UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 21-2447

Caption [use short title]
J.S. v. N.Y. State Dep't of Corrs. & Cmty. Servs.

Motion for: leave to file an brief amici curiae

Set forth below precise, complete statement of relief sought:
Leave to file the proposed brief amici curiae

MOVING PARTY: Proposed Amici Curiae **OPPOSING PARTY:** N.Y. State Dep't of Corrs. & Cmty. Servs.

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Ellen Saideman **OPPOSING ATTORNEY:** Jennifer Clark

[name of attorney, with firm, address, phone number and e-mail]

Law Office of Ellen Saideman,
7 Henry Drive, Barrington, RI 02806
401-258-7276, esaideman@yahoo.com

Ass't Solicitor General, NY State, Div. Appeals & Opinions
Office of the Attorney General, The Capitol, Albany,
NY 12224 jennifer.clark@ag.ny.gov 518-776-205

Court- Judge/ Agency appealed from: WDNY/Judge John L. Sinatra

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

Date: Jan. 18, 2022 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

No. 21-2447

In The United States
Court of Appeals for the Second Circuit

J.S.,
***Plaintiff-Appellant*,**
v.
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,
Defendant-Appellee

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS IN SUPPORT OF APPELLANTS

Pursuant to Fed. R. App. P. 29, **Council of Parent Attorneys and Advocates (COPAA), National Disability Rights Network (NDRN), Disability Rights Education & Defense Fund (DREDF), The Disability Law Project, a special project of Vermont Legal Aid (DLP), and Disability Rights Connecticut (DRCT)** hereby respectfully moves for leave to file the attached brief as *Amici Curiae* in support of Plaintiff-Appellant, J.S., who has filed the Notice of Appeal in this case. This motion is accompanied by the proposed brief *amici curiae* as required by Fed R. App. P. 29(b).

ARGUMENT

A. Interests of Proposed *Amici Curiae*

COPAA is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not represent children but provides resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education (FAPE) such children are entitled to under the Individuals with Disabilities Education Act (IDEA). COPAA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (ADA).

COPAA brings to this Court the unique perspective of parents and advocates for children with disabilities. COPAA has previously filed as *Amicus Curiae* in the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017); *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017);

Forest Grove School District. v. T.A., 557 U.S. 230 (2009); *Board of Education of New York v. Tom F.*, 552 U.S. 1 (2007); *Arlington Central School District Board. of Education v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City School District*, 550 U.S. 516 (2007), and in numerous cases in the United States Courts of Appeal.

The National Disability Rights Network (NDRN) is a nonprofit membership association of protection and advocacy (P&A) agencies in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. There is a P&A agency affiliated with the Native American Consortium, the Native American Disability Law Center, which includes Native American Nations in the Four Corners region of the Southwest. Disability Rights New York is a member of NDRN. Federal law authorizes P&A agencies to provide legal representation and related advocacy services including the rights of students with disabilities regardless of educational setting. The P&A system is the nation's largest provider of legal-based advocacy services for people with disabilities.

Education cases make up a significant percentage of P&A networks' casework. P&A agencies handled over 10,000 education matters in the most recent year for which data is available. These education matters include claims under the IDEA, Section 504, and the ADA. For P&As, the client is always the individual with the disability. *See e.g.,* Model Rules of Prof'l Conduct R. 1.14 (2020).

The Disability Rights Education & Defense Fund (DREDF), based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. DREDF was founded by people with disabilities and parents of children with disabilities and remains board- and staff-led by members of the communities for whom we advocate. Recognized for its expertise in the interpretation of federal disability civil rights laws, DREDF pursues its mission through education, advocacy, and law reform efforts. Consistent with its civil rights mission, DREDF supports legal protections for all diversity and minority communities, including the intersectional interests of people within those communities who also have disabilities.

The Disability Law Project (DLP), a special project of Vermont Legal Aid, Inc., through its contracts with Disability Rights Vermont, Inc., is part of Vermont's P&A and provides legal advocacy to Vermonters with disabilities to ensure the protection of their civil rights. As part of the P&A system, the DLP is mandated under various federal statutes to provide legal representation and related advocacy services on behalf of Vermonters with disabilities. In the past three fiscal years the DLP has represented Vermonters with disabilities in 1,087 individual cases, including in 346 in education cases, and approximately 35 individuals with disabilities served in education cases were adult students with disabilities. Because of the DLP's role in protecting the rights of students - including adult students - with

disabilities under the IDEA, the DLP offers an on-the-ground perspective of the impact of this new interpretation of the attorney's fees provision of IDEA on the ability of students and their families to protect those rights.

Disability Rights Connecticut (DRCT), a corporation organized and existing under the laws of the State of Connecticut, and whose corporate office is located in Hartford, Connecticut. Disability Rights Connecticut is the protection and advocacy system for the state of Connecticut and provides legal advocacy and rights protection to a wide range of people with disabilities, including adult students.

Amici submit this brief because they believe that children, including competent adults, have independent, enforceable rights under IDEA, and that attorney's fees for prevailing in enforcing their rights is essential for vindicating their rights. For many attorneys and advocates, the individual with the disability – the student – is the client. And many students may not have anyone apart from themselves to serve as a parent in litigation to enforce their rights. Interpreting the statute to deny children with disabilities, including competent adults, attorney's fees would be absurd, given that one principal purpose of the statute is protecting the rights of children with disabilities themselves and enable students to become independent adults who can advocates for themselves. It would also be unconstitutional to discriminate against competent adult students with disabilities by

denying them attorney's fees and require them to have the assistance of parents because requiring a parent's involvement lacks any rational basis

Based upon its experience, *Amici* offer the Court a unique and important view on these issues. *Amici* therefore respectfully request that they be granted permission to submit the attached *Amici Curiae* brief. Appellants have provided consent; *Amici* requested consent from Appellees and have been advised that Appellees taken no position on the filing of an *amici* brief. *Amici* have moved for leave to file this brief *Amici Curiae*.

B. Why a Brief from *Amici Curiae* is Relevant and Desirable

This *Amici Curiae* brief is both relevant and desirable. *See* Fed. R. App. P. 29(b)(2). The legal issues presented in the appeal are of great importance to *Amici* and their members because they work with many children who have disabilities that interfere with their education. *Amici's* attorney members frequently represent children, including competent adults, who have independent, enforceable rights under IDEA, and that attorney's fees for prevailing in enforcing their rights is essential for vindicating their rights. *Amici* are therefore uniquely situated in interpreting the statute and posit that the district court's interpretation serves to deny children with disabilities, including competent adults, attorney's fees. Further, such an interpretation leads to an absurd result given that one principal purpose of the

statute is protecting the rights of children with disabilities themselves and enable students to become independent adults who can advocates for themselves.

Amici therefore offers the Court relevant information not brought to the Court's attention by the parties. *See Neonatology Assocs., P.A. v. Comm'r,* 293 F.3d 128, 133 (3d Cir. 2002)*; Funbus Sys., Inc. v. Cal. Pub. Util. Comm'n*, 801 F.2d 1120, 1124-25 (9th Cir. 1986).

Amici states that the issue in this case meriting intervention from this Court is whether the district court below erred. The district court below erred in failing to hold that J.S., as a student who prevailed in his IDEA due process proceeding, is entitled to attorney's fees. *Amici* respectfully submit that the Court should reverse the decision of the district court.

CONCLUSION

For the foregoing reasons, COPAA respectfully requests that the Court grant its motion to file the attached brief as *Amici Curiae* in support of Plaintiff-Appellant's Request for Reversal.

Dated: January 18, 2022

Respectfully Submitted,

/s/ Ellen Saideman
Ellen Saideman
Law Office of Ellen Saideman
7 Henry Drive
Barrington, RI 02806
Phone: 401-258-7276
esaideman@yahoo.com
Counsel of record for Amici Curiae

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on the18th day of January 2022. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

/s/ Ellen Saideman
Ellen Saideman

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements and Type Style Requirements

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because:

> This motion contains 1,385 words, excluding the parts exempted by Fed. R. App. P. 27(a)(2)(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 27(d)(2)(A) and the type style requirements of Fed. R. App. P.27(d)(2)(A) because:

> this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2015 in Times New Roman 14-point typeface.

3. The motion has been scanned for viruses and is virus-free.

/s/ Ellen Saideman
Ellen Saideman

EXHIBIT A

21-2447

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

J.S.,

Plaintiff-Appellant,

—against—

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, NATIONAL DISABILITY RIGHTS NETWORK, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, DISABILITY LAW PROJECT, VERMONT, DISABILITY RIGHTS CONNECTICUT IN SUPPORT OF PLAINTIFF-APPELLANT

ELLEN SAIDEMAN
LAW OFFICE OF ELLEN SAIDEMAN
7 Henry Drive
Barrington, Rhode Island 02806
(401) 258-7276

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of these entities:

Council of Parent Attorneys and Advocates
National Disability Rights Network
Disability Rights Education & Defense Fund
Disability Law Project, Vermont
Disability Rights Connecticut

1. No amicus is a publicly held corporation or other publicly held entity;
2. No amicus has parent corporations; and
3. No amicus has 10% or more of stock owned by a corporation.

Respectfully submitted,

/s/ Ellen Saideman
Ellen Saideman
Law Office of Ellen Saideman
7 Henry Drive
Barrington, RI 02806

Counsel for Amici

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Council of Parent Attorneys and Advocates (COPAA) is a not-for-profit national organization for parents of children with disabilities and students with disabilities, their attorneys and advocates. While COPAA does not representchildren with disabilities directly, it does provide resources, training, and information for parents, students with disabilities, advocates, and attorneys to assistin obtaining the free appropriate public education (FAPE) such children are entitledto under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400,et seq. COPAA's attorney members represent students in civil rights matters. COPAA also supports students with disabilities, their parents, and advocates in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (ADA).

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amici* state that: (A) there is no party, or counsel for a party in the pending appeal who authored the amici brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that wasintended to fund preparing or submitting the brief, other than *Amici* and its members.

COPAA has previously filed as *amicus curiae* in the United States Supreme Court in a number of cases including *Winkelman v. Parma City School District*, 550 U.S. 516 (2006), and in numerous cases in the United States Courts of Appeal.

The National Disability Rights Network (NDRN) is a nonprofit membership association of protection and advocacy (P&A) agencies in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. There is a P&A agency affiliated with the Native American Consortium, the Native American Disability Law Center, which includes Native American Nations in the Four Corners region of the Southwest. Disability Rights New York is a member of NDRN. Federal law authorizes P&A agencies to provide legal representation and related advocacy services including the rights of students with disabilities regardless of educational setting. The P&A system is the nation's largest provider of legal-based advocacy services for people with disabilities.

Education cases make up a significant percentage of P&A networks' casework. P&A agencies handled over 10,000 education matters in the most recent year for which data is available. These education matters include claims under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act. For P&As, the client is always the individual with the disability. *See e.g.* Model Rules of Prof'l Conduct R. 1.14 (2020).

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new interpretation of the attorney's fees provision of IDEA on the ability of students and their families to protect those rights.

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Amici submit this brief because they believe that children, including competent adults, have independent, enforceable rights under IDEA, and that attorney's fees for prevailing in enforcing their rights is essential for vindicating their rights. For many attorneys and advocates, the individual with the disability – the student – is the client. And many students may not have anyone apart from themselves to serve as a parent in litigation to enforce their rights. Interpreting the statute to deny children with disabilities, including competent adults, attorney's fees would be absurd, given that one principal purpose of the statute is protecting the rights of children with disabilities themselves and enable students to become independent adults who can advocates for themselves. It would also be unconstitutional to discriminate against competent adult students with disabilities by denying them attorney's fees and require them to have the assistance of parents because requiring a parent's involvement lacks any rational basis.

Appellants have provided consent; *Amici* requested consent from Appellees. They have taken no position on the filing of an *amici* brief. *Amici* have moved for leave to file this brief of *Amici Curiae*.

Amici adopt the Statement of the Issues contained in Appellant's Brief at 1.

Amici adopt the Statement of the Case contained in Appellant's Brief at 2.

SUMMARY OF ARGUMENT

This case stems from an egregious violation of the Individuals with Disabilities Education Act (IDEA).[2] J.S., who had an IEP before being imprisoned and a clear legal right to special education while in prison, did not receive any special education services for three years. He filed for a due process hearing; his complaint was required to alert Defendant to the relief sought, including attorney's fees. Rather than resolve the matter during the resolution phase or offer a settlement before the hearing, Defendant-Appellee New York State Department of Correction and Community Supervision (DOCCS) argued, among other things, that the Department of Corrections was exempt from any obligations to comply with IDEA.A-30. It vigorously litigated this case so that J.S. incurred $71,542 in attorney's fees and $988.7 in costs. When J.S. prevailed and obtained compensatory education to remedy this egregious conduct, DOCCS did not appeal. But when J.S. sought

[2] This brief refers to IDEA and its predecessor statutes since the act was first adopted in 1975 as IDEA for simplicity.

statutory attorney's fees and costs as the prevailing party, DOCCS for the first time objected to J.S. receiving attorney's fees,[3] arguing that J.S. could not recover fees because he was not his parent. The district court agreed and held that only a parent can recover fees pursuant to 20 U.S.C. § 1415(3)(B)(i)(I).

IDEA is among the most important, long-standing disability rights statutes. Originally enacted in 1975, at least two generations of students with disabilities have been afforded the federal right to educational services and the ability to resolve any related disputes. Public Law 94-142. Because IDEA provides enforceable legal rights to children with disabilities, including both children who lack parents and adult students, it is absurd to interpret the statute to bar attorney's fees for prevailing students, particularly when they are adults. Denying attorney's fees to children with disabilities simply because they have legal capacity as adults to advocate for themselves raises serious constitutional problems and ethical concerns. Legal capacity is irrelevant to claims under IDEA, so there is no rational basis for discriminating against competent adult students. This case is particularly important now, after nearly two years of the Covid-19 pandemic, because there are many adult students who may have claims for compensatory education for the denial of a free appropriate public education during the pandemic.

[3] Defendant did not challenge that the request for attorney's fees at the due process proceeding, when theoretically a "parent," such as his adoptive grandmother or a surrogate parent, could have been joined to the case, if needed for attorney's fees.

ARGUMENT

I. STUDENTS HAVE INDEPENDENT, LEGALLY ENFORCEABLE RIGHTS UNDER IDEA.

That students have independent legally enforceable rights under IDEA has long been recognized. In fact, *Winkelman*, 550 U.S. at 521-22, reached the Supreme Court precisely because students had independent legally enforceable rights, and the school district argued there that students were the only parties that had redressable legal rights under IDEA, and, because parents had no rights, they could not proceed *pro se* to vindicate the rights of their children. The Court concluded that, "IDEA does not differentiate, through isolated references to various procedures and remedies, between the rights accorded to children and the rights accorded to parents." *Id.* at 531.

The Supreme Court found that "the proper interpretation of the Act requires a consideration of the entire statutory scheme." It held that parents had "independent, enforceable rights under IDEA," and that "it would be inconsistent with the statutory scheme to bar them from continuing to assert these rights in federal court." *Id.* at 526. In reaching this conclusion, the Court relied on the purpose of the statute: "to ensure that the rights of children with disabilities and parents of such children are protected." *Id.* at 528 (quoting 20 U.S.C. § 1401(d)(1)(B)). The Court stated that, "The word 'rights' in the quoted language refers to the rights of the parents as well as the rights of the child; otherwise, the grammatical structure would make no sense." *Id.* Thus, the Court held that "the statute's references to parents' rights to

mean what they say: that IDEA includes provisions conveying rights to parents *as well as to children*." *Id.* at 529 (emphasis added). Thus, the Supreme Court recognized that both parents and children have independent, enforceable legal rights.

Since *Winkelman*, federal courts have continued to hold that parents can only represent themselves *pro se* in federal court, and that minor children must be represented by counsel in actions to enforce their own rights under IDEA. *See e.g. L.V. v. N.Y.C. Dep't of Educ.,* No. 19-CV-0451, 2020 U.S. Dist. LEXIS 215550, at *9 (S.D.N.Y. Nov. 17, 2020); *B.D.S. v. Southold Union Free Sch. Dist.*, No. cv-08-1319, 2009 U.S. Dist. LEXIS 55981, at *41-42 (E.D.N.Y. June 24, 2009). Following *Winkelman*, student's rights under IDEA have been characterized as "coterminous"with the parent's rights. *See Rutherford v. Fla. Union Sch. Dist.*, No. 16-CV-9778, 2017 U.S. Dist. LEXIS 234362, at *11 (S.D.N.Y. June 14, 2017). Thus, ithas long been established that students with disabilities have their own legally enforceable rights under IDEA.

II. IDEA PROVIDES ATTORNEY'S FEES FOR STUDENTS

That students can receive an award of attorney's fees under IDEA is well established. More than thirty years ago, the Fifth Circuit held that an adult student is entitled to an award of attorney's fees under IDEA. *Fontenot v. La. Bd. of Elementary & Secondary Educ.*, 835 F.2d 117, 120 (5th Cir. 1988). In that case, the student had turned eighteen during the course of the litigation and sought attorney's

fees "in his own name." *Id.* The court pointed to the legislative history who provided "under appropriate circumstances, a *child or youth may also bring an action under the [IDEA] and receive an award of attorneys' fees* to the extent he/sheprevails." *Id., quoting* S.R. No. 112, at 14, *reprinted in* 1986 U.S. Code Cong & AdNews 1804 (emphasis added in *Fontenont*). The court noted that "the logical conclusion" of the state's argument against awarding fees to students was that all students with disabilities "who have reached the age of majority and are otherwise competent to bring suit in their own names would be foreclosed from bringing actions" under IDEA. *Id.* The court stated, "Neither the [IDEA] nor its legislative history support the conclusion that Congress intended to exclude that group of potential protections from [IDEA] protections."[4] *Id.*

Winkleman is instructive in interpreting the attorney's fees provision in IDEA. The Supreme Court specifically held that, "IDEA does not differentiate, through isolated references to various procedures and remedies, between the rights accorded to children and the rights accorded to children." *Id.* at 531. The Court said, "We

[4] This issue – whether an adult student who prevailed in a due process hearing may obtain attorneys' fees under IDEA – is one of first impression in this Court. The Magistrate Judge's reliance on *dicta* in *L.A. v. Granby Bd. of Educ.*, 227 F. App'x 47 (2d Cir. 2007) is misplaced. The issue in that case, which was only necessary because it was decided before *Winkelman* (by six days), was whether the parents could proceed *pro se* in challenging the district court's ordering requiring them to pay attorney's fees to their attorneys. The issue of the independent rights of adultstudents to attorney's fees was not before the court.

find little support for the inference that parents are excluded by implication whenever a child is mentioned, and *vice versa*." *Id.* at 530. (emphasis added). The Court thus specifically found that the statute cannot be interpreted to exclude children whenever the term parents is mentioned. Significantly, the Court specifically cited to the provision on attorney's fees as an example of the terms children and parents being used interchangeably:

> Compare, e.g., § 1415(e)(3)(E) (barring States from using certain funds for costs associated with actions 'brought on behalf of a child" but failing to acknowledge that actions might also be brought on behalf of a parent) with § 1415(i)(3)(B)(i)(allowing recovery of attorney's fees to a 'prevailing parent who is the parent of a child with a disability' but failing to acknowledge that a child might also be a prevailing party)."

Id. at 530.

Winkelman thus recognized that children had independent rights under IDEA and were entitled to attorney's fees, given that the terms child and parent were used interchangeably in the statute. The Court found that there would be a potential for injustice if only children - and not parents - could vindicate the right by IDEA to a free appropriate public education. *Id*. at 533. Likewise, there would be tremendous potential for injustice if only parents – and not students - had access to the important tool of attorney's fees to vindicate students' rights under IDEA. The statute itself recognizes that, sadly, there are children whose parents are not known or cannot be located or who are wards of the state. 20 U.S.C. § 1415(b)(2). The statute places

the responsibility of protecting the rights of these children by assigning individuals to act as surrogate parents on states and local educational agencies (LEAs). 20 U.S.C. § 1415(a), (b)(2).

Yet, some states and school districts shirk this responsibility. Students have had to resort to litigation to require states and local school districts to appoint and train surrogate parents. In *Edward B. v. Brunell*, 662 F. Supp. 1025, 1035-36 (D.N.H. 1986),[5] the court certified a class action that included "children who are inneed of a surrogate parent but do not have one." The court specifically found that the student who had a father involved in the litigation lacked typicality and could not be a class representative. *Id.* at 1036. DOCCS's interpretation of the statute would enable states and school districts to escape responsibility for providing educational services for the most vulnerable students – those without parents – simply by failing to appoint surrogate parents to represent their interests.

Further, denying attorney's fees to adult students who do not have guardians would give states and local agencies carte blanche to violate the rights of such students without having to fear any consequences because, without representation, the students would be unable to enforce their rights.

States and school districts have long had clear notice that the IDEA was

[5] Counsel in this case was the New Hampshire Protection and Advocacy Agency, a member of NDRN. Counsel has advised that this case was resolved with a consent decree that includes attorney's fees for the students' counsel.

intended to protect all students, including children without parents and adult students. In holding that IDEA applies to all eligible students, regardless of their disability, the First Circuit pointed to the original title of the statute, stating, "In assessing the plain meaning of the Act, we first look to its title: The Education for *All* Handicapped Children Act." *Timothy W. v. Rochester Sch. Dist.*, 875 F.2d 954, 959 (1st Cir. 1989) (emphasis in original).

States and school districts have long had clear notice that the IDEA's purpose includes preparing students to be self-advocates and independent adults. *See* 20 U.S.C. § 1400(d)(1)(A) (stating purpose "is to prepare students "for further education, employment, and independent living."); 20 U.S.C. § 1401(34) (providing for transition services to independent living as an adult). To deny an adult student with a disability the ability to advocate for himself by retaining counsel would be an absurd result for a statute that has the purpose of enabling students to become self-advocates.

The magistrate judge's reliance on *Arlington Central School District Board. of Education*, 548 U.S. 291 (2006), is misplaced. IDEA provides clear notice that children have independent enforceable rights. That is precisely why the school district in *Winkelman* argued that only children had enforceable legal rights to a free appropriate public education, and that parents had no rights at all. *See Winkelman*, 550 U.S. at 522.

Arlington dealt with the term costs, which was not specifically defined by the statute and held it does not include expert witness fees. *Id.* at 297, 302-03. In contrast, IDEA defines the term parent and does so broadly. 20 U.S.C. § 1401(23). It also includes a "guardian," an "individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative)," an "individual who is legally responsible for the child's welfare," and a "surrogate parent." 20 U.S.C. § 1401(23)(B), (C), (D). Neither the district court nor the magistrate addressed the statutory definition of parent. Using a textualist analysis, a competentadult student meets the statutory definition of "parent": a competent adult studentlike J.S. is his own guardian and is the person who is "acting in the place of a naturalor adoptive parent," and is "legally responsible for the child's welfare."

In fact, here DOCCS treated J.S. as a parent until he got to federal court to ask for attorney's fees. It evaluated him after he signed a consent for evaluation, A24 although the statute requires "Parental Consent." *Compare* A24 *with* 20 U.S.C. § 1414(a)(1)(D). It did not object when he filed a due process complaint and includeda request for attorneys' fees in the complaint. Having treated J.S., either as his parentor as an adult who had legal capacity to consent and represent himself, during the administrative proceedings, DOCCS's should not be allowed to deny him attorney's fees after he incurred the fees.

Moreover, DOCCS's interpretation of the statute to limit attorney's fees to

parents and to deny them to adult children who are prevailing parties is "far too strained to be correct." *See Winkelman*, 550 U.S. at 528. The Supreme Court in *Arlington* recognized that a statute cannot be interpreted to be "absurd." 548 U.S. at 296. Denying attorney's fees to minor children who seek to enforce their legal rights is absurd because federal courts have long held that minor children are legally barred from bringing federal court claims *pro se*, as discussed above. They therefore require counsel to bring their independently enforceable legal claims, and attorney'sfees are required to attract counsel. Thus, interpreting IDEA to deny attorney's fees to students with disabilities, including competent adults, would be absurd.

III. DENYING ATTORNEYS' FEES TO ADULT STUDENTS WHO LACK LEGAL GUARDIANS WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS

As the Supreme Court has stated, "[i]t has long been an axiom of statutory interpretation that 'where an otherwise acceptable construction would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989). To deny attorney's fees to children do not have parents to advocate for them, including competent adult students, when they prevail in IDEA cases, while providing them to children with parents and adults students with disabilities who have legal guardians would raise serious Equal Protection problems and is "plainly contrary to the intent

of Congress." *See id.*

The Supreme Court has held that individuals with disabilities are protected from invidious discrimination by the Equal Protection Clause of the Fourteenth Amendment, and therefore, legislation that discriminates against them "must be rationally related to a legitimate government purpose." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). *See also Bd. of Trs. v. Garrett*, 531 U.S. 356, 366-67 (2001).

There is no rational basis for denying attorney's fees to children, including adults who do not have legal guardians, when they are prevailing parties in IDEA claims and awarding fees exclusively to parents. The legal capacity (or incapacity) of the students is entirely irrelevant to their legal claims under IDEA. The purpose of the statute is to protect the rights of both "children with disabilities and parents of such children," 20 U.S.C. § 1400(d)(1)(B). Adult students are likely to have fewer resources than parents and less education, so they are less likely to be able to proceed *pro se* successfully than parents. Congress set out different rules for attorney's fees for the side enforcing the rights of parents and children under the statute in the litigation as opposed to the state educational agency or LEA. *Compare* 20 U.S.C. § 1415(i)(3)(B)(i)(I) *with* 20 U.S.C. § 1415(i)(3)(B)(i)(II) & (III). The legislative history indicates Congress did not intend to exclude children from awards of attorney's fees.

Further, to deny adults students attorney's fees would deprive them of an important incentive for states and school districts to resolve meritorious IDEA claims. IDEA provided that and it provides for states and school districts to cut off liability for attorney's fees through a ten-day-offer similar to a Rule 68 Offer.[6] Under 20 U.S.C. § 1415(i)(3)(D)(i), if a written offer of settlement made ten days before the due process hearing is not accepted within ten days and the court does notaward the parent more favorable relief than the offer or the parent was not substantially justified in rejecting the offer, the parent or student cannot be awardedany fees for the time subsequent to the offer of settlement. There is no rational basisfor depriving adult students of this incentive for resolving their claims.

IV. ATTORNEY'S FEES FOR PREVAILING STUDENTS ARE NECESSARY TO FURTHER THE ESSENTIAL PURPOSE OF THE IDEA

While many students protected by IDEA are minors whose have parents or surrogate parents who can vindicate their rights, there were 23,673 students age 18-21 receiving IDEA services in New York State as of October 7, 2020.[7] More than a third (37.8%), the largest number, have learning disabilities, 9.6% have other health disabilities, 6.3% are have speech or language disabilities, and a small number are blind (63) or deaf (120) or hearing impaired (101).

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[6] Attorney's fees are not available for attending routine IEP meetings or for resolution meetings, 20 U.S.C. § 1415(i)(3)(D)(ii) & (iii).

[7] Nysed.gov, Data Summaries, http://www.p12.nysed.gov/sedcar/goal2data.html.

Guardians are only appointed for individuals after a determination of incapacity. *See* N.Y. Mental Hygiene Law § 81.02. Based on *Amici*'s experience, only a small number have had guardians appointed. Most adults with disabilities, including many individuals with intellectual disabilities and emotional disabilities, are unlikely to meet the stiff legal requirements required for the appointment of a legal guardian under New York law. A New York court "rejected any necessity for a guardian to be appointed to afford" an individual with an intellectual disability "the rights which are available to nondisabled persons," including the right to change her name. *In re Individual with a Disability for Leave to Change Her Name*, 195 Misc. 2d 497, 499, 501, 760 N.Y.S.2d 293 (2003). The court noted that the intent of New York state law, including state law governing special education adopted pursuant to IDEA, "was "to allow persons with disabilities to maintain as much control over their own life decisions as they are capable of making." *Id.* at 500. Further, there is a movement to use supported decision-making instead of guardianship so that adults with disabilities make the important decisions about their lives, including special education services, albeit with assistance.[8]

[8] Kristen Booth Glen, "What Judges Need to Know about Supported Decision-making and Why," 58 Judge's Journal 26, 28, 30 (2019).

In addition to students currently receiving special education services who may have IDEA claims, there are also adults who have exited special education by graduating or aging out of special education who may have claims under IDEA for compensatory education for services that were denied to them. Because of the COVID-19 pandemic, many students with disabilities did not receive required special education services for some period of time since March 2020, and they may have claims for compensatory education.

A. Fee-shifting Provisions Are Intended to Support Private Litigants by Attracting Competent Counsel To Enforce Civil Rights Laws.

Numerous civil rights statutes rely on private litigants to enforce compliance with the law and thereby vindicate the rights Congress has granted. Fee-shifting provisions are a key component of these statutes, assuring these private litigants' access to the court system, particularly those who are most disenfranchised by poverty and discrimination. In the foundational opinion, *Hensley v. Eckerhart*, the Supreme Court wrote that the Civil Rights Attorney's Fees Awards Act of 1976 was "to ensure 'effective access to the judicial process' for persons with civil rights grievances." 461 U.S. 424, 429(1983) (quoting *H.R. Rep. No. 94-1558* 1 (1976)). In his concurring opinion, Justice Brennan emphasized the role private individuals play in ensuring compliance with these laws:

> All of these civil rights laws depend heavily upon private enforcement, and ***fee awards have proved an essential remedy*** if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court.

461 U.S. at 445 (Brennan, J. concurring) (emphasis added) (quoting Senate Report 2); *see also City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) ("If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." (quoting 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney)).

The fee awards authorized by these statutes are as much a part of the remedies they afford to litigants as injunctive or monetary relief. And entitlement to fees is particularly important in cases that involving legal claims that do not provide for monetary damages because the possibility of monetary damages would otherwise naturally create a market of private attorneys willing to work on a contingent basis. This, the entitlement to fees is critical in cases that enforce the IDEA because the statute does not authorize monetary damages as a remedy. *See Polera v. Bd. of Educ.*, 288 F.3d 478, 486 (2d Cir. 2002).

Without the ability to invoke IDEA's fee-shifting provision, few adult

students and children without parents would be able to obtain counsel to enforce their rights under the act. The unavailability of money damages under IDEA does not diminish the importance of cases brought to enforce the rights the IDEA or other civil rights statutes confer. As Congress recognized, damage awards "do not reflect fully the public benefit advanced by civil rights litigation" and for that reason, the amount of fees should "'not be reduced because the rights involved may be nonpecuniary in nature.'" *Rivera*, 477 U.S. at 575 (quoting Senate report).

B. Attorney's Fees for Prevailing Students Are Vital for the Proper Functioning of the IDEA

IDEA has a broad remedial purpose: "to ensure that all children with disabilities are provided with a free appropriate public education . . . [and] to assure that the rights of [such] children and their parents or guardians are protected." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 238 (2009) (internal quotation omitted).

IDEA goes to great lengths to provide an extensive set of procedural safeguards, including the right to seek administrative review of a school district determinations that impact a child's IEP and the right to FAPE. The IDEA requires these safeguards, deemed to be the "core of the statute," be to protect the substantive rights of children. *Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (internal citation omitted); *Honig v. Doe*, 484 U.S. 305, 311 (1988).

To further the purpose of IDEA and to ensure all children were able to enforce their rights, even those without economic means, Congress provided for attorney's

fee. 20 U.S.C.§ 1415(i)(3)(B)(i)(I). The right to recover attorney's fees is one of IDEA's most important procedural safeguards. Like other civil rights statutes, IDEA's attorney's fees provision allows individuals to act as private attorneys general and vindicate policies the "Congress considered of the highest priority." *Fox v. Vice*, 563 U.S. 826, 833 (2011) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)).[9]

As *Amici* knows firsthand, without the availability of fees, students would find it very difficult to obtain representation. Congress considered it so important that, when the Supreme Court held that attorney's fees could not be awarded to those prevailing against school districts under IDEA's predecessor statute in *Smith v. Robinson*, 468 U.S. 992 (1984), Congress acted "swiftly, decisively, and with uncharacteristic clarity to correct what it viewed as misinterpretation of its intent," to provide attorney's fees for parties who prevail in vindicating students' rights under IDEA. *Fontenot,* 805 F.2d at 1223.

When Congress added the statutory fee provision to IDEA, now codified at 20 U.S.C. § 1415(i)(3), it provided that the fee provision was retroactive and specified that fees were available for attorney's fees for work in administrative

[9] *Fox* interpreted the fee-shifting provisions of 42 U.S.C. § 1988. However, those standards are "generally applicable in all cases in which Congress has authorized an award of fees to a prevailing party," including cases arising underthe IDEA. *John T. v. Delaware Cnty, Intermediate Unit*, 318 F.3d 545, 555 n.4 (3d Cir. 2003).

hearings. *Mitten v. Muscogee County Sch. Dist.*, 877 F.2d 932, 935 (11th Cir. 1989). IDEA thus allows a "court, in its discretion, [to] award reasonable attorneys' fees" to a prevailing party who vindicates the right of a child with a disability." 20 U.S.C. § 1415(i)(3).

C. Because Many Students Cannot Afford Legal Representation, Attorney's Fees are Critical to Vindicating Rights Under the IDEA

Most children receiving special education services have limited resources. One-quarter of students with IEPs have families with incomes below the poverty line and two-thirds have family incomes of $50,000 or less.[10] Congress understood that, absent a fee-shifting framework as part of the IDEA's due process procedures,many children would be unable to access counsel to undertake special education cases, and, without counsel, would face the nearly insurmountable to resolve their IDEA disputes.

Senator Weicker explained that, without access to attorney's fees, economic resources "become crucial" to the protection of "children's rights regardless of the merits of the claim." 130 Cong. Rec. S9079 (daily ed. July 24, 1984). Senators specifically cited the example of Mary Tatro, who testified at a Senate hearing about

[10] Elisa Hyman, *et al.*, *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, 112-13 (2011). *See also* Kelly D. Thomason, Note, *The Costs of a "Free" Education*, 57 Duke L.J. 457, 483-84 (2007).

her family's experience in litigating *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984). That case was a "clear example of [a] school district extending judicial proceedings for more than 5 years in an attempt to force the Tatro family to drop their case due to the exorbitant cost of attorney's fees." S. Rep. No. 99-112, 99th Cong., 1st Sess. at 17-18 (1985). *See also Handicapped Children's Protection Act of 1985: Hearing Before the Subcomm, on the Handicapped of the Senate Comm. on Labor & Human Resources,* 99th Cong., 1st Sess. at 24-25 (May 16, 1985). Her family was fortunate to be able to obtain *pro bono* assistance for the appeal to the Supreme Court in which they obtained a unanimous decision in their favor.

Recent studies have confirmed that, without counsel, parents and children left on their own are without the experience or ability to "navigat[e] the intricacies of disability definitions, evaluations processes, the developments of IEPs, the complex procedural safeguards, among other provisions in the statute," and as a result, students who were represented by counsel were far more likely to be successful in their IDEA claims.[11]

[11] Lisa Lukasik, *Special Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. Va. L. Rev. 735, 775 (2016). For example, the data from twelve years of North Carolina IDEA due process hearings showed that *pro se* parents only prevailed on at least one issue in only 11.1% of the cases, and in full in only once, for 2.2% of the cases, and that was with the help of a non-attorney advocate. *Id.* In contrast, when represented by counsel, parents prevailed on at least one issue more than half the time (51.3%) and prevailed on the entire claim nearly one third of the time (30.8%). *Id.* Similarly, a study of 258 Massachusetts due

The dearth of attorneys available to assist these children is well established, particularly for those unable to pay for attorneys and experts.[12] As the Supreme Court has recognized, this dearth has led some parents to resort to representing themselves *pro se* in federal court as well as in administrative proceedings. *See, e.g.,* W*inkelman,* 550 U.S. at 535 (holding parents could proceed pro se on their independent IDEA claims).

In contrast to parents and children who are frequently unrepresented and often cannot afford expert witnesses,[13] school districts are usually represented by counsel who have expertise in special education and can draw on the expertise of school staff

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process hearings over an eight-year period found that school districts were represented in 100% of cases where parents were only represented in 40.3% of the cases, and the school districts were more likely to win, 55% of the cases, than the parent-side attorneys, who won fully in 30% and got mixed results in 29.9% while parents who were pro se won only 10.7% and mixed 20.4%. William H. Blackwell& Vivian V. Blackwell, "A Longitudinal Study of Special Education Due Process Hearings in Massachusetts: Issues, Representation, and Student Characteristics," Sage Open (Jan.-Mar. 2015), http://journals.sagepub.com/doi/pdf/10.1177/2158244015577669, at 7. A Pennsylvania study of 512 cases over a five-year period found that parents who had legal counsel prevailed 58.75% of the time whereas pro se parents, involved in the remaining one-quarter of hearings had a much lower rate of success, prevailing only 16.28% of the time. Kevin Hoagland-Hanson, *Comment: Getting Their Due (Process): Parents And Lawyers In Special Education Due Process Hearings In Pennsylvania*, 163 U. Penn. L. Rev. 1806, 1820 (2015).

[12] A Pennsylvania study found that, over a five-year period, parents were represented by attorneys from nonprofit or legal aid groups in fewer than twenty-five of the 383 cases (6.5%), less than five a year. Hoagland-Hanson, supra, at 1822.

[13] *See Arlington,* 548 U.S. at 304 (holding IDEA did not provide for expert fees as part of attorney's fees and costs).

as well as paid experts.[14] Further, their payment is not contingent on victory, and protracted litigation may provide them additional income for them and also delay in an adverse decision for their clients.[15]

Thus, the school district, with an attorney with expertise in special education zealously representing his client, can use the law to bar the *pro se* student from submitting crucial evidence and otherwise presenting his case. Hearing officers cannot assist pro se litigants with valid claims; as one hearing officer observed that favoring *pro se* litigants "when they are not following the required procedures would indicate bias."[16] Thus, *pro se* students would lose even obviously meritorious claims would lose if they lacked attorneys. The availability of counsel is, therefore, essential for students to be able to enforce their independent legal right under IDEA.

[14] Debra Chopp, *School Districts & Families Under the IDEA: Collaborative in Theory, Adversarial in Fact,* 32 J. Nat'l Ass'n Admin. L. Judiciary 423, 453 (2012).
[15] Some school districts are covered by insurance for special education litigation. Such coverage "allows school districts to avoid internalizing tall of the costs of litigation under the IDEA. A school district might refuse to provide an expensive benefit to a disabled child, knowing that it can incur up to $100,000 in legal fees at no marginal cost." *Id.* at 456.
[16] *Id.*

CONCLUSION

For the foregoing reasons, *Amici* respectfully requests that the Court reverse the decision of the district court and hold that J.S., as a student who prevailed in his IDEA due process proceeding, is entitled to attorney's fees.

Date: January 18, 2022

Respectfully Submitted,
/s/ Ellen Saideman
Ellen Saideman
Law Office of Ellen Saideman
7 Henry Drive
Barrington, RI 02806
Phone: 401-258-7276
esaideman@yahoo.com
Counsel of record for Amici Curiae

Selene Almazan-Altobelli
Legal Director
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, MD 21285
Phone: 844-436-7224
selene@copaa.org

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on the18th of January 2022. I certify that all participants are registered CM/ECF users.

/s/ Ellen Saideman
Ellen Saideman

CERTIFICATE OF COMPLIANCE WITH RULES 29(c)(7), 29(d) and 32(a)(7)

The undersigned certifies that this Brief is presented in Times New Roman font 14, in compliance with the Court's Rules.

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 6,332 words.

/s/ Ellen Saideman
Ellen Saideman