ORAL ARGUMENT NOT YET SCHEDULED

No. 14-7133

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANGELA PRICE, Parent and Next Friend of J.P., a minor,

Plaintiff-Appellant,

JEROME PARKER,

Plaintiff-Appellant,

LASHAWN WEEMS, Parent and Next of Friend of D.W., a minor,

Plaintiff-Appellant,

v.

DISTRICT OF COLUMBIA,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
(Honorable Richard J. Leon)

BRIEF OF AMICUS CURIAE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF APPELLANTS AND REVERSAL

Michael T. Kirkpatrick
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW, Suite 312
Washington, DC 20001-2075
(202) 662-9540
michael.kirkpatrick@law.georgetown.edu

Counsel for Amicus Curiae

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CERTIFICATE AS TO PARTIES, RULINGS, RELATED CASES, AND CORPORATE DISCLOSURE STATEMENT

1. **Parties and Amici.** All parties and amici appearing before the district court and in this Court are listed in Appellants' Opening Brief.
2. **Rulings Under Review.** References to the rulings at issue appear in Appellants' Opening Brief.
3. **Related Cases.** This case has not previously come before this Court. Counsel is aware of no related cases pending before this Court or any other court within the meaning of D.C. Circuit Rule 28(a)(1)(C).
4. **Corporate Disclosure Statement.** Amicus Curiae Council of Parent Attorneys and Advocates, Inc. (COPAA) is an independent, nonprofit, § 501(c)(3) tax-exempt organization of attorneys, advocates, parents, and related professionals who advocate on behalf of children with disabilities. COPAA focuses on the rights of children who receive special education services and supports, and who are eligible to be served under the Individuals with Disabilities Education Act. COPAA has no parent corporation and no publicly held corporation holds ten percent or more of its stock.

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick

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GLOSSARY

COPAA	Counsel of Parent Attorneys and Advocates
DCPS	District of Columbia Public Schools
HCPA	Handicapped Children's Protection Act
IDEA	Individuals with Disabilities Education Act
JA	Joint Appendix

INTEREST OF AMICUS CURIAE[1]

The Council of Parent Attorneys and Advocates, Inc. (COPAA) is a nonprofit organization with membership comprised of attorneys, advocates, parents, and related professionals who advocate on behalf of children with disabilities. One of the statutes that COPAA focuses on in protecting the rights of children who receive special education services and supports is the Individuals with Disabilities Education Act (IDEA), a federal statute that seeks to ensure that children with disabilities receive a free appropriate public education. In practicing under the IDEA, COPAA members are able to work with students who are eligible to receive special education and related services, and their parents. One of the main protections guaranteed by the IDEA is the right of parents and students to be meaningful participants in the educational planning process. However, COPAA recognizes that parents are often unable to participate fully in that process or otherwise exercise their rights under the IDEA without representation. Thus, COPAA strives to increase the quality and quantity of special education advocates and attorneys in order to create a level playing field for students with disabilities.

[1] This brief was not authored in whole or in part by counsel for a party. Counsel for COPAA represented Plaintiffs in the district court, but withdrew (Dist. Ct. Doc. 21), and has not represented a party in this Court. No person or entity other than COPAA or its counsel made a monetary contribution to the preparation or submission of this brief.

COPAA believes that doing so is vital to ensure that children with disabilities receive the high-quality education to which all children are entitled.

To ensure that students with disabilities have access to effective representation, Congress added a fee-shifting provision to the IDEA. COPAA recognizes that this fee-shifting provision is an important tool for parents seeking to enforce their rights under the Act. The decision below, if not reversed, would eliminate that tool for certain indigent parents and students in the District of Columbia, and deny them equal access to established legal protections.

All parties have consented to the filing of this brief.

STATUTES AND REGULATIONS

Pertinent statutes are excerpted in Appellants' Opening Brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The IDEA, 20 U.S.C. § 1400 *et seq*., was originally enacted in 1975, after Congress determined that children with disabilities were routinely denied educational opportunities afforded to children without disabilities. The IDEA seeks to ensure that each child with a disability receives a comprehensive evaluation of his or her unique needs, and a "free appropriate public education." *Id.* § 1412(a)(1)(A). To further this goal, Congress added a fee-shifting provision to the IDEA in 1986, providing for an award of reasonable attorneys' fees "to a prevailing party who is the parent of a child with a disability." *Id.*

§ 1415(i)(3)(B)(i). Congress made clear that fees awarded under the IDEA, as with other civil rights fee-shifting statutes, "shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." *Id.* § 1415(i)(3)(C).

Despite the inclusion of a fee-shifting provision, structural challenges often prevent low-income parents of students with disabilities from enforcing their rights under the IDEA. Such challenges include the reluctance of private attorneys to take IDEA cases on a purely fee-shifting contingency basis because school districts often make settlement offers that force clients to sacrifice statutory fees in exchange for the educational services their children need, as well as informational asymmetries that cause low-income parents to be less likely to recognize that their child's school is out of compliance with the IDEA or that remedies are available. As a result, poor parents utilize the IDEA's private enforcement mechanism less often than their wealthier counterparts, and poor students are less likely to receive the appropriate special education services required by the IDEA. This problem is particularly severe in the District of Columbia, where more than thirty percent of children live in poverty and where the public school system has a long history of noncompliance with the IDEA.

In 2002, the District of Columbia Superior Court, recognizing that an indigent child alleged to be delinquent or in need of supervision, or involved in

abuse and neglect or termination of parental rights proceedings, may have educational issues that cannot effectively be addressed by the defense attorney or guardian ad litem, established a panel of lawyers eligible for appointment as special education advocates to ensure that the child obtains the educational services guaranteed by the IDEA. D.C. Sup. Ct. Admin. Order 02-15. Appointed special education lawyers are entitled to compensation at the rate of $90 per hour pursuant to the District of Columbia Criminal Justice Act plan, or the Counsel for Child Abuse and Neglect plan, depending on the nature of the proceeding that brings the child before the Superior Court. In either case, the appointment orders provide that the lawyer will be compensated by the Superior Court *only if* attorneys' fees cannot be recovered from the District of Columbia Public Schools (DCPS).

By providing for the appointment of counsel to pursue educational claims, the Superior Court's appointment system addresses some of the obstacles that have prevented indigent students with disabilities from enforcing their rights under the IDEA. For example, by ensuring that appointed counsel will receive at least $90 per hour win or lose, the appointment system puts indigent parents on equal footing with wealthier parents who can agree to pay some amount of fees to special education attorneys if statutory fees are unavailable, either because the parent sacrifices statutory fees to obtain educational services as part of a settlement, or fails to achieve prevailing party status. The appointment system also addresses the

problem of informational asymmetry because a Superior Court judge who suspects that a child before the court may have unmet special education needs is empowered to appoint an attorney with specialized knowledge to investigate whether the student is entitled to relief under the IDEA and, if so, to pursue relief.

In a series of cases, DCPS has asserted that indigent parents and children represented by appointed counsel are not entitled to the same remedies available to all other prevailing parties in IDEA cases. Specifically, DCPS argues that prevailing parties are not entitled to statutory attorneys' fees if they were represented by appointed counsel at no cost to themselves, and, even if they are entitled to attorneys' fees, they are not entitled to market-rate fees, but only the $90 an hour their attorney could recover from the Superior Court under the appointment order if statutory fees were unavailable.

DCPS's arguments fail. First, it is well-settled that market-based attorneys' fees are available under federal fee-shifting statutes regardless of the fee arrangement between plaintiff and counsel.[2] Thus, whether a prevailing plaintiff is

[2] *Blum v. Stenson*, 465 U.S. 886, 895 (1984) (holding that market rates should be used to calculate attorneys' fees under fee-shifting statutes where the prevailing plaintiffs are represented by public interest lawyers at no cost to the plaintiffs); *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1524 (D.C. Cir. 1988) (en banc) (*SOCM*) (holding that the analysis in *Blum* with respect to fees sought for work performed by salaried attorneys at a non-profit legal services organization applies equally to the work of attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals and their clients' ability to pay); *accord Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir.

represented by pro bono counsel, counsel who agrees to accept a reduced rate for noneconomic reasons, or appointed counsel is irrelevant for purposes of establishing a reasonable fee. Second, several district court decisions have held that Superior Court appointment orders guaranteeing an attorney $90 per hour have no bearing on the hourly rate that a prevailing party may recover under the IDEA.[3]

In this case, Judge Leon split from the other district courts that have considered the issue and held that the IDEA's fee-shifting provision does not apply to prevailing parties represented by appointed counsel. Judge Leon reasoned that, by accepting an appointment, counsel waived his clients' right to recover the statutory fees available to all other prevailing parties under the IDEA. The decision below is wrong. A lawyer's agreement to represent a client at a reduced hourly rate to be paid by a third party in the event that statutory fees are unavailable does not bar the client from recovering market-rate attorneys' fees pursuant to a fee-shifting statute. To hold otherwise would strip indigent parents and students of an

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1995); s*ee also Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) (holding that fee-shifting statutes "allowing a 'reasonable attorney's fee'" contemplate "reasonable compensation, in light of all the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less. Should a fee arrangement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount.").

[3] *See, e.g., Douglas v. District of Columbia*, --- F. Supp. 2d ---, 2014 WL 4359192, *5 (D.D.C. Sept. 4, 2014) ("The rate at which the Superior Court caps reimbursement [for appointed counsel in IDEA cases] has no bearing whatsoever on the hourly rate at which a prevailing party may recover attorneys' fees in this Court.") (citing three other district court decisions).

important tool for achieving the goals of the IDEA and undermine the Superior Court's efforts to remove barriers to private enforcement of the IDEA by the poor. The district court's decision should be reversed.

ARGUMENT

I. Fee Shifting is Key to Ensuring Private Enforcement of Civil Rights Statutes.

Under the generally applicable "American Rule," each party to a lawsuit pays its own legal fees. A number of statutes, however, include fee-shifting provisions to open the legal process to individuals who would not otherwise be able to afford counsel, and to encourage plaintiffs to serve as private attorneys general to enforce important public policies. Such statutes allow a court to order a losing party to pay the prevailing party's legal fees. The importance of private enforcement in the protection of civil rights was recognized by Congress in the enactment of the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988, when Congress found that, without fee shifting, many individuals with meritorious civil rights claims would be unable to afford a lawyer and civil rights laws would become "mere hollow pronouncements." S. Rep. 94-1011, at 6 (1976).

A. Congress Added a Fee-Shifting Provision to The IDEA to Ensure that Disabled Children Could Enforce Their Right to a Free Appropriate Public Education.

The IDEA has its origins in the Education of the Handicapped Act, P.L. 91-230, 84 Stat. 175 (1970), which was substantially overhauled by the Education for

All Handicapped Children Act of 1975, P.L. 94-142, 89 Stat. 773. In 1990, Congress changed the title of the statute to the Individuals with Disabilities Education Act. P.L. 101-476, § 901(a)(1)(3), 104 Stat. 1103, 1141-42. Enacted in part under the Spending Clause, the IDEA imposes certain conditions on states and local school districts in return for federal money. The Act establishes an enforceable right to a free appropriate public education for children with disabilities, and establishes due process procedures, including the right to judicial review, to protect those rights.

As originally enacted, the IDEA did not contain a fee-shifting provision, but plaintiffs often joined their IDEA claims with claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination on the basis of disability in programs receiving federal financial assistance, and which has a fee-shifting provision. In *Smith v. Robinson*, 468 U.S. 992, 1021 (1984), the Supreme Court held that where a remedy available under § 504 "is provided with more clarity and precision under the [IDEA], a plaintiff may not circumvent or enlarge on the remedies available under the [IDEA] by resort to § 504." Thus, in the wake of *Smith v. Robinson*, parents could no longer bring special education cases under the Rehabilitation Act and recover attorneys' fees if relief was available under the IDEA.

Realizing that *Smith v. Robinson* would diminish access to representation, Congress responded by passing the Handicapped Children's Protection Act of 1986 (HCPA), P.L. 99-372, 100 Stat. 796, which added a fee-shifting provision to the IDEA. The HCPA provides for awards of attorneys' fees to parents who are prevailing parties in actions brought under the IDEA to ensure that disabled children, particularly those most at risk of a violation of their rights, have access to attorneys and the legal system. Although the IDEA has been amended several times, the substance of the fee-shifting provision has not changed. It is now codified at 20 U.S.C. § 1415(i)(3)(B)(i), and provides that "the court, in its discretion, may award reasonable attorneys' fees as part of the costs … to a prevailing party who is the parent of a child with a disability." The Act further provides that fees "shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." *Id.* § 1415(i)(3)(C).

B. Congress Intended that Attorneys' Fees Under The IDEA be Based on Prevailing Market Rates Regardless of Actual Cost.

The legislative history of the IDEA's fee-shifting provision demonstrates that Congress intended that fee awards under the Act be based on prevailing market rates regardless of whether the parents were represented at no cost to themselves by publicly-funded attorneys. The bill reported out of the Senate, S. 415, provided for an award of reasonable attorneys' fees to prevailing parents,

but would have limited the award in cases where the parent was represented by a publicly-funded attorney to the actual cost of providing representation. S. Rep. No. 99–112, at 12 (1985). This provision prompted seven Senators who otherwise supported the bill to issue "additional views" as part of the Senate Report, explaining that such a cap on fees "creates a blatant double standard which will have a particularly negative impact on lower income handicapped children most dependent on legal representation by publicly funded attorneys," and noting that the concept collides with the Supreme Court's decision in *Blum* v. *Stenson*, holding that attorneys' fees should be calculated on the basis of prevailing market rates regardless of actual cost. *Id.* at 17. The Senators further warned that a "cap on publicly funded attorneys' fees would deter schools from settling cases expeditiously" and would encourage school districts "to draw judicial proceedings out in an attempt to force plaintiffs to abandon their cases." *Id.*

In the House, H.R. 1523 provided for an award of reasonable attorneys' fees based on prevailing rates in the community without regard to the fee arrangement between the parent and the lawyer. The Conference Committee eliminated the Senate bill's proposed cap. The Conference Report explains that "fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." H.R. Conf. Rep. No. 99–687, at 5–6 (1986) (citing *Hensley v. Eckerhart*, 461 U.S. 424

(1983); *Marek v. Chesny*, 473 U.S. 1 (1985); and *Blum v. Stenson*, 465 U.S. 886 (1984)). The consideration and subsequent rejection of a cap on fees demonstrates that, from its enactment, the fee-shifting provision of the IDEA has provided for market rates.

II. Despite Its Private Enforcement Mechanism, The IDEA Has Not Adequately Protected Low-Income Students with Disabilities.

A. Low-Income Students Have Disproportionate Special Education Needs but are Underserved by The IDEA.

Low-income students are both overrepresented in the population eligible for special education and underserved by the IDEA.[4] At a national level, one-quarter, or approximately 2 million, of all disabled children eligible for services under the IDEA live below the poverty line, and two-thirds, or approximately 4.5 million, live in households with incomes of $50,000 or less.[5] This disparity is particularly problematic in the District of Columbia, where an even greater percentage of

[4] "Almost 20% of children receiving special education services are living in households with a yearly income of $15,000 or less, compared to 12.5% in general education households; and 36% of children receiving special education services live in households with an income of $25,000 or less, compared with 24% of children in the general population." Elisa Hyman, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 Am. U. J. Gender Soc. Pol'y & L. 107, 113 (2011) (citing Nat'l Dissemination Ctr. for Children with Disabilities, *Who are the Children Receiving Special Education Services* 6 (2003), *available at* http://nichcy.org/wp-content/uploads/docs/rb2.pdf).

[5] Mary Wagner, U.S. Dep't of Educ., *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* 29 (2002), *available at* http://www.eric.ed.gov/PDFS/ED475794.pdf.

children live below the poverty line. A 2010 study by Capital Kids found that 30.4% of children in the District lived in poverty, a rate exceeding the national average of 21.6%.[6]

Despite the disproportionate need for special education services among low-income students, indigent parents are less likely to be aware of and utilize the IDEA's private enforcement mechanism as compared to their wealthier counterparts.[7] For example, in 2002, 52% of higher income districts faced due process hearings, compared to only four percent of low-income and ten percent of middle-income districts.[8] As a result, school districts serving low-income students "spend less, both in real and in cost-adjusted terms, per child with a disability than do districts serving middle-income and wealthier families." Pasachoff at 1437 (citing Chambers at iv, 7-8). These spending disparities are a result of disproportionate enforcement pressure by wealthy parents under the IDEA.

The structure of the IDEA contributes to these disparities. Unlike many civil rights statutes, which benefit classes of people by providing structural relief or

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[6] Capital Kids, *The Poverty Factor*, Venture Philanthropy Partners (2012), http://capitalkidsreport.org/the-poverty-factor/#. As defined by the federal government, a family of four is living in poverty if they have a combined income $22,113 or less (for 2010). *Id.*

[7] *See generally* Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 Notre Dame L. Rev. 1413, 1416 (2012).

[8] Jay G. Chambers, Ctr. for Special Educ. Fin., *What Are We Spending on Procedural Safeguards in Special Education*, 1999-2000, 8-9 (2003), available at http://www.csef-air.org/publications/seep/national/Procedural%20Safeguards.PDF.

changing the practices of bad actors, the IDEA generally provides individualized injunctive relief targeted at a single student. Therefore, low-income students typically do not share in the educational benefits obtained from IDEA cases brought by wealthier parents. However, students at wealthier schools may benefit from the fact that more money is directed at their schools due to the greater volume of IDEA complaints. Thus, enforcement disparities undercut the IDEA's substantive goal of ensuring that *all* children receive a free appropriate public education. Pasachoff at 1441-42.

B. Structural Barriers Discourage Private Enforcement of The IDEA by Low-Income Parents.

1. The Supreme Court's decision in *Jeff D.* creates a disincentive for special education attorneys to represent low-income parents in IDEA cases.

In *Evans v. Jeff D.*, 475 U.S. 717, 737-38 (1986), the Supreme Court held that a defendant may condition settlement on the plaintiff's waiver of statutory attorneys' fees. The Court reasoned that because fee-shifting statutes provide for an award of fees to the prevailing *party*, statutory fees are just another weapon in "the arsenal of remedies available to combat violations of civil rights." *Id.* at 731. The Court found that fee-shifting provisions give "the victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights by means of settlement or trial," *id.* at 741, although the Court conceded that, in the long run,

fee waivers might undermine efforts to make counsel available to the poor. *Id.* at 741, n.34.

In his dissent, Justice Brennan emphasized that "Congress provided fee awards to ensure that there would be lawyers available to plaintiffs who could not otherwise afford counsel, so that these plaintiffs could fulfill their role in the federal enforcement scheme as 'private attorneys general,' vindicating the public interest." *Id.* at 745. He concluded that "allowing defendants in civil rights cases to condition settlement of the merits on a waiver of statutory attorney's fees will diminish lawyers' expectations of receiving fees and decrease the willingness of lawyers to accept civil rights cases." *Id.* at 754.

As predicted, the Court's decision in *Jeff D.* has made it more difficult for the poor to obtain legal assistance. In her study of civil rights practice in the 1990s, Julie Davies found that *Jeff D.* fee waivers were not a problem for civil rights attorneys in some cases because the attorneys had circumvented the problem by requiring clients to pay a reduced market-based rate if fees were ultimately waived, or by charging a contingency fee where damages were available.[9] Davies also found, however, that these same attorneys were much more reluctant to take on cases where, as under the IDEA, only injunctive relief is available, and where the clients were not capable of paying a reduced hourly rate in the event statutory fees

[9] Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 Hastings L.J. 197, 215 (1997).

were unavailable. *Id.* at 219, 232-33. Attorneys that continued to take cases in which damages were unavailable reported that their economic viability was at risk and that they were unsure of how much longer they would be able to continue taking such cases. Similarly, attorneys who reported representing low-income clients who paid a reduced rate reported difficulties in remaining financially viable. *Id.* at 235-36. Thus, the effects of *Jeff D.* have fallen squarely on the shoulders of the poor, and have diminished the number of attorneys willing to represent low-income parents in IDEA cases.

Compounding the problem, a report analyzing DCPS's attorneys' fees practices in 2013 confirms that DCPS pressures special education attorneys to settle fees for amounts well below market rates.[10] The problem is particularly acute in DC because a small group of DCPS attorneys regularly interact with the same members of the special education bar representing parents, which creates "a continual risk that personal animosities and adversarial relationships can develop and expand beyond an individual case to an overall relationship between the attorneys and affect the manner in which fee negotiations are conducted." *Id.* at 35. Most alarming is that "[m]ore than one attorney speculated that these flaws are part of a conscious effort on the part of DCPS to reduce the number of attorneys willing

[10] *See* Clarence J. Sundram & Thomas Harmon, *A Review of the District of Columbia Public Schools' Process for Reimbursing Attorney Fees in IDEA Cases*, 5-6 (Apr. 23, 2013).

to represent children and their families in educational matters." *Id.* at 35-36. The report concluded: "Attorneys who have had substantial practices of representing indigent parents reported that this experience with unreasonably low attorney fee offers has led them to limit the number of new indigent clients they represent." *Id.*

2. Informational asymmetry undermines the private enforcement of the IDEA by low-income parents.

For low-income students with disabilities, informational asymmetries between parents and schools regarding a child's special education needs frequently prevent parents from understanding whether a school is violating the IDEA and what remedies may be available. Pasachoff at 1438-39. School districts have significant expertise in special education matters and are accustomed to defending challenges to their provision of special education services. Parents are often unfamiliar with the services that should be available, and must rely primarily on their informational networks to understand the process. The problem is most pronounced for low-income families, who generally have limited informational networks. *Id.* For example, one study found that despite low-income parents' concerns about their children's education, they had little awareness of which disability classification their child received, and did not know the meaning of terms defining the services their child was entitled to receive, or the meaning of their

right to due process.[11] This information disparity limits the utility of the IDEA's private enforcement mechanism for the low-income population.

III. The DC Superior Court's System for Appointing Special Education Attorneys Seeks to Overcome Obstacles to Private Enforcement of The IDEA by The Indigent.

In 2002, the DC Superior Court issued an Administrative Order establishing a system for appointing special education lawyers to represent the parents of indigent children who find themselves before the family court in delinquency or neglect proceedings, and who may be eligible for services under the IDEA. D.C. Sup. Ct. Admin. Order 02-15. Lawyers appointed under the program are entitled to compensation at the rate of $90 per hour pursuant to the District of Columbia Criminal Justice Act plan, or the Counsel for Child Abuse and Neglect plan, *see* D.C. Code §§ 11-2604(a) and 16-2326.01(a)(1), depending on the nature of the proceeding that brings the child before the Superior Court. Regardless of the plan under which the special education attorney is appointed, the appointment orders provide that the lawyer will be compensated by the Superior Court *if* attorneys' fees cannot be recovered from DCPS. *See, e.g.,* JA 98, 100.

The Superior Court's system for appointing counsel to represent indigent parents and children in IDEA cases addresses some of the structural impediments

[11] *See* Ellen Anderson Brantlinger, *Making Decisions About Special Education Placement: Do Low-Income Parents Have the Information They Need?*, 20 J. Learning Disabilities 94, 96-98 (1987).

to private enforcement of the IDEA by poor families. First, the guarantee of at least $90 per hour for the attorney's time, if fee-shifting is not available, puts indigent parents on equal footing with wealthier parents who agree to pay their lawyer a reduced hourly rate in the event that statutory fees are not collected. Such an arrangement, common among special education lawyers who represent middle-class parents and children, provides for the lawyer's financial security even if the client does not succeed in attaining the prevailing party status necessary for an award of statutory fees.

Second, the guarantee of compensation from the Superior Court (even at a reduced hourly rate) mitigates the disincentives to representing the indigent in cases seeking injunctive relief that flow from the decision in *Jeff D.* Even if the client waives statutory attorneys' fees in exchange for more robust injunctive relief, the attorney is able to receive at least some compensation.

Third, the Superior Court's appointment system addresses the problem of informational asymmetry that often prevents indigent families from enforcing their rights under the IDEA. A Superior Court judge who suspects that a child before the court may have unmet special education needs is empowered to appoint an attorney with specialized knowledge to investigate whether the student is entitled to relief under the IDEA and, if so, to pursue the proper channels for obtaining such relief, regardless of whether the parent or guardian is aware of the child's

special needs or the services available. And there is good reason to suspect that many children in the juvenile justice system could benefit from special education services. As Appellants explain in their opening brief (at 4-6), children with disabilities who are not receiving appropriate services are more likely to be suspended, engage in delinquent behavior, and drop out of school. Thus, the Superior Court's system for appointing counsel to address a student's educational issues that are beyond the expertise of a criminal defense attorney or guardian ad litem is a commendable effort to ensure that indigent children receive the educational services to which they are entitled under the IDEA.

IV. The Decision Below Should Be Reversed.

Presented with a motion for attorneys' fees by prevailing parties in IDEA cases, the district court should have awarded fees "based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." 20 U.S.C. § 1415(i)(3)(C). The actual cost of the legal services to the prevailing parties—in this case zero—and the rate at which the lawyer would have been compensated by the Superior Court if statutory fees were unavailable—$90 an hour—are completely irrelevant to determining the prevailing market rate for the services provided. *See Douglas,* 2014 WL 4359192, at *5 ("The rate at which the Superior Court caps reimbursement [for appointed counsel in IDEA cases] has no bearing whatsoever on the hourly rate at which a prevailing party

may recover attorneys' fees in this Court."); *accord Wood v. District of Columbia*, --- F. Supp. 3d ---, 2014 WL 5438409, at *6 (D.D.C. Oct. 27, 2014); *Staton v. District of Columbia*, 2014 WL 2700894, at *4 (D.D.C. June 11, 2014); *Clay v. District of Columbia*, 2014 WL 322017, at *6 (D.D.C. Jan. 28, 2014); and *Eley v. District of Columbia*, 999 F. Supp. 2d 137, 157 n.9 (D.D.C. 2013).

Indeed, it is well-settled that market rates should be used to calculate attorneys' fees under fee-shifting statutes regardless of the fee arrangements between attorney and client, or between the attorney and a third-party payer such as the Superior Court. *See, e.g.*, *Blum*, 465 U.S. at 895 (holding that market rates should be used to calculate attorneys' fees under fee-shifting statutes where the prevailing plaintiffs are represented by public interest lawyers at no cost to the plaintiffs); *SOCM*, 857 F.2d at 1524 (holding that the analysis in *Blum* with respect to fees sought for work performed by salaried attorneys at a non-profit legal services organization applies equally to the work of attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals and their clients' ability to pay); *accord Covington*, 57 F.3d at 1107; s*ee also Blanchard*, 489 U.S. at 93 (holding that fee-shifting statutes "allowing a 'reasonable attorney's fee'" contemplate "reasonable compensation, in light of all the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less. Should a fee arrangement provide less than a reasonable fee calculated

in this manner, the defendant should nevertheless be required to pay the higher amount.").

The district court erred by holding, without citation to any authority, that the IDEA's fee-shifting provision does not apply to prevailing parties represented by appointed counsel. The district court's error rests on its failure to recognize that statutory attorneys' fees belong to the party, not the attorney, although it is common for parties to assign to their attorney the right to retain whatever statutory fees may be recovered. Indeed, it is because fee-shifting provisions bestow eligibility for statutory fees on the prevailing *party* that the Supreme Court held in *Jeff D.* that statutory attorneys' fees are a bargaining chip that the client may waive in exchange for a settlement on the merits. 475 U.S. at 731-32 ("Thus, while it is undoubtedly true that Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights, it neither bestowed fee awards upon attorneys not rendered them nonwaivable or nonnegotiable; instead, it added them to the arsenal of remedies available to combat violations of civil rights."). A careful reading of the district court's decision makes clear that it misunderstood who was seeking statutory fees under the IDEA.[12]

[12] *See, e.g.,* JA 106 ("Mr. Bergeron [the lawyer] now asks this Court to declare him a 'prevailing party' under the IDEA."); JA 107 ("The first, and, as it turns out, only, question I must answer is whether Mr. Bergeron is entitled to fees above the CJA's statutory rate of $90/hour."); JA 107 ("[T]he situation here—in which a court-appointed counsel seeks attorney's fees under the statute providing the

The district court failed to apply the IDEA's fee-shifting provision and award a market-based fee because it found that "the statute under which counsel was appointed sets a mandatory compensation rate." JA 103. But the compensation rate set by the appointment orders was contingent on the unavailability of attorneys' fees from DCPS in the event that plaintiffs did not prevail or waived fees as part of a settlement. Indeed, a recent Administrative Order from the Superior Court explains that appointed counsel in cases under the IDEA should seek payment from the Superior Court only after payment has been requested from DCPS and denied, and the denial has been affirmed by a court. D.C. Sup.Ct. Admin. Order 14-19 (2014) (effective Jan. 1, 2015).

That the Superior Court would have paid counsel the reduced rate of $90 an hour if statutory fees could not be recovered is akin to a lawyer charging a client a reduced hourly rate in the event that statutory fees awarded at the market rate are unavailable. Just as a lawyer who contracts with a client for a reduced hourly rate if statutory fees are unavailable does not waive his client's right to statutory fees, a lawyer who accepts an appointment at a reduced hourly rate does not waive his client's right to statutory fees. *See Blanchard*, 489 U.S. at 93 ("The presence of a

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substantive law for his case—does not often present itself."); JA 109 (This, then, is the arrangement that plaintiff [referring to the lawyer] struck. And these are the rules with which he must abide.").

pre-existing fee agreement . . . does not impose an automatic ceiling on an award of attorney's fees.").

The district court's decision, holding that a significant element of relief under the IDEA is not available to the indigent who have appointed counsel, threatens to strip indigent parents and students of an important tool for achieving the goals of the IDEA and to undermine the Superior Court's effort to remove barriers to private enforcement of the IDEA by the poor. The decision should be reversed.

CONCLUSION

For the foregoing reasons and those set forth in Appellants' Opening Brief, this Court should reverse the judgment of the district court and remand for further proceedings.

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Respectfully Submitted,

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW, Suite 312
Washington, DC 20001-2075
(202) 662-9540
michael.kirkpatrick@law.georgetown.edu

Counsel for Amicus Curiae[*]

[*] Counsel gratefully acknowledges the substantial assistance of Lindsay McAleer and Norah Rexer, third-year law students at Georgetown University Law Center, who played key roles in preparing this brief.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). The type face is fourteen-point Times New Roman font, and the word count is 5,628.

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick

CERTIFICATE OF SERVICE

I certify that on December 23, 2014, I filed the foregoing brief of Amicus Curiae COPAA using the Court's CM/ECF system, which will serve a copy of the document on all counsel of record.

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick