursue a claim or remedy expressly permitted by law.

Again, this case is a perfect example. R.M.'s mother sought reimbursement from the District for the costs of private schools in which she had enrolled her child. In affirming the administrative decision in favor of the District,

the district court excoriated the mother for treating "public schools [as] piggy banks that parents may raid to fund their children's attendance at for-profit or religious schools that the parents prefer," and invited the District to "file a motion" to recover its litigation expenses. (Merits Order at 17.) Under clear Supreme Court precedent, however:

> IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.

Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247 (2009). In other words, the form of relief sought by the mother, which so troubled the district court, is expressly authorized by the IDEA.

To be sure, not *every* plaintiff is entitled to reimbursement for private school education. But the statute does not *foreclose* relief to parents on that basis alone, and it is not per se frivolous or improper for a parent to pursue that remedy.[9] The mother pointed this out in opposing the fee motion, and the district court ultimately justified its fee order on other grounds. But the contrast between the basis on which the district court invited the fee motion, and the grounds it

[9] In contrast, an example of a truly frivolous claim would be an IDEA claim by a plaintiff seeking prospective relief for a 25-year old, in spite of the statute's cut-off at age 22. *See* 20 U.S.C. § 1412(a)(1)(A) (establishing right to special education for children "between the ages of 3 and 21, inclusive").

subsequently offered in its order justifying the fee award—many of which were not even raised by the school district in its motion for fees—is striking, and suggests the type of post-hoc reasoning that the statute forbids.

Third, courts will deter potentially meritorious claims by finding frivolousness based on a determination that the school district's version of events is more credible that the parent's. As is the case with many disputes that result in litigation, parents and school districts often have differing recollections of the interactions they had before they resorted to the administrative or judicial process. It is incredibly difficult, if not impossible, for an attorney to predict whose testimony the court will credit. If the dividing line between reasonable claims and frivolous or unreasonable claims depends on a credibility battle between school district and parent about a key event in the case, it will be very dangerous to bring IDEA cases and the number of them pursued will decrease accordingly.

Once again, this case illustrates that risk. One of the primary reasons the district court gave for its fee award was that the mother acted unreasonably by denying the school district the opportunity to provide the relief she sought. (*See* Order Granting in Part District's Motion for Attorney's Fees ("Fee Order") at 4-6.) This conclusion was based on the court's finding that the mother had refused the district's offer to refer the student to a local agency for a mental health evaluation, which, according to the court, was a necessary step before the district could

provide the counseling and therapy services the mother wanted for her child. (*See id.* at 4 (faulting the parent for "refusing to sign the referral paperwork for a mental health assessment by OCHCA").) But there was a factual dispute as to when the school district made the offer. The offer was not documented in the initial IEP, so this factual dispute came down to credibility: the parent testified that the offer was not made at the initial IEP meeting; the district said it was. (*See* Administrative Record at 519-22, 1590; Plfs.' Merits Br. to District Court at 14-15; District's Opp. to Plfs.' Merits Br. to District Court at 8.)

On this record, there was a factual basis to argue that the IEP was inappropriate because the district did not offer a mental health evaluation as part of the IEP. That the district court ultimately found the school district's version of events more credible cannot be a basis for finding the claim frivolous, unreasonable, or without foundation. *EEOC v. Bruno's Restaurant*, 13 F.3d 285, 290 (9th Cir 1993) ("Even if [the plaintiff] had foreseen witness credibility problems," that would not justify a fee award, because "an 'airtight' claim is not a prerequisite to bringing suit"); *Crane-McNab v. County of Merced*, 773 F.Supp.2d 861, 881 (E.D. Cal. 2011) ("[A] court should not find a claim to be frivolous just because the evidence presented in support of that claim was discounted because of a credibility problem or a weighing of the evidence"). The parent was entitled to make the argument, even if she was not guaranteed to prevail. If, as here, school

districts are awarded fees in cases where they prevailed because their version of contested facts was credited over the parent's (and both versions were reasonable), only those parents who are willing to accept the school district's version of the facts will have reason to proceed.

Finally, courts deter legitimate claims by awarding fees based on what they view as unreasonable conduct outside of litigation. While a parent's obstructive pre-litigation conduct may in some cases be evidence that his or her claims were pursued for an improper purpose, such as harassment or delay, that conduct cannot be the tail that wags the dog of a fee award. The IDEA allows a school district to recover attorneys' fees only when the parent pursues a "complaint" or "cause of action" that is frivolous, unreasonable, or without foundation. 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III). It does not authorize fees for unreasonable conduct in dealing with the school district outside of litigation. *Cf. Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540-42 (9th Cir. 1986) (refusing to allow Rule 11 sanctions beyond the circumstances dictated in the text of the rule). Indeed, it would be especially unfair to penalize *attorneys* by ordering them to pay fees for conduct that occurred outside of their purview or before they became involved in the matter.

In *District of Columbia v. Nahass*, 699 F. Supp. 2d 175, 179 (D.D.C. 2010), for example, the school district argued that a parent's attorney had acted

with an improper purpose because there was no evidence that he made the student "available or attempted to contact [the district] regarding scheduling the evaluations" already authorized by the district. The court rejected this argument, finding it "simply irrelevant to the issue of whether [the parent's attorney] filed the due process complaint 'to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.'" *Id.* at 184. Absent some litigation-related requirement to produce the student for evaluation or meet with the district prior to filing suit, the attorneys' failure to take these steps did not make his or his client's litigation motives improper. *See id.*

By contrast, in *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608-09 (9th Cir. 1982), the Court upheld an award of attorneys' fees to a Title VII defendant when the EEOC sued despite an "obvious disregard" for its obligation to attempt to conciliate the claim before doing so. Conciliation is a "jurisdictional condition[] precedent to suit by the EEOC" and is therefore necessarily connected to the EEOC's litigation conduct. *Id.*

Distinguishing between unreasonable non-litigation conduct and frivolous claims is particularly important in the IDEA setting. There can be a fine line between what a court may view as obstructive or unreasonable conduct toward a school district and what a parent may believe is necessary to further the best interests of his or her child. Parents often do not understand the IDEA process, and

their instincts about what is best for their child may not align with the steps that make the process run smoothly. *See* Hyman, et al., *How IDEA Fails Families Without Means*, *supra*, at 134. For example, they may be uncomfortable submitting their child to evaluations or disclosing medical and psychological records, all the while waiting while the student has not obtained any remedy. But there is no reason to believe that cases brought on behalf of such parents will be less meritorious than any other. The parent's behavior cannot change the fact of a child's disability, nor the school district's legal obligation under the IDEA to identify that child and provide him or her with a free, appropriate public education.

IV. CONCLUSION

Because IDEA litigation occurs primarily at an administrative level, there is very little district court law, and even less circuit law to guide district courts. In the absence of a clear statement from this circuit, some district courts have interpreted the IDEA fee provision outside the bounds of what the statute allows. That is what the district court did here, creating a serious risk of deterring legitimate IDEA claims and, along with that, undermining the substantive guarantees of the IDEA. Amici respectfully submit that, if the Court affirms on the merits, it should reverse the district court's fee award and reaffirm the narrow standard for awarding fees under the statute.

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

DATED: March 20, 2013

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains no more than 7,000 words, exclusive of the certificates, tables, and prefatory statements, as required by Federal Rules of Appellate Procedure 29(d) and 32(a).

March 20, 2013

/s/ Bryan H. Heckenlively
Bryan H. Heckenlively

9th Circuit Case Number(s) 12-56627

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