NO. 22-1277

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

A.B. AND D.B. INDIVIDUALLY AS PARENTS OF C.B., A DISABLED MINOR,

Plaintiffs-Appellants,

v.

BROWNSBURG COMMUNITY SCHOOL CORPORATION,

Defendant-Appellee.

On appeal from the United States District Court

Southern District of Indiana, Indianapolis Division

Case No. 1:20-cv-02487-JMS-MJD

The Honorable Jayne Magnus-Stinson, Judge

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, INDIANA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE

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Brief in support of affirmance.

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1277

Short Caption: A.B. v. Brownsburg Comm. Sch. Corp.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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i) Identify all its parent corporations, if any; and

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Attorney's Signature: */s/ Francisco M. Negron, Jr.* Date: May 18, 2022

Attorney's Printed Name: Francisco M. Negron, Jr.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amicus Curiae National School Boards Association (NSBA), founded in 1940, is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations that represent locally elected school board officials serving millions of public school students regardless of their disability, NSBA advocates for equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before federal and state courts, and has participated as amicus curiae in numerous cases addressing the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq*.

Amicus Curiae Indiana School Boards Association (ISBA) is a nonprofit association whose membership consists of all 289 reorganized public school boards in Indiana. The mission of the Association is to support its members with the resources necessary for excellence in local school board governance. As part of that mission, ISBA advises its member school corporations on the laws impacting the education of students with disabilities.

F.R.A.P. 29(a)(2) STATEMENT

All parties have consented to the filing of this amicus brief.

F.R.A.P. 29(a)(4)(E) STATEMENT

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, Amici Curiae state that (i) no party's counsel authored the brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) no person–other than Amici Curiae, its members, or its counsel–contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The collaborative purpose of IDEA will be lost, and adversarial relationships encouraged, if federal courts may award attorneys' fees when the family and the school district have come to an agreement on eligibility and services for a child with a disability. Under well-settled precedent deriving from the statute's text and purpose, attorneys' fees are only available under IDEA if and when a party secures a judgment that materially alters the parties' legal relationship. Neither party is entitled to fees under the statute in other scenarios. School districts may agree to include attorneys' fees payment in a settlement prior to judgment, but the rationale for doing so is not universal and should not be mandated when not required by IDEA.

Although costs alone do not drive school district decisions in special education disputes, costs must be a concern to school boards, as the costs of special education litigation, especially large attorneys' fees awards, have a direct effect on school district budgets. Fees paid to attorneys often come out of limited general funds, damaging the ability of school districts to fully meet their responsibility under IDEA to serve children with disabilities and their mission to serve all children. Attorneys' fees awards out of step with the statute's limitations undermine the collaborative nature of IDEA—which was designed by Congress to require ongoing close cooperation between school districts and parents in support of children with special needs.

IDEA's attorneys' fees provision is designed to support families who hold school districts accountable by obtaining rulings finding violations of IDEA, and to encourage collaboration before and leading up to a hearing. It is not designed to impose additional costs on school districts who have come to agreements with parents on the services to be provided to a child. Federal courts, including this one, have repeatedly applied *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001) in the IDEA context, rejecting the

catalyst theory. *E.g.*, *Bingham v. New Berlin Sch. Dist.*, 550 F.3d 601, 603 (7th Cir. 2010); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir. 2003). A plaintiff does not "prevail" simply by achieving the desired outcome of litigation even if it results from a voluntary change in the defendant's conduct. *Bingham*, 550 F.3d at 603. Any other rule would turn the collaborative intent of IDEA on its head by incentivizing parents to bring cases, regardless of merit, to leverage settlements from school districts. This court should not steer away from the longstanding rule in this and other circuits that attorneys' fees are not available under IDEA to either party when they have agreed upon the educational program to be provided to the child without a hearing.

ARGUMENT

I. The Collaborative Framework of IDEA Would Be Undermined if Courts Sanctioned Awards of Attorneys' Fees When Parents and School Districts have Agreed on Eligibility and Services.

All parties, including Amici, care deeply about children with disabilities and want to ensure that they are provided special education and related services designed to meet their unique needs and to prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A). School personnel carry out this purpose daily, as they actively work with families to identify, evaluate, and provide a Free Appropriate Public Education (FAPE) to students with disabilities. Any fees to be awarded an attorney in some future litigation are far from the minds of educators who provide this vital work.

IDEA's fee-shifting provision, at the center of this case, is consistent with the purpose of the statute: to ensure that eligible students with disabilities receive a FAPE in rare cases where the collaborative process between families and school districts has failed to result in appropriate services for the child. The Supreme Court has recognized IDEA's collaborative purpose. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 994, 995 (2017) (IDEA's procedures for IEP development "emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances"); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005) ("The core of the statute, however, is the cooperative process that it establishes between parents and schools."); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982) ("The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the

parents or guardian of the child.") When considered in the context of the IDEA's complex framework, its limited attorneys' fees provision makes sense.

A. IDEA's collaborative framework is designed to provide a program to meet the child's unique educational needs.

To achieve IDEA's appropriately ambitious goal, Congress required extensive collaboration between a multitude of professionals and active participation of parents to meet each particular child's unique needs through the individualized educational program (IEP) process. Collaboration is a central component of the IDEA because of the unique nature of special education. An IEP team is designed to bring together the individuals who know the child best (parents or guardians), have the clearest picture of the child's demonstrated educational needs (teachers and services providers), and understand the types and availability of resources to meet those needs (administrators).

Most of the time, the collaborative process runs smoothly, resulting in an IEP "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S.Ct. at 988. Both the family and the school continue to work together throughout the child's educational experience to adjust the program to meet the child's needs. Only in rare cases does a disagreement over eligibility or services result in a due process complaint; and only a small percentage of due process complaints result in a ruling by a hearing officer or court that a school district is liable for an IDEA violation. But it is only in these rare situations that IDEA contemplates an award of attorneys' fees.

In advance of the 2004 reauthorization of the IDEA, the government recognized that the IDEA's framework had become too adversarial and procedural rather than focused on student outcomes. President's Commission on Special Education, *A New Era: Revitalizing Special Education for Children and Their Families*, 12, 40-41 (July 1, 2002) ("A New Era"), available at

********ectacenter.org/~pdfs/calls/2010/earlypartc/revitalizing_special_education.pdf.

Congress responded in the IDEA reauthorization by attempting to streamline the IEP process. Procedurally, Congress required early resolution sessions between families and districts after a complaint is filed—emphasizing the importance of early resolution, decision-making by the IEP team, and less contentious outcomes. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108–446, 118 Stat. 2647 (2004). The Supreme Court has noted Congress' intentional effort to reduce IDEA's administrative and litigation-related costs by providing for mediation and resolutions sessions and by recognizing that "[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways…." *Schaffer*, 546 U.S. at 59, citing [Individuals with Disabilities Education Act Amendments of 1997], Pub. L. 105–17, 111 Stat. 37 (1997) Pub. L. 105–17, 111 Stat. 90, 20 U.S.C. § 1415(e); Pub. L. 108–446, 118 Stat. 2720, 20 U.S.C. § 1415(f)(1)(B) (Supp.2005); and 20 U.S.C. §§ 1400(c)(8)-(9). Early resolution opportunities provide IEP team members an opportunity to resolve the dispute before attorneys, hearing officers, and judges – who often have never met the student – get involved in the decision-making process. Early resolution of a dispute usually results in less hardened positions and less hard feelings than a due process hearing, creating greater likelihood of amicable relationships as the family and the school district continue to work together to meet the student's needs until the student graduates or withdraws.

The current IDEA fee-shifting provision dates back to 1986 when, in response to the Supreme Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984), Congress amended Part B of the IDEA to provide for prevailing party attorneys' fees in IDEA actions. Largely mirroring the fee-shifting language in other civil rights statutes, the amendment provided that courts "may award reasonable attorneys' fees" to "the parents of a child with a disability who is a prevailing party" in IDEA

litigation. Handicapped Children's Protection Act of 1986, Pub. L. 99–372, 100 Stat. 796 (1986)(codified as amended at 20 U.S.C. § 1415(i)(B)).

In keeping with the statute's collaborative purpose, IDEA prohibits awards of attorneys' fees for an attorney's participation in IEP meetings except those ordered by a hearing officer or court, or pursuant to mediation, 20 U.S.C. §1415(i)(3)(D)(ii), and courts regularly exclude such fees or reduce fee awards to reflect this restriction. *See, e.g.*, *Linda T. ex rel. William A. v. Rice Lake Area School Dist.*, 417 F.3d 704 (7th Cir. 2005) (district court's discretion constrained by IDEA provision excluding fees incurred in connection with IEP meetings except under certain limited circumstances); *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 124-25 (2d Cir. 2002) ("The IEP Team is a mechanism for compromise and cooperation rather than adversarial confrontation. This atmosphere would be jeopardized if we were to encourage the participation of counsel in the IEP process by awarding attorneys' fees for settlements achieved at that stage.")

When it added the fee-shifting provision to IDEA, Congress sought to ensure parents of all income levels access to legal representation for actions brought under the IDEA.[1] *See generally* S. Rep No. 99-112; *see also* 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, 9 (2004).

These attorneys' fees provisions are in keeping with the overall focus of the IDEA statute to preserve collaboration by de-emphasizing contentious and protracted litigation and instead encouraging streamlined, cost-efficient resolution. In this way, the IDEA's due process

[1] Courts may award parent attorneys' fees when they are a prevailing party regardless of the good faith of the school district's position. Courts may award school districts fees against a parent only when the parent's claim "was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 USC §1415(i)(3)(B)(i).

enforcement framework differs somewhat from that of other civil rights statutes. It was designed to be navigated quickly and efficiently, focusing on collaborative processes and outcomes intended to serve the needs of an individual student.

One way IDEA encourages efficiency in dispute resolution is by focusing on individual, procedural aspects of a student's education. Unlike the ADA or Section 504, the IDEA does not require discriminatory animus or conscious indifference on the part of school staff for liability. Rather, each part of a student's educational program – the who, what, when, where, and how of a student's specialized instruction – is actionable based on whether an alleged violation of the IDEA denied a student a free appropriate public education. Unlike claims for damages in civil rights lawsuits, IDEA claims can be based on a violation of any one of its robust procedural requirements. *See* 20 U.S.C. § 1414(d)(1)(B)(iii).

IDEA also encourages efficiency through relatively short timelines. The need for this is apparent, given that a child's educational needs change quickly when measured by the pace of traditional civil litigation. A due process hearing officer must issue a decision within 75 days of a parent filing a due process complaint. 34 C.F.R. § 300.515. This brief timeline is designed to ensure quick resolution of conflict and the speedy provision of necessary services to students, in sharp contrast to protracted civil rights litigation requiring the sustained and exclusive efforts of counsel preparing the case.

Finally, IDEA encourages efficient resolutions by making due process proceedings less complex than civil rights litigation and accessible to parents without the need to resort to legal representation. Due process proceedings are administrative and lack many of the most time-consuming aspects of civil rights litigation. States make available for parents model forms containing the limited information required for a complaint to easily initiate due process

proceedings. 34 C.F.R. § 300.509; *see also* 34 C.F.R. § 300.508(b) (setting forth pleading requirements for a due process complaint). There is often no discovery, including no depositions. Rather, parties are required to provide copies of evidence a short time in advance of the hearing. *See*, Perry A. Zirkel, State Laws for Due Process Hearings Under the Individuals with Disabilities Education Act, 38 J. Nat'l Ass'n Admin. L. Judiciary 3, available at ********digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1672&context=naalj (outlining state procedural practices).

IDEA's fee-shifting provision fits into its collaborative framework by permitting recovery of attorneys' fees only when parents "prevail" by securing judgement against a school district that has been found to be in violation of the statute. This finding could be based on procedure or substance. But fees are not available for aspects of the collaborative process.

B. Federal courts have recognized the need to limit IDEA attorneys' fees awards to situations contemplated by the statute.

Like its sister circuits, this court has applied *Buckhannon* in IDEA cases, finding attorneys' fees are not available when there has been no judicial imprimatur of a material alteration to the legal relationship between the parties, "either, for example, by court ordered consent decree or an enforceable judgment." *Bingham*, 550 F.3d at 603 (7th Cir. 2008). This interpretation, stemming from *Buckhannon*, gives effect to the statute's plain "prevailing party" language, which is interpreted similarly to other civil rights statutes.

Federal courts have refused to extend the meaning of IDEA's fee-shifting provision beyond its plain wording. Even in cases where a family was successful in obtaining an order against a school district, federal appellate courts have refused to find them "prevailing parties" if their child was found not eligible under the statute. The text of IDEA's fee-shifting provision, federal courts have explained, is to allow parents of *eligible* students with disabilities to effectuate their right to a free

appropriate public education. *Meridian Joint School Dist. No. 2 v. D.A.*, 792 F.3d 1054, 1067 (9th Cir. 2015) ("The purpose of the IDEA is to provide a free and appropriate public education to all disabled children who need special education services. Limiting the award of attorneys' fees against school districts to instances where the child has been determined to need special education services is not inconsistent with this purpose. Rather, it preserves public resources for those disabled children most in need of services."); *T.B. v. Bryan Independent School District*, 628 F.3d 240, 244 (5th Cir. 2010) ("Here, the plain language of the IDEA's fee-shifting provision limits recovery of attorneys' fees to the parent of a 'child with a disability'"), noting a similar finding in *D.S. v. Neptune Township Board of Education*, 264 Fed.Appx. 186 (3d Cir. 2008).

It is widely recognized that the Supreme Court in *Buckhannon* rejected the catalyst theory that the actions of the plaintiff "caused" the defendant to settle the case. *See*, *e.g.*, *Doe v. Boston Public Schools*, 358 F.3d 20(1st Cir. 2004). Such voluntary change in conduct lacks the necessary judicial approval and oversight involved in a judgment on the merits or a consent decree, or its functional equivalent. An attorneys' fee award in an IDEA case where parents merely secured a pre-hearing agreement by the school district to the requested eligibility or services would turn the statute's collaborative intent on its head by incentivizing parents to bring cases, regardless of merit, to leverage settlements from school districts.

Consistent with this Court's ruling in *Bingham*, other circuits have recognized that *Buckhannon* forecloses "prevailing party" status when a hearing officer's ruling has not changed the behavior of the school district by requiring it to take some action it had not already agreed to take. *D.F. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488 (3d Cir. 2012) (District Court did not abuse its discretion in determining that the litigation did not cause school district to agree to provide requested evaluations, where district had agreed from the outset of the litigation to provide them

and might have provided them without litigation if D.F. had complied with state regulations in requesting); *Lauren C. by and through Tracey K. v. Lewisville Independent School District*, 904 F.3d 363 (5th Cir. 2018) (even where parent received a ruling that the school district had violated IDEA by failing to identify the child as eligible for IDEA services, there was no material alteration in the legal relationship of the parties, nor was IDEA's purpose furthered by the ruling, which did not cause any change in the services already being provided to the child through the IEP); *Smith v. Fitchburg Public Schools*, 401 F.3d 16 (1st Cir. 2005) (Pre-hearing orders that memorialized the voluntary concessions made by school district and attempted to keep the settlement process moving forward in a timely manner did not provide sufficient judicial imprimatur on student's relief to make her a "prevailing party" under *Buckhannon*.)

The practical realities of school district-family discussions in IDEA disputes support this result. Families and school personnel work together, often over many years, to develop appropriate services for a student with disabilities eligible under IDEA. The staff at an IEP meeting, including a special education teacher, a regular education teacher, an administrator authorized to make decisions for the district, the child's parents, evaluators, and specialists, are all dedicated to developing an appropriate program for each child. If there is a dispute that results in the parent filing a due process complaint, the first step required by IDEA is a resolution meeting or mediation encouraging collaborative settlement. As this process evolves over weeks, a school district legitimately may change its position regarding how to approach an educational issue after further consideration of a myriad of factors, including new data and available resources.

The language of the statute shows that Congress preferred this iterative process of negotiating an end to an IDEA due process matter to litigation. Whether it occurs through a formal resolution session, mediation, settlement, or other agreement, a meeting of the minds means that the parties

can redirect their energies and dollars to the child's services. If parents could recoup attorneys' fees for this process, there would be incentive to demand more, and for school districts to agree to less.

C. An attorneys' fees award in this case would be contrary to IDEA's plain language and collaborative framework.

In this case, the parties engaged in extensive discussions to come to agreement on a program for the student. The discussion started when the student brought a crude weapon to school, a serious incident precipitating nearly one year of discussions and meetings to determine how to address the student's needs and to keep the school environment safe. *A.B. v. Brownsburg Comm. Sch. Corp.*, No. 1:20-cv-02387-JMS-MJD, (S.D. Ind. Feb. 1, 2022) [Filing No. 24-2 at 337.] The District court found that the parties' "settlement negotiations" had resulted in an April 23, 2020 compromise in which the student would remain in school under a revised Accommodation Plan (pursuant to Section 504 of the Rehabilitation Act) and the school district would pay for an independent education evaluation. But the parties continued to negotiate "regarding other requests made by the Parents." [Filing No. 24-1 at 283-87; Filing No. 24-1 at 297- 302; Filing No. 24-1 at 308-11.] On the eve of hearing, the school district "decided to end the litigation" by sending the Parents a draft Settlement Agreement agreeing to the terms demanded by the Parents in their latest letter sent ten days before the scheduled hearing, except for the entire amount of attorneys' fees. [Filing No. 24-2 at 165.] The school district filed its Stipulation and Motion for Dismissal or Final Decision with the hearing officer that same day. After more motions, the hearing officer vacated the hearing date and set a "decision deadline" of August 30. In the meantime, the hearing officer issued a Finding of Eligibility and Order to Convene a Case Conference Committee, as "the parties have agreed that the student is eligible," and "it is essential that the student begin receiving services as soon as possible." Docket No. 24-1, AR pp. 0065 -0066, Appx. 030-031.

The hearing officer declined to make a judgement on changes to the program agreed upon by the parties for the student made at the last hour, noting that "this is another attempt by Petitioner to extract last-minute concessions from Respondent." [Filing No. 24-1 at 30.] No hearing ever took place. On August 30, 2020, the hearing officer dismissed the Parents' due process complaints, finding that the parties had "resolved all child-specific issues with sufficient [clarity] for the [District] to proceed with providing services pursuant to the student's [IEP]…." *Id*. (brackets in original). [Filing No. 24-1 at 7.]

This is not a case where the school district refused to find a child eligible for services, or to agree to the parents' requests, then changed course on the eve of hearing in an attempt to avoid an adverse ruling that might include attorneys' fees. As the days and weeks went on in this matter, and the parties discussed appropriate services for the child, the family made more requests for particular services or evaluations. Eventually the district did agree to most of the requests; but it offered $10,000 in attorneys' fees, rather than the total amount of claimed fees. [Filing No. 24-2 at 73-74.]

These facts simply are not consistent with the text of IDEA's attorneys' fees "prevailing party" requirement, as interpreted by this court and others via *Buckhannon*, or the statute's collaborative framework. IDEA does not *presume* an award of attorneys' fees; it *allows* a court to award attorneys' fees to a "prevailing party." 20 U.S.C. §1415 (i)(3)(B)(i). School districts and families may settle IDEA disputes with some portion of fees included so that a hearing can be avoided and resources directed at services for the child. An offer of attorneys' fees does not concede that the party is entitled to them as a matter of law. Any argument that a school district may only "reduce" its attorneys' fees exposure through the 10-day offer of settlement is a restatement of the catalyst theory rejected in *Buckhannon* and by courts. *See*., *e.g., A.R. ex rel. R.V. v. New York City Dept.*

of Educ., 407, F.3d 65 (2d Cir. 2015) ("[U]nder *Buckhannon*, a settlement of an IDEA administrative proceeding between the parties, followed by a dismissal of the proceedings—without more—does not render the plaintiff a 'prevailing party' for statutory fee-shifting purposes no matter how favorable the settlement is to the plaintiff's interests. To permit such a fee award would be to reinstate the use of the now forbidden 'catalyst theory.'")

This case is a good example of an iterative negotiation process, which often bleeds over into the 10-day offer-of-settlement period. The parties had been negotiating for months, with the school district agreeing to the child's eligibility and all of the education-related relief requested in the parents' two hearing requests. It was the amount of attorneys' fees that the parties did not agree on. Docket 24-2, AR pp. 0447-0451, Docket No. 24-1, AR pp. 0006-0008, Appx. 032-034.

In cases like this, where the school district has worked in earnest to come to agreement with the parent on eligibility and educational services for the child, and agreement has been reached on crucial issues separate and apart from any judicial order, the clear language of the statute makes clear that the parents are not "prevailing parties."

II. An Award of Attorneys' Fees in This Case Would Encourage Parties Not to Collaborate, but to Litigate.

Amici and their members share a mission to provide an equitable and excellent education to public school children —an often-herculean effort given scarce state and federal resources allocated to this task. Vital to this mission is educating some of our nation's most vulnerable children—students with disabilities—whose right to a free appropriate public education is carefully protected by IDEA. The costs of special education, especially large attorneys' fees awards, increasingly threaten the ability of school districts to meet this core mission. Most school districts faced with even the slimmest possibility of being found to have violated IDEA and being

ordered to pay thousands of dollars to an attorney will choose instead to use available dollars for a child's education.

Special education disputes with families not only are rare – as most families are satisfied with the services provided to their child and the school staff's work to provide the best program possible for the child – but also show the downsides of IDEA's fee-shifting provision. It can, in some cases, incentivize parents to continue to request more services, well after the parties have agreed about the needs of the child, so that attorneys may recover fees through a settlement or an order.

A. In contentious and drawn-out disputes, schools may offer attorneys' fees as part of settlement, but that offer is not based on a legal entitlement.

There are a number of reasons a school district might decide to find a child eligible for services, or to add or change services for a child as his or her needs change. Amici urge the court not to assume that the reason the district would refuse a requested service is a cost analysis only. But it must be acknowledged that both parties in special education disputes must face the reality of the significant costs of litigation. Here, and in many cases where the case has dragged on for some time, the parents have an incentive to try to recoup attorney's fees either through settlement or a ruling, and the school district has an incentive to limit its exposure to pay for attorney's fees so that it can meet the educational needs of the child and other children.

When parents and school personnel disagree on IDEA eligibility or services for a student, there are often months or years of conversations, meetings, and collaboration before the disagreement results in a due process complaint. By that time, the family and the school staff have been attempting to collaborate in the child's interest. Even after a hearing, the family and school personnel usually endeavor to maintain a rapport, even if strained, as they must continue to work together as long as the child remains a resident of the district.

Once the family files a due process complaint, however, relatively short federal and state timelines kick in. Often, a school district must decide in a matter of weeks whether to attempt to settle the matter or to litigate it. In some situations, compromise is advantageous for the school district so that it can settle the matter rather than to proceed to a contentious and costly hearing. The parties engage in settlement discussions, sometimes through the IDEA's resolution session, sometimes through mediation. The process is iterative: the school is learning more and more as the days go on, and often receiving more requests from the parents. The parents' attorney has an incentive not to agree, to continue to request additional services, and to settle with some fees included, or to push to hearing in the hopes of a final judgment and entitlement of reasonable attorneys' fees. The school district may have an incentive to offer some attorney fees to encourage settlement.

But as a matter of law, a party is eligible for a fee award under the IDEA statute only if they secure a judgement that changes the legal relationship of the parties. In other words, IDEA allows for attorney fees awards when a hearing officer or judge has determined that the district must be ordered to comply with the law. As this Court has noted, "[T]he IDEA only guarantees the right to a free education; it does not explicitly guarantee the right to attorney's fees incurred in pursuit of that education." *T.D. v. LaGrange*, 349 F.3d at 477 (citation omitted).

B. School districts must consider the costs of a dispute when determining how to allocate public dollars.

School officials working through special education disputes must consider a variety of factors of which cost – in dollars -- is only one. There is a significant toll taken from school staff in time, emotion, and stress, by going to hearing, and a burden on the relationship with the child's family. Financial cost also is an important consideration, given school officials' responsibility to allocate

public dollars in accordance with their education mission, and given that special education litigation has become a very real, and unpredictable, piece of a school district's budget.

Since IDEA's predecessor was enacted in 1974, federal special education litigation has soared, with decisions doubling from the 1990s to the 2000s. American Association of School Administrators, *Rethinking Special Education Due Process*, 10 (April 2016) (hereinafter "AASA"), available at **********aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf. The quantity of due process hearings rose steadily through 1990s and has remained consistently high throughout the early 2000s. William H. Blackwell and Vivian V. Blackwell, "A Longitudinal Study of Special Education Due Process Hearings in Massachusetts: Issues, Representation, and Student Characteristics," Sage Open (March 23, 2015), available at ********journals.sagepub.com/doi/pdf/10.1177/2158244015577669. During the 2016-2017 school year, for example, families filed 18,490 due process complaints, with 2,119 resulting in completed due process hearings by the end of the year. U.S. Dep't of Educ., 41st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, xxxi (2019), available at ********sites.ed.gov/idea/files/41st-arc-for-idea.pdf.

As the IDEA became increasingly litigious, costs to school districts similarly grew, and now are unwieldy, hard-to-predict budget line items. Nationally, districts spend around $90 million total per year in conflict resolution related to special education. AASA, supra, at 23. According to a survey conducted by the American Association of School Administrators in 2016, school districts paid an average of $19,241.38 when compelled to compensate parents for their attorney's fees

associated with a due process hearing. *Id.* at 3. However, this is a national average, with certain jurisdictions awarding total fees many orders of magnitude greater.

Meanwhile, while special education expenditures rise, the federal contribution to that cost remains drastically underfunded. Congress enacted the IDEA to provide "federal funds to assist state and local agencies in educating children with disabilities." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006). While Congress committed to covering up to 40 percent of per-pupil expenditures for students with disabilities in public elementary and secondary schools, 20 U.S.C. § 1411(a)(2), 45 years later, despite Congressional assurances, the percentage of costs covered by the federal government has remained much lower, currently sitting at about 13 percent. National Education Association, *Special Education: Federal Share of the Average Per Student Cost 13%* (2022), **********.nea.org/advocating-for-change/action-center/our-issues/special-education#:~:text=The%20federal%20law%20has%20always,full%20funding%20level%20for%20states (The federal share of the average per student cost was 13 percent in the 2020 fiscal year, the smallest share since the 2000 fiscal year).

As litigation costs rise and school budgets are perpetually underfunded, attorneys' fees awarded under the IDEA can take an increasingly disproportionate share of school funding each fiscal year. While statutorily federal IDEA funds cannot be allocated to cover attorneys' fees, 34 C.F.R. § 300.517(b)(1), the consistent underfunding of special education means that districts' general funds—meant to cover education for all students—are stretched thin to cover the deficit in special education funding. *See, e.g.*, Heather Graves and Lea Kopke of The Press Times, *Wisconsin's special ed system: High stress, sparse state funding*, Wisconsin Public Radio (Oct. 2, 2021), **********.wpr.org/wisconsins-special-ed-system-high-stress-sparse-state-funding,

("Forcing school districts to divert general funds to special education costs "has emerged as a major contributor to inequity in Wisconsin's school finance system," according to a 2019 Wisconsin Policy Forum issue brief. Since each district's share of special education students varies widely, schools with more special education students must divert more money from programs that serve the general student population. Those include several northeast Wisconsin districts."). Attorneys' fees awarded in special education can directly affect the ability of school districts to serve their students, cutting into essential funding for teacher salaries and direct special education services.

Amici recognize that fulfilling the goals of the IDEA and appropriately educating students with disabilities in accordance with the law involves necessary financial expenditures on the part of school districts. These are natural results of a statutory framework designed to protect the educational rights of a vulnerable subset of students. Yet, the current landscape in which attorneys' fees awards figure prominently in settlement and due process cases, and school districts must pay their own attorneys to engage in that process, does not result in greater benefit for students with disabilities on the whole. School administrators acknowledge that in 80 percent of cases, the cost of defending an educational decision in a due process hearing was a consideration in granting parent special education requests. AASA, supra at 12. Tellingly, 40 percent of administrators consented to "unreasonable, unnecessary, or inappropriate" parent requests solely because the cost of granting the request was a fraction of the cost of proceeding to due process. *Id.* Districts are placed in the difficult position of going beyond their legal obligations—necessarily resulting in a legally unnecessary expenditure of funds—in order to avoid the potential of more costly litigation.

There are no villains in these disputes: both parents and school districts are advocating from different perspectives on what is appropriate for a student. An 11th hour settlement can occur

because resources arise for districts from year to year depending on a variety of factors. Choosing to provide additional services when resources become available might be disincentivized if districts know they will be stuck with a large legal bill. This means a student might not get necessary services or at least might face delays as a district weighs the outcome of a hearing and appeal to federal court. Neither the increased costs to the public till nor the delay in services make sense from a public policy perspective. This is why Congress intended collaboration as the most expeditious way to ensure delivery of education services, with litigation being a secondary option.

The majority of requests for due process hearings are resolved without a hearing through settlement or mediation. Schools have an incentive very early on in a case to try to compromise and settle the case to minimize the costs described above and the diversion of staff from their usual duties. There is far less incentive to follow this process if the school district knows that any compromise will lead not only to payment of its own attorneys' fees, but the parent's fees as well.

CONCLUSION

Maintaining collaborative and cooperative relationships between schools and parents is vital to educating all students, especially those with special needs. Fee awards in cases like this, where the school district had agreed to eligibility and all of the educational services requested by the parents in their due process requests, discourage early resolution and encourage protracted litigation, frustrating a core tenant of the IDEA.

Amici urge this court to affirm the holding below, and to continue to apply *Buckhannon* to uphold the plain language and clear intent of IDEA to prevent attorneys' fees award in the absence of a judgment that materially alters the parties' legal relationship.

May 18, 2022

Respectfully Submitted,

/s/ Francisco M. Negrón, Jr.

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 Seventh Circuit by using the appellate CM/ECF system on May 18, 2022. I certify that all participants are registered CM/ECF users.

/s/ Francisco M. Negrón, Jr.

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Case Number 22-1277

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Attorney for Amici Curiae National School Boards Association and
Indiana School Boards Association

Dated: May 18, 2022

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