NO. 08-50830

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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**EL PASO INDEPENDENT SCHOOL DISTRICT,**
Plaintiff-Appellant

**v.**

**RICHARD R., as next friend of R.R., MARK BERRY,**
Defendants-Appellees

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**R.R., by his next friend, E.R.,**
Plaintiff-Appellee

**v.**

**El Paso Independent School District,**
Defendant-Appellant

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On Appeal From The United States District Court
Western District Of Texas, El Paso Division

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# BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND AND NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF BRIEF OF EL PASO INDEPENDENT SCHOOL DISTRICT SUPPORTING REVERSAL OF DECISION BELOW

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## I.
## SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Texas Association of School Boards Legal Assistance Fund (including the Texas Association of School Boards, Texas Association of School Administrators, and the Texas Council of School Attorneys) -- Amicus Curiae

2. National School Boards Association, 1680 Duke Street, Alexandria, VA 22314

2. Christopher P. Borreca, Thompson & Horton LLP, 711 Louisiana, Suite 2100, Houston, Texas 77002 – Attorney for Amicus Curiae

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Christopher P. Borreca
Attorney for the Amicus Curiae Texas Association of School Boards Legal Assistance Fund and National School Boards Association

## II.
## INTEREST OF AMICUS CURIAE

Over 770 public school districts in Texas are members of Amicus Curiae Texas Association of School Boards ("TASB") Legal Assistance Fund, which advocates the positions of local school districts in litigation with potential state-wide impact. The TASB Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards ("TASB"), the Texas Association of School Administrators ("TASA"), and the Texas Council of School Attorneys ("CSA"). These governing organizations are concerned about the negative effect that the district court's disregard of the Individuals with Disabilities Education Act's clear preference for resolving disputes short of the adversarial process, the intent and purpose of the resolution session and the parent's failure to cooperate will have upon the school districts of Texas. The TASB Legal Assistance Fund, therefore, has paid all costs associated with the preparation of this brief. This brief is assumed to be opposed by Appellees as request for agreement was made to counsel for Richard R. and Mark Berry, but not responded to. Accordingly, a motion for leave to file has been filed.

The Texas Association of School Boards ("TASB") is a non-profit, unincorporated association of the public school districts of the State of Texas. Approximately 1,047 public school districts in the state, through their elected

boards of trustees, have joined as members of TASB. The members of TASB are responsible for the governance of the public schools of Texas. *See* TEX. EDUC. CODE § 11.151(b). While TASB does provide insurance to school districts, the Legal Assistance Fund is a separate entity from TASB and has its own board and officers. The Legal Assistance Fund has no contact with the insurance division at TASB, and does not discuss ongoing cases with any of the insurance adjusters. The Texas Association of School Administrators ("TASA") represents the state's school superintendents and other administrators who are responsible for carrying out the education policies adopted by their local boards of trustees. The Council of School Attorneys ("CSA") is composed of attorneys who represent more than 90% of the public school districts of Texas.

The National School Boards Association ("NSBA") is a nonprofit organization representing state associations of school boards, as well as the Hawaii State Board of Education and the Board of Education of the U.S. Virgin Islands. Through its members, NSBA represents over 95,000 school board members who govern more than 14,000 local school districts serving about 49.8 million students. NSBA regularly represents its members' interests before Congress and federal and state courts and have participated as *amicus curiae* in many cases involving the IDEA. NSBA supports an interpretation of the IDEA that fosters collaboration

between parents and school districts and that promotes resolution of disputes as early as possible.

## III.
## SUMMARY

The Individuals with Disabilities Education Act ("IDEA" or "Act"), as reauthorized in 2004, added a mandatory meeting, a "resolution session," as a means to decrease litigation. The Act previously and currently allows for voluntary mediation to be provided at state expense. It is significant that the resolution session is mandatory for both parties whereas the mediation provisions in the Act and its regulations remain voluntary. *See Comments to the Regulations*, 71 Fed. Reg. 156, 46701-46702 (2006) (declining to make resolution sessions optional and mediations mandatory due to statutory language). Congress recognized the importance of providing school districts with an opportunity to resolve a matter at its headwaters. It would be illogical that a parent, having set forth the requested relief in the clear manner required by the Act, could frustrate that meeting's purpose simply by rejecting the very relief requested. If this Court adopts the reasoning and rationale of the district court, however, the resolution session will be reduced to a meaningless requirement under the law, something clearly unintended by Congress. The district court erred by overlooking this clear language and intent of the Act's amendments.

In addition, the district court erred by approving the parent's insistence upon a consent decree, rather than an enforceable settlement agreement because no such

requirement is legitimatized by case law or statute. Further, at this stage of the proceedings where the parent was refusing to settle, there was no evidence that the parent was the "parent of a child with a disability." As such, no attorneys' fees could have been awarded, therefore the parent was without justification for refusing the settlement agreement on the basis argued. The parent's uncooperative actions also were ignored by the district court and the hearing officer. The holding of the district court will serve to frustrate the purposes of the IDEA and the policies of the Texas Education Agency, will needlessly increase school district legal expenditures and place parents and schools into needless adversarial positions, promoting efforts to obtain attorneys' fees rather than improve services for students with disabilities. In all respects, the decision of the district court should be reversed.

## IV.
## ARGUMENT AND AUTHORITIES

### A. The District Court Ignored the Statutory and Regulatory Intent Regarding Enforceability of the Proposed Settlement Offer.

When Congress reauthorized the Individuals with Disabilities Education Act in 2004, significant changes occurred in the area of dispute resolution.[1] For the first time, Congress acknowledged three important steps: 1) an intent for parents to give a school district clear notice of the nature of their dispute, 2) a requirement for the district to respond to the complaint, as well as 3) an opportunity for the parent and the District to resolve the matter before proceeding with more formal means via the adversarial process. *See* 20 U.S.C. § 1415(b)(7)(A) (notice of relief requested); 20 U.S.C. §1415(c)(2)(B)(i)(I) (written response); and 20 U.S.C. §1415(f)(1)(B) (resolution sessions).

The notion, however, that parents should first address their concerns concerning their student with the school district before filing a request for a due process hearing did not originate with this legislation. The origins of the resolution session are important for this Court to review in order to understand the significant degree that the district courts' decision stands as an aberration in the trajectory of this legal doctrine.

[1] The background of this case is extensively dealt with in Appellant El Paso ISD's brief and will not be repeated here. *See* El Paso ISD's brief, pp. 6 - 15.

1. **The Courts Favor Resolution.**

As early as 1987, the Eighth Circuit in *Evans v. District No. 17 of Douglas County, Nebraska*, held that it was inappropriate to grant reimbursement for a private school placement by the parents when there was "no indication that district officials would have refused to make changes in the coming year." *Evans v. District No. 17 of Douglas County, Nebraska*, 841 F.2d 824, 832 (8th Cir. 1987). In a decision that has become known as the "Evans rule" in the Eighth Circuit, the court noted that "the school district should be on notice of disagreements and given an opportunity to make a voluntary decision to change or alter the educational placement of a handicapped child." *Id.* At 831-32. The parents had discussed problems they were having with their child's behavior, and all parties agreed that changes were appropriate for the following year, and both the school and parents were exploring those changes. Without considering less restrictive alternatives, the parents unilaterally removed their child from the school and enrolled her in private school. "[T]he school district should have had the opportunity, and to an extent had the duty, to try these less restrictive alternatives before recommending a residential placement." *Id.* At 832. "The difficulty in this case is that . . . the school officials were never given the opportunity to make (or refuse to make)

changes because the parents unilaterally removed their child from the school district." *Id.* at 831.

In a subsequent decision following the 8th Circuit's adoption of the "Evans rule," a district court denied reimbursement to parents who unilaterally changed the placement of their child to a private school:

> Plaintiffs contend that Gail and Carl D.'s request for administrative review of the January 1993 IEP constituted notice sufficient to satisfy the Evans Rule. The argument fails because the Evans Rule requires that notice be provided before parents unilaterally withdraw their child from public school. A school district should be on notice of disagreements and given an opportunity to make a voluntary decision to change or alter the educational placement of a handicapped child. Plaintiff's interpretation would render the Evans rule – which is designed to afford the school district the first opportunity to decide the change in placement issues – meaningless.
> (citations omitted.)

*Carl D. v. Special School District of St. Louis County*, 21 F. Supp. 2d 1042, 1059 (E.D. Mo. 1998).[2]

In *James v. Upper Arlington City School District*, 987 F. Supp. 1017 (S.D. Ohio 1997), parents requested reimbursement for a unilateral private placement decision. The court discussed the scheme of the statute:

> The IDEA provides a relief system through which parents who disagree with the appropriateness of a proposed IEP can convey their

[2] This requirement for notice prior to removing a disabled child to a private school was codified in the 1997 amendments to the IDEA at 20 U.S.C. §1412(a)(10)(c)(iii)(I).

> concerns. *The process begins with a complaint to the school district*, followed by a due process hearing at which the parents are able to voice their concerns to an impartial hearing officer of the state educational agency as *determined by state law*. (emphasis added)

*Id.* at 1021.

"The parents had an obligation to give the Upper Arlington School District an opportunity to explore further their concerns, and if necessary, seek an impartial due process hearing." *Id.* at 1024. *See also, Schoenfeld v. Parkway School District*, 138 F.3d 379 (8th Cir. 1998) (denying reimbursement to parents who made unilateral placement decision since the school "had no opportunity to provide an appropriate education for Scott in the public school as is preferred by the IDEA because he transferred to private after only one day in eighth grade without any discussion with Parkway officials about possible accommodations to meet his current needs"); *Patricia P. v. Board of Educ. of Oak Park*, 203 F.3d 462 (7th Cir. 2000) (holding that the parent forfeited the right to reimbursement where she did not cooperate in making the child available for evaluation by the school district and that courts will look harshly upon any party's failure to reasonably cooperate with another's diligent execution of their rights and obligations under the IDEA).

In addition, the Texas Education Agency ("TEA") has itself adopted a policy that special education disputes should be resolved by school districts prior to the

more formal adversarial system. The Texas Education Agency's Commissioner's Rules Concerning Special Education Services states:

> "It is the policy and intent of TEA to encourage and support the resolution of any dispute … at the lowest level possible and in a prompt, efficient, and effective manner. Possible options for resolving disputes include, but are not limited to:
>
> (1) meetings of the student's ARD committee;
> (2) meetings or conferences with the student's teachers;
> (3) meetings or conferences with campus administrators, the special education director of the district . . ."

*See* 19 Tex. Admin. Code § 89.1150 (2008).

Despite the common-law developing a favorable viewpoint of allowing a school district an opportunity to cure a parent's complaint, along with the statutory changes made in 1997 regarding notice prior to removing a child from public school and placing them in private school, and the policy of the Texas Education Agency for resolution at the "lowest" level, the United States Department of Education, prior to the Act's amendments in 2004, was less receptive. The changes made to the Act in 2004, however, vitiated the Department's reluctance to impose a required opportunity for the school district to resolve the matter.

2. **Pre-IDEA 2004 Executive Agency Rulings Disfavored Mandatory Resolution.**

The United States Department of Education ("USDOE"), prior to the Act's 2004 reauthorization issued letter rulings calling into question state statutes and

regulations requiring that due process hearings be disallowed if a parent had not first presented their complaint to the school district's IEP team[3] for resolution. In *Lillbask v. Sergi,* 193 F.Supp. 2d 503 (D. Conn. 2002), the federal court upheld the validity of the Connecticut state statute requiring such a presentment even when the USDOE had written an opinion letter rejecting the state law as being contradictory to the then wide-open allowance for due process hearings to occur. Despite the court's ruling upholding the law, the USDOE persisted in its position, threatening to deny Connecticut its right to its share of the federal financial allotment to Connecticut to conduct its Part B-IDEA program. *See Appendix A to this Brief, "Letter to Sergi from Asst. Sec. Pasternack," Sept. 25, 2002.* In light of that threat, Connecticut capitulated and removed the requirement from its law. *See Lillbask v. State of Conn. Dept. of Educ.*, 397 F.3d 77, 89 (2nd Cir. 2005).

Around the same time, Texas Education Agency promulgated rules providing for a similar requirement for a parent to present to the ARD-IEP team any complaint prior to a due process hearing being held. *See* Texas Proposed Rule §89.1152 (not adopted). Again, the USDOE, in letter opinion, held that such a requirement would not be permitted under the IDEA. *See Appendix to this Brief, "Letter to Lenz from Stephanie Lee, Director," OSEP, March 6, 2002.* Such

[3] In Texas, the IEP team is called the Admission, Review and Dismissal (ARD) team. *See* 20 Tex. Admin. Code § 89.1050.

rulings currently stand in sharp contrast to the amended IDEA. The fact that Congress took this step, essentially rejecting the USDOE's previous position, establishes the importance it placed on mandating that the school district be afforded the opportunity to "cure" the problem without a due process hearing. In this case, it is clear that the parents did not allow El Paso ISD such an opportunity, despite El Paso ISD's offer to provide all relief as requested prior to litigation.

### 3. **IDEA 2004 Reforms Balance in Favor of Mandatory Resolution Opportunities.**

Congress recognized these frustrations and rewrote the due process requirements in 2004. Under the new law and its regulations, the parent *must* meet with selected members of the IEP team "so that the LEA (school district) has the *opportunity* to resolve the dispute that is the basis for the due process complaint." *See* 20 U.S.C. §1415(f)(B). (emphasis added).

In the appeal before this Court, the parent requested the following relief in the request for due process hearing:

a. A referral to special education and a full and individual evaluation;

b. A notice of the parent's procedural rights;

c. An order to convene an ARD meeting to review the FIE;

d. An order requiring the District to provide written notice whenever the school district proposed or refused to initiate or change the identification, evaluation or educational placement of the child; and

e. Attorneys' fees of undisclosed amount.

(Administrative Record, "AR" 231).

At the resolution meeting, the school district offered the following relief:

a. A full and individual evaluation;

b. Appropriate notices of procedural rights;

c. Proper compliance with applicable federal and state laws regarding the provision of prior written notice;

d. Convene an ARD IEP meeting; and

e. Attorneys' fees of $3,000. (Record "R" 497-501).

The parent refused this offer, despite its 1:1 correspondence with the request for relief. The parent ultimately received no more than the relief requested from, or offered by, the school district. The district court wrongly justified the parent's refusal to settle on the grounds that the offered settlement would not have been in the form of a consent decree. The core of the Act, however, is the cooperative process that it establishes between parents and schools. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53, 126 S.Ct. 528, 532 (2005). By ignoring these aspects of the law, the district court's ruling seriously undermined the IDEA's collaborative framework. Seemingly, the district court ruled that the parent's rights under the settlement agreement could not be *enforced* absent a decree. By doing so, the district court erred by ignoring the Act and its regulations' clear statement that the parties who resolve a matter through a resolution session *must*

execute a legally binding agreement that is enforceable in any state court of competent jurisdiction or, in a district court of the United States, or, by the TEA if the state has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements, pursuant to the state enforcement mechanisms. *See* 20 U.S.C. §1415(f)(B). Because the school district offered all of the relief that could be granted by the hearing officer in an enforceable agreement, there was no justification to reject its terms.[4]

There is no credible law or evidence that El Paso ISD's settlement offer would not have been enforceable under the Act. The district court's adoption of the Appellees' argument that the settlement document needed to be in the form of a consent decree is illogical and at odds with the very statute and regulation at issue and case law. The only basis for holding that the settlement offer must be in the form of a consent decree would be to ensure that a non-existent action for attorneys' fees could be created, unrelated to any purpose that proper educational services for the student would be provided.[5] This of course has been rejected by the United States Supreme Court. *See Buckhannon Bd. and Care Home v. West Va. Dep't. of Health and Human Res.*, 532 U.S. 598, 600, 121 S.Ct. 1835, 1838

[4] Hearing officers may not award attorneys' fees. See 20 U.S.C. § 1415(i)(3)(D).

[5] The district court's ruling, in fact, would lead to unnecessary protraction of cases and frustrate the very purpose of early resolution. One could easily envision the shameful specter of the horrendous case of *Jarndyce v. Jarndyce* in Charles Dickens' *Bleak House*, where because of protracted delays the corpus of the estates were depleted by court costs and legal fees.

(2001); *Lewis v. Cont'l. Bank Corp.*, 494 U.S. 472, 480-81, 110 S.Ct. 1249, 1251 (1990). Attorneys' fees, in fact, are particularly eschewed under the IDEA at the stage of litigation where the resolution session is at issue. The Act specifically excludes any attorney fee award for attendance at a resolution session, even though a parent's attorney is allowed to participate in that process. *See* 20 U.S.C. §1415(i)(3)(D)(iii) (attorneys' fees not allowed for resolution meeting attendance).

It was clear in the requests made by the Appellees, however, that an award of attorneys' fees was the primary objective sought since all of the requested and obtained relief for the child was granted by the school district before the due process hearing even began. (AR 310, AR 174-175, AR 7-9; R 394, R 405). The parent's refusal to cooperate at the resolution session and the failure of the hearing officer to hold that the parents failed to present an Article III case or controversy effectively denied the school district's "opportunity" to resolve the issues.

Courts should give effect, if possible, to every clause and word of a statute, avoiding any construction which implies that the legislature was ignorant of the meaning of the language it employed. *See Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S.Ct. 391, 394 (1883). *See also* George Costello, *Statutory Interpretation: General Principles and Recent Trends*, CRS Report for Congress, (March 30, 2006). It would be a basic violation of statutory construction as well as common

sense to conclude that a school district could offer all of the relief requested in a mandatory meeting where the statute provides that the school district is to be provided the "opportunity to resolve the complaint" but then be forced to proceed to hearing simply because the parent refuses to sign an agreement which provides for that same relief. The district court erred by neglecting to acknowledge that El Paso ISD was not provided the "opportunity" allowed under the Act when the parent rejected the resolution which mirrored the request for hearing.

In this case, the school district satisfied not only one of the prerequisite actions created by the Act and designed to eliminate the need for litigation, but two. Prior to the resolution session, the school district provided a "written notice" to the parent, stating that there was no case in controversy because the school district was willing to provide all of the relief requested. (AR 197-207; R 497). The school district then reiterated its offer at the resolution session. (R 393, R 497-501).

The legislative history to IDEA 2004 makes clear that the newly-mandated requirement for the district to respond to the complaint with this "written notice" was designed as a means of decreasing the need for a due process hearing. The Senate Report states "The Committee is hopeful that such a written response from the school may, in fact, help a parent to resolve a disagreement, and eliminate the

need to proceed to a due process hearing." *See* SEN. REP. NO. 108-185 (2003). Here, the District fully complied with the intent of the Act only to be rebuked by an uncooperative litigant. The parent not only refused the relief sought, he also failed to provide consent to evaluate the student. (AR 7; R 394, R 405).

The legislative history also clearly lays out the same rationale for requiring the parent to submit their request to the IEP team via the resolution session, previously eschewed by the Department of Education. The Senate Report reads:

> Although it is to be expected that a parent would try to resolve a disagreement with the IEP team before filing a due process complaint, the committee has heard of instances in which a school district learns for the first time that a parent has a problem with the district when it receives a notice of the parent's complaint. When this occurs, the school district has not had the opportunity to resolve the disagreement before going to a due process hearing. The committee believes that the parties should have a forum to resolve matters in a more informal way before moving to a more adversarial process.
>
> During this resolution session, the parent will meet with the IEP team to discuss his or her complaint and the specific issues that form the basis of the complaint, and *the local educational agency shall have an opportunity to resolve the complaint*. The committee intends the local educational agency to promptly schedule the resolution session and the parent to facilitate the occurrence of the resolution session by not delaying the meeting or refusing to attend. The committee does not intend that either party would have the right to refuse to participate in the resolution session. . . .
>
> . . . . The goal of these new provisions is fairness: to be sure that a district is aware of a problem and has a *chance* to resolve it in a less formal manner before having to spend the time and resources for a due process hearing. The purpose is not to make parents go to another

> IEP meeting to explain an issue that has already reached an impasse with the district. *See* SEN. REP. NO. 108-185 (2003) (emphasis added).

The Act requires that the parent identify, with specificity, the relief requested. It makes no sense that a school district, statutorily provided with an *opportunity* to resolve a complaint, could not do so upon offering to do exactly what the parent has requested as relief simply at the whim of an uncooperative parent. [6]

The district court's ruling, if left to stand, will also needlessly increase costs incurred by school districts in the State of Texas. Litigation costs under the IDEA are already prohibitively expensive. In 1999-2000, the average cost of a litigated case was $94,600 for the year. Jay G. Chambers, et al., American Institutes for Research, *What Are We Spending on Procedural Safeguards in Special Education*, 1999-2000, Rpt. 4 at 8 (May 2003), available at http://csef.air.org/publications/-SEEP/national/Procedural%20Safeguards.pdf The district court's holding will lead to schools being faced with the impossibility of settling any case prior to a due process hearing unless unlimited attorneys' fees are paid. As the Senate Report previously cited established and the House Report echoed, the purpose of the reforms made to the IDEA was to restore trust between the parties and reduce

[6] In his recent book, "Life Without Lawyers", Philip Howard, the author of the previous treatise, "The Death of Common Sense" describes similar situations as this case where needless litigation results from a quest for attorneys' fees. *See Life Without Lawyers*, pp. 49-67, P. Howard, Norton & Co. 2009.

litigation. *See* H.R. REP. NO. 108-77 at 85, 116 (2003). The district court's opinion is counter-productive to such aims and if affirmed, would only encourage protraction of litigation to attain prevailing party status, to the detriment of the prompt provision of services to the child.

**B. The Hearing Officer was without Jurisdiction to Hear this Case.**

As shown in El Paso ISD's Brief of Appellant, Article III jurisdiction did not exist due to a lack of standing, ripeness and failure to evade mootness. *See* Appellant Brief, pp. 18-41. Additionally, this is a child find case. Because of that, the facts of this case make out the very essence of the doctrine of mootness. Mootness deprives a court of subject matter jurisdiction. *Bd. of Trs. of the State Univ. of N.Y.*, 142 F.3d 135, 140 (2nd Cir. 1994). It is a firmly entrenched and fundamental principle of law that a cause is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, could not have any practical effect upon the then existing controversy. *Flight Eng'rs. Int'l. Ass'n. v. TWA, Inc.*, 305 F.2d 675, 680 (8th Cir. 1962) (citation omitted). Mootness can be demonstrated by showing "no practical relief can follow a judicial determination of the controversy. *Id.* (citation omitted).

Because this is a child find case at its most basic, the hearing officer could only award the very relief that was already offered by El Paso ISD. Because the

school district was prevented by the parents from conducting its own evaluation of the child prior to the due process complaint or the due process hearing (and the school district is always entitled to conduct its own evaluation), such relief, even if requested, could not have been granted in the absence of a showing of eligibility. *See Andress v. Cleveland Indep. Sch. Dist.*, 64 F.2d 176 (5th Cir. 1995) (school district always entitled to evaluate student for eligibility under the Act) and *Collingsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 236 (3rd Cir. 1998) (no relief available unless child is eligible under the Act).

The Seventh Circuit, addressing a very similar case, held that an attorneys' fee request in the face of a school district's offer to provide all of the relief requested did not justify a continuation of the litigation. *Bingham v. New Berlin School District*, 550 F.3d 601, 602-603 (7th Cir. 2008). In *Bingham*, the parents alleged a violation of the IDEA and requested that the school district reimburse them for the cost of the student's private school. *Id.* at 602. The school district, prior to the hearing, tendered a check for the full amount of the reimbursement requested. *Id.* The parents accepted payment but did not withdraw the due process request. *Id.* The district filed a motion for summary judgment and the hearing officer concluded that because of the payment, "there remains no actual existing controversy that this tribunal has the authority to adjudicate. The continuation of

these proceedings would have no practical effect on the underlying controversy, so the matter has become moot." *Id.*

The hearing officer then refused the parents' request to declare that the parents had prevailed as a means of obtaining attorneys' fees. The parents appealed to district court where that court declared that they were not prevailing parties and denied their claim for fees. The Seventh Circuit affirmed the lower court. *Id.* at 602. Acknowledging that *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services*, 532 U.S. 598 (2001) controlled any fee awards in IDEA related litigation, the court held that the parents had not secured a material alteration of the legal relationship between the parties, either, for example, by court ordered consent decree or an enforceable judgment. *Id.* at 603.

In *Bingham,* the Court readily dismissed any sympathies for maintaining a live controversy solely for the basis of gaining judicial imprimatur in the form of a consent decree in order to obtain attorneys' fees. *Id.* at 603-604. In the case before this Court, the hearing officer erred when she did not dismiss the matter as moot and the district court erred by not acknowledging that the matter was moot. This Court, like the Seventh Circuit, should find that an offer of settlement of all issues

deprives jurisdiction for lack of standing and mootness and, concurrently, reject any claim for fees.

### C. The Parent was not Justified in Insisting upon a Consent Decree in Order to Obtain Attorneys' Fees Because an Award of Attorneys' Fees Would not be Possible.

Many courts have disallowed attorneys' fees when the school district was prevented from resolving the complaint by the actions of the parent. For example, in *Johnson v. Bismark Public School District*, 949 F.2d 1000 (8th Cir. 1991), the parent's attorney attended one ARD, but did not participate. *Id.* at 1001. He requested the next meeting to be rescheduled, and then missed that one as well (which had been scheduled on a date of his choosing). *Id.* at 1002. His next action was to request a due process hearing alleging "every perceived omission and questionable action that counsel could cull from his examination of Michael's record." *Id.* The court held that although the plaintiff could be construed as the prevailing party, she "unreasonably protracted the final resolution of the controversy" because neither she nor her attorney made an effort to resolve the matter or articulate the issues prior to the filing of the due process complaint. *Id.* The relief amounted to an annual review (which is required by law anyway) and a summer program, which the district never had the opportunity to consider before the hearing. *Id.* The court granted a motion for summary judgment for the district,

a *non-moving party*. *Id.* at 1004. *See also Petrovich v. Consolidate High School District #230*, 939 F.Supp. 884 (N.D. Ill. 1997) (denying attorneys' fees where an attorney made a demand on behalf of a student who had been served under IDEA in a previous school district, but never requested any sort of evaluation or services in his current school before a disciplinary incident precipitating his expulsion, and then gave the district only five days to meet his demands, one of which was a high school diploma); *Patricia E. v. Bd. Of Educ. of Community High Sch. Dist. #155*, 894 F.Supp. 1161, 1166 (N.D. Ill. 1995) (holding that while plaintiffs are free to resort to administrative action under the provisions of IDEA, they cannot expect to recover fees and costs when their efforts contributed nothing to the final resolution of a problem which could have been achieved without resort to the administrative process); *Combs v. School Board of Rockingham County*, 15 F.2d 357 (4th Cir. 1994) (denying attorneys' fees and stating that school boards cannot be expected to be clairvoyant and must be given adequate notice of problems if they are to remedy them).

While the offer made by the school district to grant the relief requested should be sufficient to find that no attorneys' fees could have been awarded for this action, the relief granted by the hearing officer fails to provide a basis for an

attorney fee award because the threshold requirement, namely, to be "a parent of a child with a disability" was not met.

The assertion that a parent could be justified rejecting a settlement in lieu of a "consent decree" is unsupported by the fact that nothing in the decision of the hearing officer could have resulted in prevailing party status. In an unpublished decision from the Third Circuit, the Court held that only a "prevailing parent of *a child with a disability*" is entitled to a fee award. *See D.S. v. Neptune Township Board of Education*, 264 F. App'x 186 (3rd Cir. 2008) (emphasis added). The Court acknowledged that the Administrative Law Judge ordered the child to be evaluated under four separate orders and also ordered an independent educational evaluation. Because the record contained no finding that the child was ever identified as a student with a disability, his parents could not be considered prevailing "parents" under the statute. *Id.* *See also* 20 U.S.C. §1415(i)(3)(B) (parents of a *child with a disability* entitled to fees) (emphasis added). *See also Collingsgru, infra* (parents have no rights under the IDEA if they do not have a disabled child under the statute). In the case before this Court, the parent only obtained an order to evaluate and to convene an IEP meeting to consider the results of the evaluation, which had been offered by El Paso ISD prior to litigation. Accordingly, even assuming that the parents could show that they achieved a

material alteration of the legal relationship that furthered the purposes of the IDEA, without a showing that the child qualified as a student with a disability, attorneys' fees could still not even be awarded. The failure to accept the school district's settlement because of the "need" for a consent decree in order to obtain attorneys' fees and prevailing party status simply is not justified because the potential fee award at that point in time was illusory at best.

## CONCLUSION

For the foregoing reasons, as well as those stated by El Paso ISD, the judgment below should be reversed.

Respectfully submitted,

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By:_____

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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(s)_____
Attorney for Amicus Curiae
Texas Association of School Boards
Legal Assistance Fund and the
National School Boards Association

Dated:_____

## CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 2009, two true and correct copies of the Brief of Amicus Curiae Texas Association of School Boards Legal Assistance Fund and National School Boards Association In Support Of Brief Of El Paso Independent School District Supporting Reversal of Decision Below and one copy of a disc containing a computer readable copy of the Brief were served by U.S. Mail, certified, return receipt requested on,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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**EL PASO INDEPENDENT SCHOOL DISTRICT,**
Plaintiff-Appellant

**v.**

**RICHARD R., as next friend of R.R., MARK BERRY,**
Defendants-Appellees

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**R.R., by his next friend, E.R.,**
Plaintiff-Appellee

**v.**

**El Paso Independent School District,**
Defendant-Appellant

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On Appeal From The United States District Court
Western District Of Texas, El Paso Division

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# APPENDIX TO BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND AND THE NATIONAL SCHOOL BOARDS ASSOCIATION

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NOW COMES Amicus Curiae Texas Association of School Boards Legal Assistance Fund and The National School Boards Association pursuant to Fifth Circuit Rule 47.5 and FED. R. APP. P. 32.1(B), files and attaches the following

cases or materials cited within its Brief of Amicus Curiae which may not be available in a publicly accessible electronic database:

1. *D.S. v. Neptune Township Board of Education*, 264 F. App'x 186 (3rd Cir. 2008).
2. "Letter to Sergi from Asst. Sec. Pasternack," Sept. 25, 2002.
3. "Letter to Lenz from Stephanie Lee, Director," OSEP, March 6, 2002.

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