Case Nos. 14-56457 (L), 14-56524

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IRVINE UNIFIED SCHOOL DISTRICT,
Plaintiff-Appellant,

v.

K.G., an adult student,
Defendant-Appellee.

Appeal from a Decision of the
United States District Court for the Central District of California
Honorable James V. Selna
No. 2:10-cv-01431-JVS-MLG

BRIEF OF AMICI CURIAE CALIFORNIA SCHOOL BOARDS ASSOCIATION EDUCATION LEGAL ALLIANCE & NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF IRVINE UNIFIED SCHOOL DISTRICT AND REVERSAL OF THE DISTRICT COURT'S DECISION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae California School Boards Association Educational Legal Alliance and National School Boards Association state that they do not issue stock and that neither of them is a subsidiary or affiliate of any publicly owned corporation.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amicus Curiae California School Boards Association ("CSBA") is a non-profit, membership organization composed of nearly 1,000 California school district governing boards and county boards of education. CSBA advances the interests of California's more than 6 million public school students by supporting and strengthening local school board governance. As part of CSBA, the Education Legal Alliance ("ELA") helps to ensure that local school boards retain their authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The ELA's activities include joining in litigation where legal issues of statewide concern affecting public education are at stake.

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, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students, including approximately 6.4 million students with disabilities. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as amicus curiae in numerous cases involving issues under the Individuals with Disabilities Education Act ("IDEA").

This case is a matter of statewide and Circuit-wide significance because it presents this Court with an opportunity to remind the lower courts that awards of attorney's fees in favor of students and parents under the IDEA are not automatic and should not be treated differently from awards under fee-shifting principles applicable to 42 U.S.C. § 1988. The Court's decision here will affect how school districts throughout California and the Ninth Circuit assess the prospective risks and costs associated with due process litigation in the future. To assist the Court with evaluation of the issues before it, Amici Curiae present the following ideas, arguments, theories, insights, and additional information.

FRAP 29(C)(5) STATEMENT

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, Amici Curiae state that (A) no party's counsel authored this brief in whole or in part; (B) no party or party's counsel contributed money to fund the preparation or submission of this brief; and (C) no person other than Amici Curiae and their counsel contributed money to fund the preparation or submission of this brief.

ARGUMENT

Amici Curiae believe the Court should reverse the district court's decision below and realign attorneys' fees awards under the IDEA, 20 U.S.C. § 1415(i)(3)(B)(i), with the principles of awards made under 42 U.S.C. § 1988 as set

forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and its progeny.[1] Too often, awards of attorney's fees under the IDEA to prevailing students and parents are viewed by their attorneys and the district courts as automatic, a foregone conclusion unmoored from the actual outcome achieved. Unfortunately, this inappropriate bias in favor of granting automatic fee awards creates a dangerous incentive to place the reality of excessive fee awards ahead of educational policy decisions when administrative due process cases are filed or even threatened. This is true in part because attorneys' fees awards impose enormous additional costs on school districts, which are already struggling to find the funding to meet the needs of students with disabilities given that Congress has failed to provide sufficient resources to them to meet IDEA requirements.

I. IN CHANGING COURSE IN ITS FEE ANALYSIS, THE DISTRICT COURT BACKTRACKED FROM THE CORRECT LEGAL STANDARD AND SHIFTED TO AN "AUTOMATIC" FEE GRANT

Despite having previously ruled that the circumstances of the instant case did not warrant an award of attorney's fees for equitable reasons, the district court reversed course after reviewing this Court's subsequent decision in a separate case,

[1] In confirming that *Hensley*'s principles apply in IDEA matters, this Court observed that "solid policy reasons" supported its decision: (1) "*Hensley* represents the established standard for awarding attorney's fees in civil rights cases"; and (2) "the *Hensley* standard will not only guide courts, but allow parties themselves to better assess the prospective costs of [litigation] and make more informed choices about when to litigate and when to settle." *Aguirre v. Los Angeles Unified Sch. Dist.*, 461 F.3d 1114, 1120 (9th Cir. 2006).

Orange County Dep't of Educ. v. Cal. Dep't of Educ., 550 Fed. Appx. 361 (9th Cir. 2013). In that case, the Court reversed the district court's earlier determination that another student seeking an award of fees for having established "who would pay for his Free Appropriate Public Education" in administrative due process proceedings before the California Office of Administrative Hearings was not a prevailing party for fee-shifting analysis. *Id*. at 362. Relying on *Orange County Department of Education*, the district court reconsidered its earlier decision in this case and ruled that K.G. was in fact a prevailing party.

The district court's prevailing party determination is not directly at issue in this appeal.[2] Instead, the question as Amici Curiae see it is whether the district court improperly shifted to a nearly automatic fee grant standard following its new prevailing party determination. Amici Curiae contend that the district court did so based on an inaccurate view and application of the law. In short, fees were essentially automatic in this case once the district court concluded that K.G. was a prevailing party under *Orange County Dep't of Educ.*, 550 Fed. Appx. 361. For the reasons more fully explained below, the district court abused its discretion when it failed to properly assess K.G.'s degree of success following the prevailing party determination.

[2] Plaintiff-Appellant separately challenges whether the district court should have reached the issue at all.

A. Attorney's fees awards are not automatic once a party is determined to be a prevailing party.

There should be nothing "automatic" about attorney's fees awards in IDEA cases. *Farrar v. Hobby*, 506 U.S. 103, 119 (1992) (O'Connor, J., concurring) ("Section 1988 expressly grants district courts discretion to withhold attorney's fees from prevailing parties in appropriate circumstances"); *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1037 (9th Cir. 2006) (Beezer, J., concurring) ("Prevailing party status does not guarantee the receipt of attorney's fees"); *Choate v. County of Orange*, 86 Cal. App. 4th 312, 324 (2001) (prevailing parties under § 1988 "potentially entitled to attorney fees … [b]ut that does not end the matter").

"Narrow discretion" does not mean "no discretion," and it should not be interpreted to allow an automatic award of fees to a prevailing party. "[T]he most critical factor" in an attorney's fees analysis, including under the IDEA, is meaningful degree of success. *Farrar*, 506 U.S. at 114; *Aguirre*, 461 F.3d at 1118. Moral satisfaction in pursuing an argument or claim is not enough to constitute meaningful success. *Farrar*, 506 U.S. at 114.

"[S]ection 1988 is not 'a relief Act for lawyers' who accomplish no public goal 'other than occupying the time and energy of counsel, court and client." *Choate*, 86 Cal. App. 4th at 324 (quoting O'Connor, J., concurring in *Farrar*, 506 U.S. at 122); *accord Aguirre*, 461 F.3d at 1120 ("Acquiring a client with one

strong claim should not give special education attorneys the green light to bill time on every conceivable issue"). This Court has aptly observed the consequence were it otherwise: "All children suffer when the schools' coffers are diminished on account of expensive, needless litigation." *Aguirre*, 461 F.3d at 1120.

B. The district court failed to properly consider the degree of success achieved by the "prevailing party" in determining the size and appropriateness of the award of attorneys' fees and costs.

In overly narrowing its discretion, the district court failed to properly consider and adjust for the extremely limited success achieved by the student's attorney in protecting her client's rights under the IDEA in this particular case. Perhaps most striking is that the district court awarded attorney's fees for work done after the administrative stage of the case, despite the fact that K.G. graduated from high school with a regular diploma in April 2010 (ER Vol. IV:519), months before his counsel filed her trial court brief in September 2010.

It is axiomatic that relief must directly benefit a plaintiff in order to constitute a material alteration of the legal relationship between the parties. *Farrar*, 506 U.S. at 111. Yet there was no legal relationship between K.G. and the school district to be altered after he graduated because the obligation to provide IDEA services ends with a high school diploma. 34 C.F.R. § 300.102(a)(3); *Parents of Student W v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994) (IDEA "promises no more" than services enabling a student to graduate).

Any controversy between K.G. and the school district on the merits of the administrative appeal was effectively moot as of his graduation.[3] *Moseley v. Bd. of Educ.*, 483 F.3d 689, 692-93 (10th Cir. 2007); *Browell v. Lemahieu*, 127 F. Supp. 2d 1117, 1126-27 (D. Haw. 2000) ("There is no effective relief that this Court can grant to Plaintiff. It is undisputed that Plaintiff has received a high school diploma."). At that point, the dispute was solely among educational agencies about funding. There was no risk that K.G. would have to "give back" his education, and, as Plaintiff-Appellant's Opening Brief demonstrates, K.G.'s continued involvement in the case was not adverse to the school district, but devoted to achieving a judicial determination that the state department should have been liable for providing services to K.G. in the past. (Opening Brief at 13 et seq.)

Because any dispute between K.G. and the school district was effectively moot on the merits as of April 2010, any claim for attorney's fees based on the merits after that point was also moot. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990); *Moseley*, 483 F.3d at 694. The rule is consistent with the admonition that a party's interest in pursuing an argument for moral satisfaction or to prove a point – as K.G.'s counsel did relentlessly, though unsuccessfully, pursuing the California Department of Education in this case – does not constitute

[3] The instant dispute remains a live controversy because 20 U.S.C. § 1415(i)(3)(B)(i) provides independent grounds for jurisdiction to hear an action to recover attorney's fees arising out of administrative proceedings.

meaningful success.[4] *Farrar*, 506 U.S. at 114; *Choate*, 86 Cal. App. 4th at 324. To the extent K.G. can even be characterized as a prevailing party in this regard – and Amici Curiae doubt that he can be – reasonable attorney's fees are "no attorney's fees at all." *Farrar*, 506 U.S. at 115; *Aguirre*, 461 F.3d at 1121. The district court, however, awarded fees for this misadventure despite previously characterizing such an award as inequitable, presumably feeling constrained by the inaccurate view that fees should be automatic.

II. THE DISTRICT COURT'S INTERPRETATION AND APPLICATION OF FEE-SHIFTING IMPOSES SIGNIFICANT ADDITIONAL COSTS ON SCHOOL DISTRICTS ALREADY OVERBURDENED BY THE ENORMOUS EXPENSE OF PROVIDING SPECIAL EDUCATION.

The district court's expansive interpretation and application of fee-shifting in this case is particularly troubling given the significant expense that automatic fee awards impose on school districts in addition to their obligation to fund the cost of special education and related services. By draining education dollars away from the classroom and into litigation, unwarranted fee awards have the potential to

[4] Amici Curiae understand the policy at work in fee-shifting, i.e. to ensure the availability of counsel to vindicate the rights of plaintiffs. The problem here, however, is that the only interest pursued by K.G.'s counsel was her own interest in holding the California Department of Education responsible for K.G.'s education, particularly after K.G. graduated and there was no longer any need to protect any relief awarded at the administrative level. *Miller v. Bd. of Educ.*, 565 F.3d 1232, 1248 (10th Cir. 2009).

inflict substantial harm on all students, including those with disabilities. *Accord Aguirre*, 461 F.3d at 1120.

A. Litigation costs, including attorneys' fee awards, are a significant additional burden under the IDEA.

In April 2013, the American Association of School Administrators ("AASA") released a proposal concerning reauthorization of the IDEA entitled, "Rethinking Special Education Due Process," in which it argues that the current due process system should be reconsidered because it –

> continues to expend considerable school district resources and impedes the ability of school personnel to provide enhanced academic experiences for all students with disabilities because it devotes the district's precious time and resources to fighting the legal actions of a single parent.[5]

By adding to the financial and resource expenditures of IDEA litigation, the district court's decision to grant an unmerited fee award may also unintentionally result in educational costs. Based on a survey of 200 school superintendents from across the United States, AASA found that

> [m]ore than ever before, districts are weighing the cost of complying with parents' requests for services, programs and placements against the cost of engaging in a due process hearing, even when districts believe these requests are frivolous, unreasonable or inappropriate for the student.[6]

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[5] Available at http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf at 2.

[6] *Supra* at 11.

These results were echoed a year later by a California-specific survey compiled by the Due Process Sub-Committee of the SELPA Administrators of California.[7]

While school districts make every effort to provide a free appropriate public education to students with disabilities, they must also carefully consider where to expend their limited funds in order to best serve the interests of all children. Attorney's fee awards that divert dollars from educational services into the pockets of attorneys who achieve only minimal success for one student severely diminish the ability of public schools to accomplish their educational mission.

B. Congress has yet to appropriate the promised level of funding for special education and related services that school districts must provide under the IDEA.

Congress enacted the IDEA under the Constitution's Spending Clause, Art. I, § 8, cl. 1, to provide "federal funds to assist state and local agencies in educating children with disabilities." *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 295 (2006). Since passage of the IDEA, Congress has committed to assisting state and local agencies in their obligation to educate students with disabilities with federal funds amounting to "40 percent of the average per-pupil expenditure in public

[7] Available at http://www.smcoe.org/assets/files/about-smcoe/superintendents-office/statewide-special-education-task-force/Survey%20Comparison%20on%20Rethinking%20Special%20Education.pdf SELPAs are Special Education Local Plan Areas comprised of constituent local school districts and other educational agencies, with responsibilities for implementing certain IDEA requirements in California. Cal. Educ. Code § 56195 et seq.

elementary schools and secondary schools in the United States." 20 U.S.C. § 1411(a)(2). Yet 40 years later, "the percentage of costs covered by the federal government has remained stagnant at about 16%, with school districts across the nation struggling to meet their needs." Bill Summary, IDEA Full Funding Act 2014 (S. 2789 (113th Congress, 2013-2015)).[8] In September 2010, The IDEA Full Funding Act was introduced with the goal of meeting Congress's commitment by fully funding IDEA at the 40% level. *Id.* As with similar legislative attempts to fully fund IDEA, however, the 2014 bill died.[9] Thus, the overwhelming responsibility to pay for IDEA services necessary to ensure students with disabilities receive free appropriate public education remains a burden on state and local school district budgets.[10]

These unfortunate circumstances have motivated concerned educational organizations to continue to push Congress not only for full funding, but also to

[8] Available at http://www.help.senate.gov/imo/media/doc/IDEA%20Full%20Funding%20Act%202014%20-%20Bill%20Summary.pdf.

[9] *See* https://www.govtrack.us/congress/bills/113/s2789. Amicus Curiae NSBA, among other key education organizations, had also sought a mandatory funding requirement in the 2004 reauthorization of the IDEA, but mandatory funding language did not make it into the final bill.

[10] It should be noted as well that IDEA funds cannot be used to pay attorney's fees awards or other litigation costs in IDEA actions under current regulations. 34 C.F.R. § 300.517(b)(1). Under the regulations, IDEA funds may be used to pay for a hearing officer or to use a particular facility to hold the due process hearing. 34 C.F.R. § 300.517(b)(2). As such, the limited general funds of public school districts are often strained to pay the cost of both underfunded IDEA services and excessive attorney fee awards when the services they do provide are challenged.

consider the tremendous financial burden the current due process system has become due, in no small part, to attorney-related fees and costs. In the meantime, the courts should not stray from thoroughly assessing IDEA attorney's fees requests for degree of success. The award in this case in particular risks turning the IDEA into "a relief Act" for K.G.'s lawyer because it obligates the school district to pay for her personal pursuit against the state department of education. This is not what fee-shifting is for.

III. CONCLUSION

Fee awards that depart from the standards of 42 U.S.C. § 1988 do not support the underlying reason for fee-shifting and create precedent that prejudices the ability of school districts and other educational agencies to fully meet their responsibility under the IDEA to provide children with disabilities with free appropriate public education. Such judicial decisions not only may impose huge financial costs on one district through a massive fee award to an attorney who should not be entitled to it, but also may impede school districts in general from making appropriate educational and fiscal decisions that benefit the students they serve for fear of incurring such burdensome legal costs.

The district court's award of attorney's fees in this case was based on an inaccurate view and application of the law and should therefore be reversed.

DATED: March 25, 2015

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Rules 29(c) and (d) and 32(a)(5) of the Federal Rules of Civil Procedure, the attached brief uses a proportionally spaced typeface of 14-points or larger and contains 2,846 words.

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

s/Sue Amaro
Sue Amaro