No. 12-56627

IN THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

G.M. and R.M.,

Plaintiffs-Appellants,

v.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
Case No. 8:11-cv-01449-DOC-MLG
The Honorable David O. Carter, Judge Presiding

AMICI CURIAE BRIEF OF COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC., AND CALIFORNIA ASSOCIATION FOR PARENT-CHILD ADVOCACY

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CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Federal Rule of Appellate Procedure 26.1. Amici Curiae have no parent corporations, subsidiaries or affiliates that have issued shares to the public.

Dated: March 20, 2013

Respectfully submitted,

s/ Michael N. Westheimer
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CONCISE STATEMENT OF INTEREST

The *Council of Parent Attorneys and Advocates, Inc.* (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes the key to effective educational programs for children with disabilities lies in collaboration between parents and educators as equal parties. To this end, COPAA does not undertake individual representation for children with disabilities, but provides training and resources for advocates and attorneys to help each child obtain the free appropriate public education ("FAPE") and special education services and supports guaranteed by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C § 1400 *et seq*., and other statutes. COPAA also assists children with disabilities in finding attorneys or advocates to represent them, and files amicus briefs on the IDEA and related issues.

California Association for Parent-Child Advocacy (CAPCA) is a volunteer-run, California-wide organization of parents, advocates, professionals and attorneys that monitors and sponsors policy and legislation affecting the education and life-long prospects of young children, adolescents, and young adults with disabilities. CAPCA is interested in this case as some of its members are parents who have considered or gone through due process, whose ability to do so would have been impaired had they imagined that they might have been required to bear the school district's legal fees except in the extreme or rare circumstance of

the case being frivolous. Other members are non-attorney advocates whose ability to recruit lawyers would be impaired by this ruling. The District Court's attorney fee order, if allowed to stand, will have a chilling effect on all of the various subgroups of CAPCA's organization with the result being a significant reduction in families pursuing legitimate special education claims against school districts.

All Parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In order to protect the rights of children with disabilities, families need access to counsel. Nothing in the IDEA nor any aspect of federal law authorizes interpreting IDEA's attorney fee-shifting provisions in a manner that curbs access to counsel for these children. This case is no exception. The IDEA requires the provision of FAPE to promote the highly important policy objectives of ensuring that public education prepares all children with disabilities for further education, employment and independent living. To that end, the IDEA contains several provisions to ensure that children with disabilities and their parents have access to legal counsel to help them navigate the IDEA's procedures. Congress did not enact the fee-shifting provision at issue in this litigation to increase needlessly the already formidable obstacles faced by individuals seeking to enforce their statutory rights under IDEA. Thus, this fee-shifting provision is limited to the exceptionally rare circumstance that an action is frivolous or filed for an improper purpose. This

Court and many other courts have recognized this provision must be interpreted under an onerous legal standard and invoked in only the most egregious of cases; otherwise it would create a chilling effect that would undermine the IDEA's statutory purpose.

In this action, in shifting fees to the student and her parents, the District Court misapplied settled precedent and ignored the evidence in the record. The District Court's misinterpretation of the fee-shifting provision severely frustrates IDEA's purpose, contravenes public policy and will discourage the relatively small legal community of advocates for educational rights of children with disabilities.

Amici agree with Appellants' persuasive arguments that the Student was entitled to a remedy under the IDEA. *See* Appellants' Opening Brief, filed on March 13, 2013 ("Opening Brief"). Amici will not repeat those arguments. Instead, Amici argue that the award of attorneys' fees to the school district was legal error that must be reversed. Precedent is clear that prevailing school districts can be awarded attorney's fees under IDEA only in the most egregious and rare circumstances, which were not present in this case.

ARGUMENT

I. The District Court Applied the Wrong Legal Standard in Ordering Appellants and Their Attorney to Pay Appellee's Attorneys' Fees

In an action under the IDEA, a prevailing school district can recover attorneys' fees in only two circumstances, against either:

- "the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation;" or
- "the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was 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) (2005).

Both of these provisions share a common trait: they are interpreted under an onerous legal standard that makes it extremely rare and difficult for a school district to recover attorneys' fees. Here, the District Court misapplied settled law by setting the bar too low, thereby undermining the purpose of the IDEA and hindering parents from being able to seek redress when their children with disabilities are denied the educational opportunities it guarantees.

A. The District Court Committed Legal Error in Holding that IDEA's "Frivolousness" Provision Justified an Award of Fees to the School District

1. The "Frivolousness" Provision Entitles a School District to Fees Only If There is No Evidence Which, If Believed, Would Entitle the Plaintiff to Relief

Section 1415(i)(3)(B)(i)(II) of the IDEA allows prevailing school districts to

recover fees for claims that are "frivolous, unreasonable, or without foundation," or which "clearly" become so during the litigation. 20 U.S.C. § 1415(i)(3)(B)(i)(II) (2005). Congress took this language directly from *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-422 (1978), which set the standard for awarding fees to prevailing defendants in cases arising under Title VII and 42 U.S.C. § 1988. *See* 150 Cong. Rec. S5349 (daily ed. May 12, 2004) (statement of Sen. Gregg) ("The first part of the amendment comes from the U.S. Supreme Court case of *Christiansburg* . . . .").

In 2011, the Ninth Circuit reaffirmed the *Christiansburg* standard, holding: "so long as the plaintiffs present evidence that, if believed by the fact-finder, would entitle them to relief, the case is *per se* not frivolous and will not support an award of attorney's fees." *R.P. v. Prescott Unif. Sch. Dist.*, 631 F.3d 1117, 1126 (9th Cir. 2011) (hereinafter "*Prescott*").

Other Circuit Courts of Appeal have reached the same conclusion. *AFSCME v. County of Nassau*, 96 F. 3d 644, 652 (2d Cir. 1996), *cert. den'd* 520 U.S. 1104 (1997) (holding that fee shifting under the frivolousness provision is unjustified "where evidence is introduced that, if credited, would suffice to support a judgment"); *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 186 (6th Cir. 1985), *cert. den'd* 473 U.S. 906 (1985) (holding that claims are not frivolous, unreasonable, or lacking in foundation when supported by "some evidence");

Oakstone Cmty. Sch. v. Williams, No. 2:11-cv-1109, 2012 U.S. Dist. LEXIS 130449, at *11-12 (S.D. Ohio Sep. 13, 2012) (same); *EEOC v. Consolidated Serv. Sys.*, 989 F.2d 233, 238 (7th Cir. 1993); *Sullivan v. Sch. Bd. of Pinellas Co.*, 773 F.2d 1182, 1189 (11th Cir. 1985) (stating that "[c]ases where findings of frivolity have been sustained . . . [are those in which] the plaintiffs did not introduce *any evidence* to support their claims"); *see also* Jessica Butler-Arkow, *The Individuals with Disabilities Education Improvement Act of 2004: Shifting School Districts' Attorneys' Fees to Parents of Children with Disabilities and Counsel*, 42 Willamette L. Rev. 527, 538 (2006).

Courts applying *Christiansburg*'s "some evidence" standard have consistently recognized that the standard is "extremely high," and that fees are shifted "very rarely and only in exceptional cases." Butler-Arkow, 42 Williamette L. Rev. at 536; *see Saman v. Robbins*, 173 F.3d 1150, 1157 (9th Cir. 1999) (attorneys' fees in civil rights cases should be awarded to the defendant only in "exceptional circumstances") (citing *Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1990)); *Riddle v. Egensperger*, 266 F.3d 542, 547 (6th Cir. 2001) (awarding fees to a defendant is "an extreme sanction, and must be limited to truly egregious cases") (citing *Jones v. The Continental Corp.*, 781 F.2d 1225, 1232 (6th Cir. 1986)); *Mitchell v. Moore*, 218 F.3d 1190, 1203 (10th Cir. 2000) (finding that "rarely will a case be sufficiently frivolous" for fees to shift); *Arnold v. Burger King Corp.*,

719 F.2d 63, 65 (4th Cir. 1983), *cert. den'd* 469 U.S. 826 (1984) (stating a fee award is a "conservative tool to be used sparingly").

The "some evidence" standard means that a claim is not rendered frivolous merely because it is unsuccessful. *Prescott*, 631 F.3d at 1126; s*ee also Sullivan*, 773 F.2d at 1189 (noting that the question is "whether the case is so lacking in arguable merit as to be groundless or without foundation rather than whether the claim was ultimately successful") (citing *Jones v. Texas Tech University*, 656 F.2d 1137, 1145 (5th Cir. 1981)). Nor is a claim frivolous simply because a fact-finder rejects the plaintiff's evidence or witnesses, *EEOC v. LB Foster Co.*, 123 F.3d 746, 752-53 (3rd Cir. 1997), *cert. den'd* 522 U.S. 1147 (1988), or finds the plaintiff's evidence unpersuasive, *EEOC v. Kenneth Balk & Assoc.*, 813 F.2d 197, 198 (8th Cir. 1997), or gives greater weight to the defendant's evidence, *Glymph v. Spartanburg Gen. Hosp.*, 783 F.2d 476, 480 (4th Cir. 1986). Rather, a claim is frivolous when the plaintiff fails to come forward with *any* evidence supporting the claim. Courts might award attorneys' fees to a prevailing defendant when the plaintiffs make "frivolous argument[s] with no chance of success," but will not award fees for merely "weak argument[s] with little chance of success." *Khan v. Gallitano*, 180 F.3d 829, 837 (7th Cir. 1999); *see also Bonner v. Mobile Energy Servs. Co., LLC*, 246 F.3d 1303, 1305 (11th Cir. 2001) (holding that the plaintiffs' "markedly weak" case was not frivolous).

2. The District Court Misapplied the "Frivolousness" Standard

Although the District Court paid lip service to *Prescott*, it misapplied the standard. The District Court acknowledged that "so long as the plaintiffs present evidence that, if believed by the fact-finder, would entitle them to relief, the case [was] per se not frivolous." *G.M. v. Saddleback Valley Sch. Dist.*, No. SACV 11-1449 DOC, 2012 U.S. Dist. LEXIS 169411, at *11 (C.D. Cal. Nov. 26, 2012) (hereinafter "Order") (citing *Prescott*, 631 F.3d at 1126).

Nonetheless, the District Court did not determine whether the record included "some evidence" which, if believed, would entitle the Student to relief. Instead, the District Court inquired as to whether the Student and Parent had identified a "fact dispute resolved against her that, had it been resolved in her favor, would have entitled her to relief," and stated that she had created "immaterial fact disputes." *Id.* at *11, 14. In rephrasing the *Prescott* standard, the District Court misconstrued the evidence in the record and misapplied the law.

As detailed in the Opening Brief, the five-volume Excerpts of Record undeniably contain abundant evidence, listed below, that could support relief:

- Student's therapist diagnosed her with and treated her for depression;
- Student's therapist informed the school district that she had a Major Depressive Disorder and other issues that negatively impacted her

ability to concentrate and focus on school work;

- The school district failed to meet its obligations in response to the therapist's reports;
- Although Student was failing four of six classes, the school district failed to conduct any initial assessment for special education and only acted after being notified she was being privately placed; and
- After the school district finally acknowledged the Student was eligible for services under the IDEA because she had an Emotional Disturbance and Other Health Impairment, it offered an Individualized Education Program ("IEP") that was wholly inadequate.

See Opening Brief, pp. 3-10, and corresponding citations to Excerpts of Record. Since there is evidence in the record that could have allowed Student to prevail, the action is not frivolous.

The District Court misinterpreted the underlying Administrative Law Judge ("ALJ") Decision as ruling that the Student's factual contentions did not entitle her to relief. This is a mischaracterization of the ALJ's Decision. Not once did the ALJ state or imply that Appellants' evidence, even if believed, would not entitle her to relief. Rather, the Decision is clear that the ALJ weighed evidence presented by both parties and simply found the Appellee's more persuasive. *See*,

e.g., ALJ Decision, Legal Conclusion 10 (acknowledging the existence of evidence in support of Appellants' claim for relief but finding it "insufficient"). The ALJ did not find the claim was frivolous or meritless, but merely that Student "failed to meet her burden." *Id.*, Legal Conclusion 52. That kind of shortcoming cannot and does not justify an award of attorneys' fees to Appellee.

Further, the District Court deviated from the Ninth Circuit's precedent by relying on an unpublished Fifth Circuit opinion for the proposition that the Parent was "stonewalling." Order at *5-9 (citing *El Paso Indep. Sch. Dist. v. Berry*, 400 Fed. Appx. 947, 2010 U.S. App. LEXIS 23153 (5th Cir. Nov. 8, 2010)). This has no bearing on the legal standard of whether there is "some evidence" in the record, but rather penalizes parents based on how they pursue their IDEA rights. *Cf. Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1051 (9th Cir. 2012) (penalizing "parents − and consequently [student] − for exercising the very rights conferred by the IDEA undermines the statute's fundamental purposes").

Other court rulings have deemed similar parental conduct to be irrelevant. For example, an Ohio district court recently declined to find a claim "frivolous" where experts testified that the student required forms of education that the school was not providing her and the parent made plausible arguments for an available remedy that would have provided educational benefit to her. *Oakstone Cmty. Sch.*, 2012 U.S. Dist. LEXIS 130449, at *12-14. Likewise, in this case, the parent

requested relief available under the statute and based expert testimony.

The District Court also deviated from the *Prescott* precedent by making the Parent's "unilateral" decision to enroll her child in a private school without notifying the school district a factor in its decision to award fees. In other cases, however, a parent's "unilateral" decision to enroll a child in an alternative school, even without notice, has not resulted in a finding that the claim was "frivolous." In *Lunn v. Weast*, No. DKC 2005-2363, 2006 U.S. Dist. LEXIS 36052 (D. Md. May 31, 2006), a Maryland district court found neither a "frivolous" claim nor an "improper purpose" despite the parent's failure to notify the district before "unilaterally plac[ing] the child in private school." *Id*. at *13. Likewise, in *Taylor v. Missouri Dept. of Elementary and Secondary Ed*., No. 06-4254-CV-C-NKL, 2007 U.S. Dist. LEXIS 74070 (W.D. Mo. Oct. 3, 2007), a Missouri district court declined to find a claim "frivolous" after the parent enrolled a student in a private school without notifying the school district.

> Parents, although they ultimately failed to show that the District did not provide [Student] with FAPE, did have some good-faith basis in their Due Process claims … . ***To hold otherwise would only serve to discourage parents from advocating for the rights of their children.***

Id. at *117-18 (emphasis added).

B. IDEA's "Improper Purpose" Provision Does Not Support an Award of Fees Against Parent in This Case

The IDEA also allows a prevailing school district to recover attorneys' fees

against the attorney of a parent or the parent herself for claims brought 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)(III) (2005). It is appreciably more difficult for a prevailing school district to recover attorney's fees under the improper purpose provision because it requires a showing of both frivolousness and improper motive. *Prescott*, 631 F.3d at 1126-27; *see also Oakstone Cmty. Sch.*, 2012 U.S. Dist. LEXIS 130449, at *10; *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323, 1336 (11th Cir. 2002); *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 524 (6th Cir. 2002); *Sterling Energy, Ltd. v. Friendly Nat'l Bank*, 744 F.2d 1433, 1435 (10th Cir. 1984)*; see also Mullane v. Chambers*, 333 F.3d 322, 338 (1st Cir. 2003) (citing *Whitney Bros. Co. v. Sprafkin*, 60 F.3d 8, 15 (1st Cir. 1995) (prevailing school districts prove improper purpose only in "egregious circumstances" and fee-shifting must be "used sparingly"). In light of the fact that the Parent's claim was not frivolous, it could not have been filed for an improper purpose.

Even if the claim had been frivolous (which it was not), fees under this provision are warranted only if the Parent "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Baker v. Health Mgmt. Sys., Inc.*, 264 F.3d 144, 149 (2nd Cir. 2001); *see also Kelly v. Saratoga Springs City Sch. Dist.*, No. 1:09-cv-276, 2009 U.S. Dist. LEXIS 88412, at *18 (N.D.N.Y. Sept. 25, 2009)

(stating that "[e]ssentially, a defendant is entitled to attorneys' fees where a plaintiff brings an action under the IDEA in bad faith").

Indeed, the District Court failed to cite any precedent supporting its finding of an "improper purpose." Instead, the District Court relied on the fact that Parent initially attempted, as was her right, to pursue her claims without legal counsel. *See generally Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).

The District Court's conclusion that the Parent did not have a right to withdraw the *pro se* Complaint and seek counsel is inconsistent with the statute's reliance upon parents to assert and protect the rights of their children with disabilities. A parent does not act with an improper purpose when she determines that she needs an attorney to represent her child's interests adequately. Since the action was neither frivolous nor filed for an improper purpose, the District Court's fee award was legal error and must be reversed.[1]

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[1] Importantly, less than one month after issuing the fee award in this action, the same judge awarded another school district nearly $100,000 in fees in *C.W. v. Capistrano Unified Sch. Dist.*, No. SACV 11-1157 DOC, 2012 U.S. Dist. LEXIS 174136, at *29-32 (C.D. Cal. Dec. 5, 2012). Two fee awards to school districts within such a short time belies any argument that the District Court is applying the requisite demanding legal standard that results in fee awards to school districts only in extremely rare cases.

II. The District Court's Interpretation of The Fee-Shifting Standard is Contrary to the Purpose of the IDEA and Violates Public Policy

A. The Fee-Shifting Provision Must Be Read in Context of the Statute as a Whole and Its Purpose

The District Court erroneously interpreted the fee-shifting provision in isolation instead of reading it in the context of the IDEA as a whole. The IDEA has a broad remedial purpose: "to ensure that all children with disabilities are provided a free appropriate public education . . . [and] to assure that the rights of [such] children and their parents or guardians are protected." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (citation and internal quotation omitted). The District Court's interpretation of the fee-shifting provision is inconsistent with the IDEA's purpose and undermines it.

IDEA goes to great lengths to provide an extensive set of procedural safeguards, including the right to seek administrative review of school district determinations that impact a child's IEP and his or her right to FAPE. 20 U.S.C. § 1415. The IDEA requires that these safeguards, deemed to be the "core of the statute," be exercised by parents in order to protect the substantive rights provided to their children. *Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (internal citation omitted). These "extensive procedural requirements [are] designed to guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decision they think

inappropriate." *Buser by Buser v. Corpus Christi Indep. Sch.*, 51 F.3d 490, 493 (5th Cir. 1995) (citation and internal quotations omitted).

IDEA relies upon parental advocacy to ensure the protection of the rights of children with disabilities. Congress included parents in every critical point of the statutory scheme. Federal courts cannot read the fee-shifting provisions so broadly that parents cannot ensure the protection of the rights of their children. Not only would the parents be unable to find counsel for their children, they also would be discouraged from engaging in parental advocacy for their children, severely undermining the purpose of the IDEA itself. *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 . . . . . Such a procrustean interpretation of section 1415(i)(3)(B)(i)(II) is inconsistent with the IDEA's objective of 'ensur[ing] that the rights of children with disabilities and parents of such children are protected.'") (citations omitted).

B. Parents of Special Education Children Already Face Considerable Burdens and Risks in Pursuing Due Process Hearings

Plaintiffs in IDEA cases face an uphill battle. The plaintiff must navigate his or her way through the administrative process, and a plaintiff who loses an administrative hearing bears the burden of proof in district court and on appellate review. *See Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1127 (9th Cir.

2003), *cert. den'd* 2005 U.S. LEXIS 2566 (Mar. 21, 2005) (citing *Clyde K. v. Puyallup Sch. Dist., No. 3,* 35 F.3d 1396, 1398 (9th Cir. 1994)). Further, many children who qualify for services under the IDEA come from poor families who lack the resources to obtain assistance to navigate the complex IDEA process. *See, e.g.*, Kelly D. Thomason, Note: *The Costs of a "Free" Education: The Impact of* Schaffer v. Weast *and* Arlington v. Murphy *on Litigation Under the IDEA*, 57 Duke L.J. 457, 483-84 (2004). Over two-thirds (67.6%) of school-aged children with disabilities, or more than 4.5 million children, are members of families with annual income of less than $50,000. Mary Wagner, Camille Marder, Jose Blackorby, *The Children We Serve: Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households*, Sept. 2002, *available at* www.seels.net/designdocs/SEELS_ Children_ We_ Serve_ Report.pdf (accessed Mar. 19, 2013) at 28-29, Ex. 3-10. Families without the resources to pursue private counsel for their IDEA claims are forced to seek *pro bono* assistance, proceed *pro se*, or abandon their claims altogether.

Although the IDEA permits prevailing parents to recover reasonable attorney fees, due process hearings are "[g]enerally expensive … for parents if they hire an attorney." General Accounting Office, GAO-03-897, "Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts," Sept. 2003, *available at*

www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-03-897/content-detail.html (accessed Mar. 19, 2013), at 7. If the parent utilizes an expert witness, the expert's fees are not recoverable even if the parent prevails. *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 293 (2006). The costs a parent will incur if he or she fails to prevail on a claim are incentive enough for most private individuals not to risk filing a "frivolous" claim. Lawrence Siegel, *The Complete IEP Guide: How to Advocate for Your Special Ed Child* 178, 179 (2011). As an indication of the fees a parent might incur, the District Court ruled in the present case that the school district reasonably incurred $55,000 in fees, and in *Capistrano* the same judge awarded another school district nearly $100,000 in fees. *Capistrano*, 2012 U.S. Dist. LEXIS 174136, at *29-32.

C. Unless Limited to Extremely Rare and Egregious Circumstances, Burdening Parents and Their Counsel with the School District's Fees Would Make It Virtually Impossible for Parents to Secure Legal Representation and Undermine Enforcement of the IDEA

The District Court's lax application of the IDEA's fee-shifting provisions threatens significant and lasting harm to children with disabilities who need educational assistance. There is a broad consensus that there is a dearth of lawyers specializing or trained in the area of special education. For example, Rutgers School of Law cites a "critical shortage of legal assistance for indigent parents of children with disabilities in New Jersey." Rutgers School of Law Special Education Clinic web page, *at* http://law.newark.rutgers.edu/clinics/special-

education-clinic (accessed Mar. 19, 2013). Similarly, another study finds: "[t]here is a nationwide shortage of attorneys in private or not-for-profit practices who have experience representing parents in IDEA cases." Margaret Wakelin, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3:2 Nw. J. L. Soc. Pol'y 263, at 282 & n.215 (2008) (citing "Brief of Autism Society of America et al. as Amici Curiae Supporting Petitioner" (*Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007)), at 9). Shifting fees to plaintiffs' attorneys in anything but the most egregious case would discourage the relatively few attorneys who do take these cases.

The Ninth Circuit expressly recognized this in *Prescott*, stating that "[l]awyers 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." *Prescott*, 631 F.3d at 1126. Here, the District Court's ruling flies in the face of this precedent and chills participation by attorneys in these cases, further hindering parents from being able to vindicate their children's educational rights.

D. Statutory Interpretation and Public Policy Considerations Mandate an Even Higher Threshold for Awarding Fees to a Defendant Than in Employment and Rule 11 Cases

Although the IDEA's fee-shifting provisions were modeled after the

Christiansburg standard for awarding fees in employment cases and the standard for imposing sanctions under Rule 11 of the Federal Rules of Civil Procedure ("Rule 11"), key differences in the statutory schemes mandate that courts apply fee-shifting to prevailing defendants in IDEA cases more narrowly. In each instance, the applicable provision cannot be interpreted in isolation but must be interpreted within the context of the statute as a whole. The IDEA's statutory scheme mandates a narrower application; otherwise, the statute's purpose would be undermined in ways that are not present in employment and Rule 11 cases.

The IDEA differs from employment statutes in several key respects. First, the IDEA's fee-shifting statute exposes the plaintiff's attorney to liability for the defendant's attorneys' fees, while 42 U.S.C. § 1988(b) does not. *Compare* 20 U.S.C. § 1415(i)(3)(B)(i)(II), *with* 42 U.S.C. § 1988(b). There is no chilling effect for employment cases because employment attorneys are not personally exposed under 42 U.S.C. § 1988. Second, employment statutes generally provide for recovery of monetary damages. *See, e.g.*, 42 U.S.C. § 1981a (providing for damages in cases of intentional discrimination in employment). By contrast, the IDEA does not provide a damages remedy. *Oman v. Portland Pub. Sch.*, 679 F.3d 1162, 1166-67 (9th Cir. 2012); *cert. den'd* 133 S.Ct 859 (2013); *Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 936 (9th Cir. 2007), *cert. den'd* 552 U.S. 1231 (2008). Employment attorneys have greater incentives to take employment cases

because they have the opportunity to seek monetary damages (and earn a proportionate share of the recovery as a contingency fee). Further, the absence of this inducement in IDEA cases decreases incentives for pursing frivolous litigation. Third, government agencies such as the U.S. Equal Employment Opportunity Commission ("EEOC") exist to assist plaintiffs seeking to vindicate employment violations, while parents seeking to enforce their children's rights under IDEA have no similar recourse. In light of these differences, a fee award to a prevailing employer does not undermine the enforcement of employment laws to the extent a fee award to a prevailing school district undermines the IDEA. Thus, even though the IDEA's frivolousness provision is modeled after employment laws, multiple considerations mandate that it be applied more narrowly.

Similar considerations apply with regard to IDEA's improper purpose provision. *See* 20 U.S.C. § 1415 (i)(3)(B)(i)(III). That provision is modeled in part based on Rule 11, which allows courts to sanction attorneys who sign and file briefs on behalf of clients for an improper purpose. *Prescott*, 631 F.3d at 1125, *see* 150 Cong. Rec. S5250, S5349 (daily ed. May 12, 2004) (statement of Sen. Gregg) (noting that the second prong "comes from another well-established Federal law: Federal Rule of Civil Procedure 11").

Attorney exposure to monetary sanctions arose from an amendment of Rule 11 in 1983. *See* Theodore C. Hirt, *A Second Look at Amended Rule 11*, 48

Am. U. L. Rev. 1007, 1009-10 (1999). Over the next ten years, however, there was an outpouring of criticism that the 1983 amendment created a chilling effect on advocacy. *Id.* at 1010-12. In fact, studies indicated that the amended Rule 11 chilled civil rights plaintiffs and their attorneys, including forcing 31 percent of civil rights attorneys to forego claims they felt had merit. Lawrence Marshall, Herbert M. Kritzer, Frances Kahn Zemans, *The Use and Impact of Rule 11*, 86 Nw. U. L. Rev. 943, 971 (1992). As a result, Rule 11 was amended again in 1993 to add significant procedural protections for attorneys and reduce their potential exposure to monetary sanctions. Among other things, a "safe harbor" provision was added, which gives alleged violators the opportunity to withdraw challenged papers without risk of sanction. Fed. R. Civ. P. 11(c)(2). By contrast, the IDEA contains none of the procedural safeguards that were added to Rule 11 to minimize its chilling effect. Due to the lack of protections in the IDEA that are provided in Rule 11, it is even more crucial to ensure that the IDEA attorney fee-shifting provisions are interpreted narrowly.

Regrettably, the District Court failed to recognize these issues. Rather, the District Court was more concerned about protecting school districts from "attacks" by parents of special-needs children. Order at *18. Of course, in this case, the school district was well armed by the 140-attorney law firm representing it while the Parent struggled *pro se* to navigate the IDEA's procedures and seek the

educational assistance her child needed. Given the difficulties parents face in finding attorneys to represent them in IDEA cases, it is outrageous that the District Court cited her initial *pro se* status to saddle both her and the attorney she eventually retained with the school district's attorneys' fees.

Amici urge the Court to send a clear message: That is not the law. That is not what the IDEA is about.

III. Conclusion

For each of these reasons, Amici respectfully ask the Court to reverse the attorney fee award in favor of the school district. Amici urge the Court to issue an opinion in accordance with its prior precedent mandating that district courts apply the IDEA's fee-shifting provision narrowly − in recognition of the IDEA's statutory purpose − and apply an onerous legal standard that results in fee awards to prevailing school districts only in the most egregious and rare circumstances.

Dated: March 20, 2013

Respectfully submitted,

s/ Michael N. Westheimer
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 5165 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: March 20, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) March 20, 2013.

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Dated: March 20, 2013

Respectfully submitted,

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