CASE NO. 12-56060

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

T.B., by and through his *Guardian Ad Litem*, ALLISON BRENNEISE AND ROBERT BRENNEISE

Plaintiffs-Appellants,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT

Defendant-Appellee.

AMICUS CURIAE BRIEF OF CALIFORNIA SCHOOL BOARDS ASSOCIATION'S EDUCATION LEGAL ALLIANCE IN SUPPORT OF DEFENDANT-APPELLEE SAN DIEGO UNIFIED SCHOOL DISTRICT

On Appeal from the United States District Court
for the Southern District of California
District Court Case 08-CV-28-MMA

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae California School Boards Association's Education Legal Alliance avers that it does not issue stock and is not a subsidiary or affiliate of any publicly owned corporation.

STATEMENT OF AUTHORSHIP

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, Amicus Curiae California School Boards Association avers that:

(i) Neither party's counsel in this matter authored this amicus curiae brief;

(ii) Neither of the parties or their respective counsel contributed money to fund this amicus curiae brief; and

(iii) No person other than the amicus, or its members or counsel, contributed money to fund this amicus curiae brief.

DATED: March 5, 2013

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INTRODUCTION AND SUMMARY OF ARGUMENT

Amici Curiae California School Boards Association's Education Legal Alliance ("CSBA") submits this brief in support of Defendant-Appellee San Diego Unified School District ("District") with respect to the following issues: (1) whether the District Court erred when it found that the District did not intentionally discriminate against T.B. under Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities[1] in its offer of specialized health care; and (2) whether the District Court erred in reducing Appellants' demand for attorneys' fees and costs from nearly $1.4 million to $50,260.50 in attorneys' fees and $5,173.41 in costs.

Regarding the first issue, Appellants argue that a violation of a state statute that relates to a special education service amounts to *per se* intentional discrimination under Section 504. Appellants' theory is that such a statutory requirement falls within the Section 504 definition of "accommodation" and, because it has been promulgated by some type of legislature, it must be "reasonable." Appellants argue that if a school district violates such a statute, it automatically violates a student's right to a "reasonable accommodation" as provided under Section 504.

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[1] For purpose of this brief, Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act will be collectively referred to as "Section 504."

Appellants' theory is both incorrect and impracticable. Appellants' theory stretches any definition of reasonable accommodation and any real or conceivable legislative intent. It would essentially create an automatic right to money damages for violating a statute, even when that violation did not deny the student the right to a free, appropriate public education under the Individuals with Disabilities Education Improvement Act ("IDEA"). School districts throughout California are already in a state of financial distress. Creating an automatic right to such damages would neither improve education, nor would it further the purpose of the IDEA or Section 504.

Regarding the second issue, Appellants contend that the District Court improperly conducted a subjective "apples to oranges" comparison between the District's offer of settlement and the relief obtained at hearing when it reduced Appellants' fee demand based on that offer. Appellants assert that the District Court should not have considered what Appellants characterize as an offer made outside of the authority of the IDEA.

Appellants' interpretation of the IDEA statute that describes the preclusive effect of an offer of settlement, pursuant to 20 U.S.C. section 1415(i)(3)(D), is unfounded. Appellants' assertion that the District's offer was outside of the authority of the IDEA is incorrect.

IDEA due process disputes do not involve easily quantifiable disputes over money damages such that a court can easily quantify and compare an offer to an award. Rather, due process disputes typically involve a parent's desired educational program, adjudicated against a school district's offer of what it believes to be a free, appropriate public education under the IDEA. If an administrative law judge ultimately determines that a violation of any of the multitude of substantive and procedural requirements related to the IDEA has occurred, the judge must determine if it rises to a denial of a free, appropriate public education. The judge must then exercise his or her broad equitable discretion to fashion what he or she determines to be appropriate relief.

In attempting to resolve disputes through an offer of settlement, it is virtually impossible to offer exactly what a judge might order. In attempting to resolve disputes through settlement, school districts must base offers on what they understand that the parents desire through settlement. A determination that such an offer must "objectively" line-up with a judge's award with the exactitude that Appellants propose would simply reduce the odds of a reasonable pre-trial offer of settlement having any sort of preclusive effect to, for lack of a better expression, "slim and none."

The IDEA favors prompt resolution of disputes. Given the condensed timeline for due process proceedings and the lack of opportunity to engage in

discovery, school districts rely on parents' proposed resolutions and settlement demands to formulate settlement offers. In order to effectuate the intent of Congress in promoting settlement and the preclusive effect of section 1415(i)(3)(D), courts must have equitable discretion in comparing offers of settlement and awards.

Appellants also argue that the District's offer was contrary to the mainstreaming policy of the IDEA. However, the IDEA specifically contemplates parents' right to privately educate their children. The IDEA also specifically contemplates monetary remedies for parents who unilaterally place their children in private schools. School districts should not be penalized for constructing settlement offers in reliance on parents' settlement demands for private services when those offers are wholly consistent with the IDEA. CSBA urges the Court to affirm the decision of the District Court.

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

This brief is filed with consent of all parties. Amicus Curiae is the CSBA's Education Legal Alliance ("Alliance"). CSBA is a collaborative group of virtually all of the state's more than 1,000 school districts and county offices of education. CSBA provides its members with a wide range of services including policy analysis, legal advocacy, legislative representation, professional development workshops, and information services. As part of the CSBA, the Alliance helps

insure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make policy and fiscal decisions for their school districts. The Alliance represents its members by addressing legal issues of statewide concern to school districts. The Alliance's activities include joining in litigation where the interest of public education is at stake.

As public school districts and county offices of education, the members of CSBA have a strong interest in the outcome of this case. Appellants' interpretation of the law regarding Section 504 claims and attorneys' fee awards, if followed, would negatively impact the operation of CSBA's member school districts and related education agencies, as well as other public education agencies within the jurisdiction of the Court of Appeals for the Ninth Circuit, which are all charged with the equitable distribution of public resources for the benefit of children.

ARGUMENT

The District Court appropriately granted the District summary judgment on Appellants' Section 504 claims by finding that the District did not act with "deliberate indifference" in offering specialized health care services. The District Court appropriately reduced Appellants' demand for attorneys' fees and costs by analyzing the equitable effect of Appellants' refusal to accept the District's offer of settlement.

I. The District Court's Grant of Summary Judgment Regarding Appellants' Section 504 Claims Should be Affirmed.

In order to succeed on a Section 504 claim, a plaintiff must prove that the defendant engaged in "intentional discrimination" or acted with "deliberate indifference." *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008). A school district can only be liable for damages under Section 504 if it does not provide meaningful access or reasonable accommodation to a student with a disability intentionally or with deliberate indifference. *Id.*

Appellants argue that a violation of California Education Code section 49423.5 should automatically constitute "deliberate indifference" under Section 504. Appellants assert:

> [W]here a statute specifies the manner in which a disability must be accommodated in public school, the statute creates and delineates an accommodation, which is, *per se*, reasonable. The failure to provide such a reasonable accommodation in the manner required by law is therefore unreasonable and constitutes an intentional refusal to provide meaningful access to the benefits of public education. (Appellants' Opening Br. at 18.)

Appellants' argument is incorrect.

A. A Violation of a Procedural Requirement of the IDEA or a Related Statute Does Not Automatically Equate to Deliberate Indifference.

Appellants propose an expansive definition of "deliberate indifference." As quoted above, Appellants argue that the Court should automatically deem a violation of a state statute that relates to services for individuals with exceptional

needs under the IDEA as a failure to provide a "reasonable accommodation" under Section 504. Appellants' interpretation would essentially convert all procedural violations related to the IDEA, or any other related statutes, into claims for money damages.

Special education is replete with rules and regulations. In *A New Era: Revitalizing Special Education for Children and Their Families*, July 1, 2002, at 12, President George W. Bush's Commission on Excellence in Public Education identified at least 814 monitoring requirements that apply to procedural obligations provided in the IDEA. (CSBA's Request for Judicial Notice ("RFJN"), Ex. A.) In addition, there are a multitude of federal and state laws and regulations that relate to virtually all aspects of public educational services, including, for example, healthy lunches, school facilities, staff credentials, and curricular standards. All of those regulations and requirements arguably relate to the provision of services provided to students who are protected under Section 504. In practical terms, it would be unrealistic, if not impossible, for IEP team members, who have devoted their time and study towards expertise in actually educating students, to have memorized all of those regulations and requirements. Congress, in recognition of the possibility that an IEP team making an individualized decision that does not squarely comply with a specific rule or regulation has legislated that a violation of a procedural requirement does not automatically amount to a denial of a free,

appropriate public education under the IDEA. In due process hearings, an administrative law judge may only base his or her decision that a child did not receive a free, appropriate public education on substantive grounds. 20 U.S.C. § 1415(f)(3)(E); Cal. Educ. Code § 56505(f). A procedural violation amounts to a substantive denial of a free, appropriate public education *only* where it impedes the student's right to a free, appropriate public education, significantly impedes the parents' ability to participate in the decision-making process regarding the provision of free, appropriate pubic education, or causes a deprivation of educational benefits. *Id.*; *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479, 1484 (9th Cir. 1992).

Appellants' expansive standard for "deliberate indifference" would create automatic liability for damages under Section 504, even in situations where a procedural mistake occurred and a judge determined that it did not rise to the level of a substantive violation of the right to a free, appropriate public education. Such a determination would result in a system where, in many cases, due process hearings would merely serve as a procedural mechanism on the way to litigation for more fruitful damages. As a consequence, resources that could be used to provide educational services to students would be diverted to covering the costs of additional litigation.

Had the Legislature intended to allow damages in such circumstances, it would have authorized prevailing parties to obtain damages under the IDEA. It did not. Courts have expressly found that money damages are not available under the IDEA. *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999); *Robb v. Bethel Sch. Dist.* # 403, 308 F.3d 1047 (9th Cir. 2002).

Congress did not envision that type of *per* se liability when it enacted the Education of All Handicapped Children Act ("EAHCA"), the precursor to the IDEA. At that time, Congress specifically found that the financial resources of state and local educational agencies responsible for providing education for students with disabilities were "inadequate to meet the special educational needs of handicapped children…" PL 94-142, November 29, 1975, 89 Stat 773. EAHCA was intended to, among other things, provide a funding mechanism to allow school districts to meet those needs, rather than to impose additional financial burdens on school districts. Congress could not have envisioned a system where damages, although not available under the EAHCA, could simply be obtained by passing through an additional procedural requirement – a due process hearing.

This Court has found that "establishing a violation of the right to a FAPE [free, appropriate public education] under the IDEA is not sufficient to prevail in a § 504 claim for damages. *Mark H. v. Hamamoto*, 620 F.3d 1090, 1096 (9th Cir. 2010). A violation of the IDEA does not automatically constitute a violation of

Section 504. *Mark H. v. Lemahieu*, 513 F.3d 922, 924 (9th Cir. 2008). This Court has further found that a parent "cannot rely on the administrative hearing officer's decision with regard to an IDEA FAPE as dispositive of whether a FAPE was denied under § 504." *Id.* at 933. Appellants' proposal would circumvent this Court's previous decisions. CSBA urges this Court to reject Appellants' interpretation.

B. Appellants' Interpretation Would Undermine the Discretion of School Districts to Determine Appropriate Personnel to Meet the Unique Needs of Students with Disabilities.

As quoted on page 4 of this brief, Appellants argue that "where a statute specifies the manner in which a disability *must* be accommodated in public school, the statute creates and delineates an accommodation, which is, *per se*, reasonable." (Emphasis added.) However, Education Code section 49423.5 does not prescribe a mandatory manner by which a special education service is to be provided. Section 49423.5 states, "[n]otwithstanding Section 49422, an individual with exceptional needs who requires specialized physical health care services, during the regular schoolday, *may* be assisted by any of the following individuals …" (Emphasis added.) Even assuming, *arguendo*, that Section 49423.5 specified a "reasonable accommodation" as proposed by Appellants, it would merely specify some of many reasonable accommodations that "may" be provided. A school district

cannot be held to be deliberately indifferent to its requirements by failing to offer a specific form of specialized health care services when it has, by statute, a choice.

In interpreting the IDEA, the United States Department of Education has found that personnel decisions are appropriately left to the discretion of school districts. The United States Department of Education's Office of Special Education Programs ("OSEP") and Office for Civil Rights ("OCR") have jointly opined that "[d]eterminations as to which personnel will provide services to a child eligible under Part B [of the IDEA] are left to State and local educational authorities." *See Letter to Williams*, 21 IDELR 73, p. 8 (OSEP and OCR 1994); *see also Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 208 (1982); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988).

Typically, an IEP team will identify a student's needs and specify appropriate special education and related services to address those needs. There is no requirement that an IEP describe an employee's job title or the qualifications of that particular employee to implement the IEP because that determination is left to the discretion of the school district. School districts are best equipped to make personnel determinations because they know their employees' backgrounds, qualifications and trainings, as well as the individual needs of their students in school settings.

Given the discretion afforded school districts in making personnel decisions, a school district should not be found to be deliberately indifferent when utilizing its expertise to provide a certain type of qualified staff to provide for the unique needs of a particular child. The potential liability associated with such a finding would chill the exercise of professional discretion of school district staff in providing for the needs of students with disabilities. CSBA respectfully requests that the Court reject Appellants' proposed standard.

II. The District Court's Decision to Reduce Attorneys' Fees and Costs Should be Upheld.

Appellants seek nearly $1.4 million in attorneys' fees and costs. Appellants argue that that the District Court erred in considering the District's offers of settlement in reducing that demand because the offers, as Appellants mistakenly assert, did not "objectifiably" match the award ordered by the administrative law judge. Appellants also incorrectly argue that the offers of settlement did not include any relief authorized by the IDEA.

A. The District Court Correctly Analyzed the Preclusive Effect of the District's Offers of Settlement in Reducing Appellants' Demand for Attorneys' Fees and Costs.

Due process disputes do not typically involve easily quantifiable demands for monetary settlements. They involve complex substantive and procedural requirements with which school districts must comply in offering a free, appropriate public education as mandated by the IDEA. Parents, school districts,

experts, and even courts can disagree on what components of an educational program constitute a free, appropriate public education.

Appellants contend that the District Court improperly conducted a subjective "apples to oranges" comparison between the District's statutory offer of settlement and the relief obtained at hearing. Appellants' characterization is an over-simplification and would render the preclusive effect of 20 U.S.C. section 1415(i)(3)(D) inconsequential. Section 1415(i)(3)(D)(i) states:

> (i) In general
>
> Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—
>
>> (I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;
>>
>> (II) the offer is not accepted within 10 days; and
>>
>> (III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

Due process disputes do not involve lengthy pre-trial opportunities to narrow issues and more clearly define proposed remedies such that a settlement offer can precisely match an award ordered by a judge. In enacting the precursor to the IDEA, the EAHCA, Congress identified a streamlined dispute resolution process to

minimize the effects of such disagreements on children with disabilities. Congress never intended that process to result in major litigation.[2]

Congress also sought to encourage settlement. The IDEA favors settlement and encourages parties to resolve disputes outside of a due process hearing as evidenced by the IDEA's comprehensive resolution process. *See* 20 U.S.C. § 1415(f); 34 C.F.R. § 300.510; *see also El Paso Indep. Sch. Dist.* v. *Richard R.*, 591 F.3d 417, 425-426 (9th Cir. 2009); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 477 (7th Cir. 2003). In addition to the resolution session required within the first 15 days of a complaint, described in footnote 2 of this brief, states must offer a mediation procedure to parties involved in a due process dispute. 20 U.S.C. § 1415(e); 34 C.F.R. § 300.506.

When parties are unable to resolve their disputes, Congress still sought to encourage settlement by limiting attorneys' fees in cases where a parent refuses to consent to an offer of settlement and the relief obtained at hearing is not more favorable than that provided in the offer. 20 U.S.C. § 1415(i)(3)(D); 34 C.F.R. §

[2] Following a request for a due process hearing, the parties must convene a resolution session within 15 days. 20 U.S.C. § 1415(f)(1)(B); 34 C.F.R. § 300.510(a). If the parties are unable to resolve the dispute within the first 30 days, the due process hearing may occur. 20 U.S.C. § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.510(b). In California, the administrative law judge must render a decision within 45 days of the 30 day resolution period. Cal. Educ. Code § 56505(f)(3). There are no discovery procedures available, except for the issuance of subpoenas. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.511, 300.512, 300.514, and 300.515.

300.517(c)(2)(i). In order to effectuate the intent of the IDEA and avoid litigation altogether, school districts must typically base such offers of what parents seek through settlement. Because such requests rarely amount to an easily-quantifiable value, it is difficult, if not impossible, to provide an offer of settlement that can precisely match by description the remedy ordered by the judge.

Courts and administrative law judges are not restricted to precise remedies sought by petitioning parents. The IDEA empowers courts and administrative law judges to grant the relief that they determine to be appropriate. *Sch. Comm. of the Town of Burlington v. Massachusetts Dep't of Educ.*, 471 U.S. 359, 369 (1985); 20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3). Courts have broad discretion to fashion a remedy or remedies to ensure that a student is appropriately educated within the meaning of the IDEA. *Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994). There is no obligation to provide day-for-day or hour-for hour compensation. *Id.*

Courts and administrative law judges have authority to award tuition reimbursement for expenses incurred for a private school placement and/or private services. *Burlington*, 471 U.S. at 369; *see also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13-15 (1993). They also have authority to grant compensatory education in various forms, including ordering a school district to provide specific services from a particular provider. *See Student W.*, 31 F.3d at 1497. Rulings can

also come in the form of an order requiring one of the parties to take a specific action, such as requiring parents to make a student available for an assessment or ordering a school district to convene an IEP meeting or conduct a specific evaluation. *Id.* at 1498. Portending how a trier of fact will rule and predicting what, if any, remedies may be ordered is simply unrealistic.

In this case, T.B. sought in his petition a program that included very specific components. Through settlement discussions, T.B. sought a program with a different set of specific components. The "objective" standard proposed by Appellants would have been impossible in this case. The District Court appropriately looked at all of the facts and applied equitable considerations in determining that Appellants did not obtain relief more favorable than they would have obtained had they accepted the District's offer of settlement.

B. Appellants' Argument that the Relief Offered by the District is not Authorized by the IDEA is Incorrect.

Appellants state, "[a] settlement offer that provides *none* of the relief available under the IDEA cannot be objectively compared with relief obtained in an IDEA hearing, which is what the statute contemplates." (Appellants' Opening Br. at 34.) Appellants, though, do not cite any authority that the statute that section 1415(i)(3)(D) contemplates a certain form of settlement offer or is otherwise restricted in any manner. By its very nature, an offer of settlement involves a compromise. Successful compromise typically results in an alteration of what each

party believes to be appropriate. Appellants' restriction of settlement offers to what Appellants perceive to be "authorized" by the IDEA is not found in the plain language of section 1415(i)(3)(D). Such restriction would simply limit settlement options available to parties involved in a due process dispute. Such a restriction could not have been intended by Congress.

Moreover, Appellants are incorrect in their assertion that the IDEA does not contemplate a private school placement, such as that offered by the District through settlement. Amici Curiae for Appellants urge the Court to "not allow the District Court's ruling and analysis to stand" because it "condones a practice [of] excluding students with disabilities from public schools." Amici Curiae for Appellants incorrectly equate the District's settlement offer to promotion of the "separate but equal" doctrine rejected in *Brown v. Board of Ed.* 347 U.S. 483 (1954). (Amici Curiae for Appellants Br. of DRLC and LRLC in Support of Appellants at 12.) Contrary to Appellants' and Amici Curiae for Appellants' characterizations, though, the IDEA specifically contemplates parents' rights to educate their children privately.

Under the IDEA, school districts must "have available to them a free, appropriate public education" to all eligible students within their jurisdictions. 20 U.S.C. § 1400(d)(1)(A). If the students are enrolled in public schools, school districts must actually offer a free, appropriate public education by developing an

individualized education program ("IEP"). 20 U.S.C. §§ 1412(a), 1414(d). This population includes students placed in private schools or facilities by IEP teams. 20 U.S.C. § 1412(a)(10)(B).

For students enrolled in private schools by their parents, without the involvement of the school district, the IDEA sets forth separate obligations. *See* 20 U.S.C. § 1412(a)(10)(A); 34 C.F.R. § 300.130 *et seq*. Such children may receive special education and related services consistent with their proportionate share of federal funding. 20 U.S.C. § 1412(a)10); 34 C.F.R. §§ 300.132-33.

Allowing parents to exercise their right to a private education is in no way analogous to a doctrine of "separate but equal." To the contrary, the IDEA recognizes that some parents' interests in an educational program for a child with a disability differ from the program offered in public school. The IDEA, respectful of that choice, provides specific procedures and some level of federal financial assistance to private school children with disabilities.

The District offered T.B. placement in a public school. Rather than place T.B. in a public school, T.B.'s parents sought, through settlement, to privately educate their child. A settlement offer that allowed them to exercise that option is consistent with the IDEA.

Additionally, the IDEA contemplates the remedy of reimbursement for students enrolled by their parents in private schools or facilities when an

administrative law judge finds that a school district has failed to make a free, appropriate public education available prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c). A settlement offer that provides for funding of private schools or services is also consistent with the IDEA.

The District Court appropriately valued the District's offer of settlement and appropriately applied equitable considerations when determining whether Appellants received a more favorable outcome. CSBA urges the Court to affirm the District Court's decision.

C. The District Court's Attorneys' Fees Award Will Not Thwart Qualified Attorneys from Representing Parents.

Amici Curiae for Appellants claim that the District Court's award of over $50,000 in attorneys' fees "undermines access to counsel" for parents and students. Amici Curiae for Appellants insinuate that this Court's decision will have a widespread impact on all parents' ability to retain qualified attorneys. Amici Curiae for Appellants' argument is not correct.

According to the National Center for Education Statistics, which is a research arm of the United States Department of Education, the average starting salary in California during the 2007-08 school year for a teacher with two or fewer years of experience was $44,770. (CSBA's RFJN, Ex. B.) Thus, the amount of fees Appellants seek, nearly $1.4 million, is equivalent to the salaries for over 31 teachers. Neither Appellants nor Amici Curiae for Appellants have provided any

evidence that an award of over $50,000 in one case will affect the ability of parents to pursue due process claims.

In many cases, parents have initiated due process proceedings without the involvement of attorneys. During the 2011-12 school year, 23 percent of due process complaints were filed with the California Office of Administrative Hearings ("OAH") without legal representation. (CSBA's RFJN, Ex. C.) Advocates who are not licensed to practice law in California are not entitled to attorneys' fees for their representation of students in administrative hearings. *Z.A. v. San Bruno Park Sch. Dist.*, 165 F.3d 1273 (9th Cir. 1999). Likewise, parents who are attorneys are not entitled to attorneys' fees if they represent their children in administrative hearings or court proceedings brought under the IDEA. *Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087 (9th Cir. 2006). That has not deterred advocates or attorney parents from representing students in due process proceedings. The unavailability of attorney's fees and costs has not even deterred non-attorney parents from simply proceeding on their own.

Furthermore, parents of students with disabilities are only entitled to reasonable attorneys' fees if they are a prevailing party following a due process hearing. When a student does not prevail on any issues, the student is not entitled to attorneys' fees. During the 2011-12 school year, OAH issued approximately 114 decisions following due process hearings. (CSBA's RFJN, Ex. C.) School

districts prevailed on all issues in approximately 60% of the decisions. *Id.* The fact that parents were entitled to no attorneys' fees in approximately 60% of the decisions has not deterred attorneys from representing students in due process hearings.

In California, OAH, pursuant to an agreement with the California Department of Education ("CDE"), is required to maintain a list of free or reduced cost attorneys and/or advocates and make that list available to the public. Cal. Educ. Code § 56502(h). To be included on the list, attorneys and advocates must swear under penalty of perjury that they provide "free or reduced cost representation or other assistance." The current list includes over 145 attorneys or advocates. (CSBA's RFJN, Ex. D.) There is no shortage of attorneys available to provide representation for reduced costs.

When Congress originally enacted the precursor to the IDEA, the EAHCA, it did not include a provision entitling parents of students with disabilities to obtain attorneys' fees if they prevailed in a due process hearing. Congress did not add the attorneys' fee provision of the IDEA until 1986. S. Rep. No. 99-112 (1985), *as reprinted in* 1986 U.S.C.C.A.N. 1798. The Legislature did not originally intend for attorneys' fees to be awarded to prevailing parties in administrative hearings. *Smith v. Robinson* (1984) 468 U.S. 992 (1984). Despite that, attorneys were not deterred from representing special education students in administrative hearings.

Amici Curiae for Appellants' arguments regarding the detrimental impact that the District Court's award of over $50,000 in attorneys' fees in this case will have on parents' ability to secure qualified counsel is unfounded. CSBA urges the Court to affirm the reduction of attorneys' fees and costs as ordered by the District Court.

CONCLUSION

CSBA respectfully requests that the Court affirm the District Court's Grant of Summary Judgment and Decision on Attorneys' Fees.

DATED: March 5, 2013　　　FAGEN FRIEDMAN & FULFROST, LLP

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,758 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2003, Times New Roman, 14 font size.

DATED: March 5, 2013 FAGEN FRIEDMAN & FULFROST, LLP

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California School Boards Association

9th Circuit Case Number: 12-56060

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