No. 12-56627

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

G.M.; R.M., a minor child by and through her mother G.M.,

Plaintiffs-Appellants,

—v.—

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE THE CENTRAL DISTRICT OF CALIFORNIA,
CASE NO. 8:11-CV-01449-DOC-MLG

BRIEF OF *AMICI CURIAE* NATIONAL AUTISM ASSOCIATION, ELIZABETH BIRT CENTER FOR AUTISM LAW AND ADVOCACY AND TALK ABOUT CURING AUTISM IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN FAVOR OF REVERSAL

ELI Z. TOMAR
DEVON A. CORNEAL
SEAN P. NEAFSEY
PATTON BOGGS LLP
2550 M Street, NW
Washington, DC 20037
Telephone: (202) 457-6000
Facsimile: (202) 457-6315

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amici curiae* certifies that the National Autism Association (NAA), the Elizabeth Birt Center for Autism Law and Advocacy (EBCALA) and Talk About Curing Autism (TACA) are nonprofit organizations, not publicly held corporations. As such, NAA, EBCALA and TACA have no parent corporations, subsidiaries or affiliates that have issued shares to the public.

Dated: March 20, 2013

Respectfully submitted,

/s/ Eli Z. Tomar
Patton Boggs LLP
Eli Z. Tomar
Devon A. Corneal
Sean P. Neafsey
2550 M Street, NW
Washington, DC 20037
Tel: (202) 457-6000
Fax: (202) 457-6315
Email: ETomar@pattonboggs.com

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All parties to this appeal have consented to the filing of the brief. No party or counsel thereof authored this brief; no person other than *Amici* contributed money intended to fund preparing or submitting this brief.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amicus curiae the National Autism Association (NAA) is a parent-led nonprofit organization created to respond to the needs of the autism community. *Amicus* provides research funding, ongoing advocacy, education, and support for autism families, including families addressing the responsibility of school districts to provide services under laws such as the Individuals with Disabilities Education Act (IDEA).

Amicus curiae the Elizabeth Birt Center for Autism Law and Advocacy (EBCALA) is a non-profit organization whose purpose is to educate parents, advocates, and lawyers concerning the challenges of autism spectrum disorders in legal areas including special education, insurance, healthcare, family law, criminal law and tort law. Among other things, EBCALA provides training, resources and a forum for parents, advocates and lawyers to advance legal and advocacy strategies to improve the lives of those with autism and their families.

Amicus curiae Talk About Curing Autism (TACA) is a non-profit organization whose mission is to educate, empower and support families affected

by autism. TACA connects families to professionals and other families, allowing them to share stories and information to help improve the quality of life for people with autism. TACA provides direct support services through parent support groups, educational seminars, educational materials, referral to legal and medical professionals, scholarship programs, and a parent to parent mentor program.

Defendant sought and received tens of thousands of dollars of attorneys' fees pursuant to the IDEA's fee-shifting provision for defending against a lawsuit that the District Court found lacked factual support. *Amici* have an interest in ensuring that the IDEA is interpreted as Congress intended and that well-intentioned parents and advocates are not chilled from protecting the rights of children, adolescents and young adults with disabilities. *Amici* agree with the assertions and arguments made in Plaintiffs-Appellants' brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court's decision disregards Congress's intent to limit the IDEA's fee-shifting provision to those rare circumstances where litigation is patently frivolous and will impair the ability of children with disabilities to receive a free appropriate public education ("FAPE"). 20 U.S.C. § 1415(i)(3)(B)(i)(II)-(III). Congress enacted the IDEA "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(B). Consistent with that purpose, Congress codified a fee-shifting provision designed

to protect parents who legitimately – even if ultimately unsuccessfully – seek to protect their children's rights to a FAPE, while offering recourse to school districts in rare cases of abuse. 20 U.S.C. § 1415(i)(3)(B)(i)(II)-(III). The District Court's decision impermissibly broadens the application of the fee-shifting provision and will have a chilling effect on parents' advocacy on behalf of children with disabilities unless it is reversed.

The District Court acknowledged that the fee-shifting provision was designed to address litigation abuses. The Court nevertheless ignored the statute's intent and expanded fee shifting far beyond the limited circumstances Congress intended. The District Court suggested that demanding, litigious, or generally unsuccessful parents or their attorneys may be held responsible for a prevailing school district's attorneys' fees. This unexacting approach creates a real risk that well-intentioned parents or their attorneys will forgo necessary litigation out of fear that they might be saddled with tens of thousands of dollars of attorneys' fees if unsuccessful.

Congress could have adopted a fee-shifting provision that transferred a prevailing party's attorneys' fees to any losing party or attorney but it did not. Rather, sponsors of the legislation stressed how rarely this rigorous fee-shifting scheme would apply. Indeed, one senator who championed the fee-shifting provision stated that "complaints that could be considered marginally frivolous

would not be affected. Only those complaints that meet a high standard of frivolity would be met with approved sanctions by the courts." Congress thus was careful not to chill or otherwise discourage parents from seeking redress under the IDEA. The District Court here was not. For that reason, *Amici* respectfully urge this Court to apply the IDEA's fee-shifting provision as Congress intended and reverse the judgment below.

ARGUMENT

I. CONGRESS DID NOT INTEND FEE-SHIFTING TO UNDERMINE OR DISCOURAGE IDEA LITIGATION AND CRAFTED THE STATUTE NARROWLY TO PREVENT EGREGIOUS ABUSES OF PROCESS WHILE STILL MAINTAINING ACCESS TO THE COURTS.

Congress first enacted the IDEA in 1975. In the nearly forty years since, Congress repeatedly has made clear that the Act's primary purpose is to provide redress to students with special needs. In 1986, after the Supreme Court determined in *Smith v. Robinson*[1] that fees were not available in special education actions based on general civil rights statutes, Congress fixed that decision by passing the Handicapped Children's Protection Act. *See* Pub. L. No. 94-142, 89 Stat. 773 (1986). Indeed, the 2004 reform of IDEA[2] was, in its sponsor's words, designed to "give parents greater access to be involved in making decisions about

[1] 468 U.S. 992 (1984).

[2] The 2004 reform law is known as the Individuals with Disabilities Education Improvement Act (IDEIA) of 2004. For clarity, we refer to all statutes amending the original law as the IDEA.

their child's education." 149 Cong. Rec. 7190 (2003) (quoting Representative Michael Castle of Delaware). This Court also has, on more than one occasion, recognized that purpose, noting that the IDEA's "primary goal is to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services." *R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1121 (9th Cir. 2011) (internal quotation omitted). The statute's provisions—including the fee-shifting provision—must always be read to further this goal.

The IDEA's fee-shifting provision "allows a prevailing state educational agency or school district to collect fees in certain **rare** circumstances." *Id.* at 1124 (reversing district court's grant of attorneys' fees) (emphasis added). The provision permits recovery of fees only in circumstances where: 1) an attorney files a complaint that is "frivolous, unreasonable, or without foundation" or "continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation"; or 2) a parent or attorney files suit 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) and (III). Although there is little case law on the IDEA's fee-shifting provision, *see Prescott*, 631 F.3d at 1124, the legislative history of the provision evidences a desire to preserve parental access to federal courts and to shift fees only in extreme circumstances. The provision was

never intended to penalize advocates "bringing a suit where they have a plausible, though ultimately unsuccessful, argument . . . ." *Id.* at 1126.

A. PROPONENTS OF THE FEE-SHIFTING PROVISION INTENDED ONLY TO PREVENT EGREGIOUS ABUSES OF PROCESS.

As stated above, requiring parents to pay a district's legal fees would have a chilling effect on advocacy and, therefore, Congress limited fee shifting to the most egregious – and rare – cases of abuse. With the rights of vulnerable children with disabilities at stake, Congress intended the IDEA fee-shifting threshold to be more difficult to satisfy than even the already significant general fee-shifting standards in civil rights cases. This Court has recognized that "[t]he IDEA's legislative history confirms that Congress fashioned section 1415(i)(3)(B)(i)(II) after the *Christiansburg* standard," *Prescott*, 631 F.3d at 1125 (citing 150 Cong. Rec. S5250, S5349 (daily ed. May 12, 2004)), which sets a far higher bar for courts to shift fees from defendants to plaintiffs than vice versa. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978).[3] Under *Christiansburg*, "attorneys' fees may only be awarded to defendants in civil rights cases where the plaintiff's claims are frivolous, without foundation or brought in bad faith." 150 Cong. Rec. 24,275

[3] While the text of the original conference report does not reflect it, both the House and Senate sponsors of the legislation clarified that the report should include a note "detailing the limited circumstances in which [state and local education agencies] can recover attorneys' fees, specifically, the Conferees intend to codify the standards set forth in *Christiansburg*." 150 Cong. Rec. S5250. In fact, statements of the sponsors indicate that *Christiansburg* was viewed on the floor and that the fee-shifting provision was represented to be even more exacting.

(2004) (quoting Senator Edward Kennedy). This is in large part because, under the statutory scheme, the "plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Christiansburg*, 434 U.S. at 418 (internal citations omitted). Given the high stakes in IDEA cases, even this standard was not considered sufficiently rigorous. Senator Mike Enzi, a Republican of Wyoming, and one of the two cosponsors of the Senate fee-shifting amendment, noted that "[t]he standard set by this amendment is higher than the standard currently followed by the courts in civil rights cases. Legitimate complaints under IDEA would not be affected. Even complaints that could be considered marginally frivolous would not be affected. Only those complaints that meet a high standard of frivolity would be met with approved sanctions by the courts." 150 Cong. Rec. 9201 (2004).

Unsurprisingly, the architects of the fee-shifting proposal and lead sponsors of the legislation stressed how rarely this fee-shifting scheme would apply, how extreme the circumstances would need to be to trigger the penalty, and even provided some examples of the types of abusive cases in which it might apply.[4]

[4] In an attempt to reestablish trust between districts and parents and to reduce litigation, the original House bill to reform IDEA during the 2003-2004 legislative session included a proposed cap on damage awards to be set by each state's Governor based on state-appropriate costs. H.R. 1350, 108th Cong. § 205(i)(2)(C) (2003); *see also* Hon. Michael N. Castle, Improving Results For Children With Disabilities Act, 149 Cong. Rec. 7190 (2003). This proposal was controversial for its breadth and was sharply criticized for having the potential to

Senate bill and amendment sponsor, Senator Judd Gregg of New Hampshire, stressed that "this is a very high standard and prevailing defendants are rarely able to meet it and obtain a reimbursement of their attorney's fees." 150 Cong. Rec. 9198 (2004). Senator Enzi reiterated the intended infrequency in shifting fees to plaintiffs by asserting, "[w]e are talking about a very small minority of complaints, probably less than 1 percent." 150 Cong. Rec. 9199 (2004).

Senator Gregg provided additional insight into why reform to the fee-shifting arrangement was necessary. He explained:

> The law does not permit school districts that prevail in a case to recover their attorney's fees. In most cases, this is the right policy, as we do no [sic] want to discourage parents from seeking redress when they believe their child is not getting what is promised under IDEA. . . .

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chill the exercise of due process rights and to make the courts inaccessible to many middle and working-class families. *See* H.R. Rep. No. 108-77, Minority Views, at 379-80 (2003). The bill narrowly passed the House of Representatives along party lines, with 163 Democrats, seven Republicans, and one Independent voting against passage. 149 Cong. Rec. 10,062 (2003).

The companion Senate bill, S. 1248, did not include a provision to set attorneys' fees. During floor debate on S. 1248, its sponsor, Senator Judd Gregg, a Republican from New Hampshire, introduced Senate Amendment 3147, which provided the text for the fee-shifting provision now codified at 20 U.S.C. § 1415(i)(3)(B)(i). The Senate bill containing the current fee-shifting provision was unanimously passed and the same bill passed the House by a vote of 397 to 3. 150 Cong. Rec. 24,307 (2004). Not one of the 171 House votes opposing the earlier fee cap bill, or warning of "limit[ed] access to knowledgeable and experienced legal representation," was troubled enough by the fee-shifting provision to speak out against it in debate or to vote against final passage. And with good reason: Congress only intended section 1415(i)(3)(B)(i) to be a backstop against extremely egregious and abusive suits.

> [T]here are sometimes situations where a parent or their attorney files a number of complaints and requests for due process hearings, triggering the school district to spring into action to prepare for the hearing. The parent subsequently drops the complaint, but the school has spent considerable time and money preparing for the hearing; a closer look at the facts reveals that the complaints were not filed for any proper purpose, but instead were done to harass or retaliate against the school district. In these limited instances, school districts should be able to recover their attorney's fees.

150 Cong. Rec. 9198 (2004).

To demonstrate the need for the fee-shifting policy change, Senator Gregg provided an example of an actual case from his home State of New Hampshire. He recounted a parent who filed fifteen different complaints against the school district. 150 Cong. Rec. 9199 (2004). According to the Senator, these complaints were "accompanied by a daily barrage of letters, faxes, and telephone voice messages" to the point that the school district was forced to hire a program specialist to handle all of the grievances. *Id*. Senator Gregg explained that under then-existing law, there was "no disincentive or negative consequences of filing complaint after complaint, making call after call, flooding the district with thousands of pages of documents . . . ." *Id*. He urged his colleagues to support his proposal to allow shifting fees to plaintiffs in these exceedingly rare, but extremely abusive cases. Senator Gregg's colleagues heeded his call by enacting what became 20 U.S.C. § 1415(i)(3)(B)(i) with the clear intent that it be used to provide some recourse for

school districts and judges dealing with such "frivolous, egregious behavior." *Id*. They did not intend that fees would be shifted to plaintiffs who were merely unsuccessful or even to those whose claims were "marginally frivolous."

B. THE COURT SHOULD REFRAIN FROM SHIFTING FEES TO PLAINTIFFS EXCEPT WHERE A CASE AMOUNTS TO AN ABUSE OF THE LEGAL SYSTEM.

The legislative history reveals a Congress that was highly sensitive to concerns about chilling IDEA claims and refused to enact any reform that had the potential to curtail legal recourse for parents of children with special needs. Senator Gregg was confident that his "amendment [would] not chill representation . . . [but rather] give school districts some relief in those rare situations where a parent has abused their due process rights." 150 Cong. Rec. 9198 (2004).

This requires courts to refrain from shifting fees to plaintiffs – parents and their advocates – simply because their case was ultimately unsuccessful. As the *Prescott* court cautioned, "a district court [should] resist . . . engag[ing] in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." 631 F.3d at 1126 (citing *EEOC v. Bruno's Restaurant*, 13 F.3d 285, 287 (9th Cir. 1993)). Applying "hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success." *Christiansburg*, 434 U.S. at 422.

Because parents are understandably driven by an overarching goal to do right by their children and will vigorously pursue that goal, Congress was prudent to establish the highest fee-shifting standard recognized in the law. Recently, a federal court astutely observed that the exceptionally high IDEA standard "reflects the reality that parents are perhaps more likely than others to act 'unreasonable' in defense of their children, even with the best of intentions, and they should not necessarily be punished for it if it is not accompanied by an improper purpose." *I.S. v. Sch. Town of Munster, Cause*, 58 IDELR 186, 192 (N.D. Ind. Mar. 19, 2012). Further, because attorneys are often engaged long after the parent has set out on her course – as is true in the instant case – it is imperative to apply this same exacting standard to attorneys as well. Due process proceedings are easy to initiate, and there is no regulation in California of individuals or firms offering special education "advocacy." Unfortunately, special education cases are difficult to win with excellent representation, and virtually impossible to win without counsel's involvement. When parents recognize this and manage to secure legal representation after litigation is well underway, the rights of students with disabilities are more likely to receive effective protection. As this court warned, too sweeping an application of fee-shifting may improperly discourage lawyers "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.

Congress intended that attorneys' fees only be shifted to plaintiffs when their case results in an abusive misappropriation of judicial resources. Congress enacted section 1415(i) to untie courts' hands only in these extreme cases, but not to hold parents and their advocates personally liable for pursuing an unsuccessful case. As the *Prescott* court wisely observed, these individuals "shouldn't have to face financial ruin for attempting to vindicate the rights of their disabled child." *Id*. at 1126-27. Similarly, lawyers, many of whom take financial risks in order to represent students with disabilities, should not face financial disaster if they accept cases that have been weakened by parental behavior before their entry or if they fail to achieve an appropriate balance between zeal and caution.

C. THE DISTRICT COURT'S DECISION DISREGARDS CONGRESSIONAL INTENT AND SHOULD BE REVERSED.

When examined in the context of Congress's intent, there can be little doubt that the District Court did not apply the IDEA's fee-shifting provision as intended. The District Court's purported bases for its decision do not rise to the level of egregious misconduct sufficient to shift payment of the defendant's fees to the plaintiffs. The District Court based its holding on Mother G.M.'s purported "stonewalling" of the school district in its assessment of Student R.M. (11-cv-01449, Dkt. 49, at 4-5.) The Court also indicated that G.M.'s alleged failure to

provide sufficient evidence regarding a qualifying disability when combined with her supposed mischaracterizations of the record and otherwise unpersuasive factual arguments constituted frivolousness. (*Id*. at 7-8.) Finally, the Court stated that G.M.'s previous failure to attend two administrative hearings during a prior action involving "essentially the same" allegations evidenced unnecessary delay and a needless increase in litigation costs. (*Id.* at 10.)

Congress, however, did not intend to penalize the pursuit of what ultimately might be a factually weak case. It did not desire to apply the fee-shifting provision to overzealous lawyering that results in characterizations which a court deems one-sided or unpersuasive. Nor is Congress's purpose served by penalizing parents and students for procedural missteps such as a failure by parents to appear in a previous, similar or identical filing—missteps which were intertwined with a parent's representation by a non-lawyer "education advocate." Rather, as Senator Gregg's real-world example aptly illustrated, Congress intended fee-shifting to apply only to parents whose conduct is far outside the bounds of zealous litigation – such as those who persistently filed a dozen-plus complaints accompanied with scores of harassing letters, phone calls, and faxes, which is simply not the case here.

G.M.'s conduct here is that of a concerned parent, not an egregious, persistent harasser. The record demonstrates that R.M. had been treated for

depression-related illnesses and that the school district did not assess R.M., despite knowledge of her mental health struggles. (Administrative Record ("AR") pp. 114-15, 697, 1374.) In response, G.M. removed R.M. to another educational facility. (AR p. 513.) Although the school district eventually developed an independent education plan for R.M., G.M. did not release referral paperwork for an additional mental health assessment after the district suggested that R.M.'s current placement was inappropriate. (AR pp. 138, 813-15, 1551-80.) G.M. apparently was uncertain that the school district's recommended facility would address R.M.'s needs and felt that the school district's tactics may have been designed to coerce her withdrawal of consent to an assessment. (11-cv-01449, Dkt. 33, at 9.) G.M. therefore commenced administrative proceedings using a non-lawyer education advocate, who canceled a hearing appearance on one occasion due to illness and failed to appear on another occasion without excuse. (11-cv-01449, Dkt. 45, Exhs. A, B.) G.M. then hired her current counsel and refiled her action. (*Id.*, Exh. C.)

Taken together, the circumstances of this case fall well short of the situation for which Congress intended the fee-shifting provision to apply. Accordingly, *Amici* urge this Court to honor the clear intent of Congress and reverse the fee award below.

II. PERMITTING A BROAD INTERPRETATION OF IDEA'S FEE-SHIFTING PROVISION OPENS THE DOOR TO BOTH INCONSISTENT APPLICATION OF THE STATUTE AND INTIMIDATION OF ADVOCATES.

As one scholar noted, because "[t]he definition of frivolous may be in the eye of the beholder[,] . . . caution [is needed] in shifting fees." 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, 541 (2006). Butler-Arkow highlighted a Federal Judicial Center study that the United States Courts of Appeals reversed nineteen percent of Rule 11 appeals on the grounds that the cases were not frivolous. *Id.* With such a high frequency of improper sanctions, Butler-Arkow advocates for a clear, narrow standard. "Avoiding the application of [fee-shifting] to cases near the murky dividing line ensures that parents are not improperly chilled from bringing IDEA enforcement claims on which they may not ultimately prevail." *Id.*

Unfortunately, the "murky dividing line" is present frequently in IDEA cases. In fact, IDEA cases frequently pose diametrically opposed views of the scope of school district and parental responsibilities, and administrative tribunals and courts differ in their application of the mandate that local educational agencies provide a FAPE. As recent tragedies involving school violence and suicide make clear, parents seeking mental health services for troubled adolescents must

navigate a complex service system in which medical and educational boundaries are unclear. The interaction between parental errors, student needs, and school system actions and delays is the source of many disputes in special education, and these disputes pose difficult equitable questions which cannot be resolved in any uniform, predictable fashion. Parties often dispute whether procedural violations—the aspects of IDEA which courts have proven most ready to enforce—constitute bases for relief or mere "harmless errors." Because of these practical difficulties and deviations in the context of IDEA litigation, anything less than a bright-line rule that applies only to those rare, egregious instances of abusive litigation will open the door to an inconsistent application of the statute in a variety of situations and will only exacerbate the already numerous difficulties surrounding these cases. In this case, counsel argued that information available to the District about the student's depression and its educational impact created assessment obligations as a matter of law, and that had the district assessed, the student would have been found qualified for special education months earlier, before her family resorted to unilateral placement. While the student's attorneys have not prevailed on that argument up to this point, it is far from the kind of frivolous claim which fee-shifting aims to prevent.

If courts fail to apply the IDEA's fee-shifting to the narrow circumstances Congress intended, school districts also will be emboldened and use the risk of

responsibility for their attorneys' fees as an improper negotiation tactic. As the National Council on Disability noted, concerned parents of disabled children are already being told by school districts, "[i]f you lose, you pay." Nat'l Council on Disability, *National Disability Policy: A Progress Report*, at 63 (2005). Should broad interpretations of the fee-shifting provision—like the District Court's here—be upheld, school districts will only increase use of this tactic. Lower-income families, who already have great difficulty finding qualified legal counsel, will forego redressing their children's rights to avoid bankrupting themselves. Worse yet, the few attorneys willing to take on IDEA cases will flee this practice area lest they face crushing financial liability if they are unsuccessful. These real and imminent practical consequences further favor a rejection of the District Court's approach here and an application of the narrow fee-shifting provision Congress intended.

CONCLUSION

For the foregoing reasons, *Amici curiae* request that this Court reverse the November 26, 2012 District Court decision granting Defendant's motion for attorneys' fees.

Dated: March 20, 2013

Respectfully submitted,

/s/ Eli Z. Tomar
ELI Z. TOMAR
DEVON A. CORNEAL
SEAN P. NEAFSEY
PATTON BOGGS LLP
Attorneys for *Amici curiae*
National Autism Association
Elizabeth Birt Center for Autism Law and Advocacy
Talk About Curing Autism

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, and Circuit Rule 32(a)(5), 32(a)(6) and 32(a)(7), I certify that the foregoing *Amici curiae* brief:

1. Has been prepared in a proportionately spaced typeface using Times New Roman 14-point font; and
2. Contains 4,084 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Counsel relies on the word count of the computer program used to prepare this brief.

Dated: March 20, 2013

ELI Z. TOMAR
PATTON BOGGS LLP

By: /s/ Eli Z. Tomar
Eli Z. Tomar
Attorneys for *Amici curiae* National Autism Association, Elizabeth Birt Center for Autism Law and Advocacy, and Talk About Curing Autism

CERTIFICATE OF SERVICE

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

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 20, 2013

ELI Z. TOMAR
PATTON BOGGS LLP
By: /s/ Eli Z. Tomar
Eli Z. Tomar
Attorneys for *Amici curiae*
National Autism Association
Elizabeth Birt Center for Autism Law and Advocacy
Talk About Curing Autism