No. 09-2448

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

L.J., A MINOR, INDIVIDUALLY AND BY HIS PARENTS, V.J. & S.J.,

Plaintiffs-Appellants,

v.

AUDUBON BOARD OF EDUCATION,

Defendant-Appellee.

Appeal from the United States District Court,
District of New Jersey, No. 06-cv-05350

BRIEF OF AMICI CURIAE (LISTED ON NEXT PAGE)

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BRIEF OF AMICI CURIAE

CHILDREN'S VOICES, INC., DISABILITY RIGHTS ADVOCATES, THE EDUCATION LAW CENTER, THE EDUCATION LAW CENTER OF PENNSYLVANIA, NEW JERSEY SPECIAL EDUCATION PRACTITIONERS, THE SPECIAL EDUCATION CLINIC AT RUTGERS UNIVERSITY SCHOOL OF LAW-NEWARK, THE SPECIAL EDUCATION LEADERSHIP COUNCIL OF NEW JERSEY

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici that submit this brief are nonprofit organizations dedicated to ensuring a free and appropriate public education for all children with disabilities, as guaranteed by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq*.

IDEA's guarantee of a free and appropriate public education will be frustrated if the courts fail to properly apply the provision in IDEA mandating the award of attorney's fees to prevailing parties based on relevant market rates for attorneys with comparable experience in cases of similar complexity. Families with children who have disabilities are often economically disadvantaged and would be unable to obtain counsel without the benefit of the fee-shifting provision of IDEA.

Amici submit this brief to show that the District Court utilized an improper standard to determine the appropriate hourly rate of Plaintiffs-Appellants' counsel. *Amici* take no position on the merits of Plaintiffs-Appellants' fee application or the arguments advanced by Plaintiffs-Appellants or Defendant-Appellee.

The specific interest of each *Amicus* Organization is as follows:

Children's Voices, Inc., a non-profit organization located in Boulder, Colorado, advocates for a high quality education for all kids. It defends the educational rights of the hundreds of thousands of school-age children in Colorado.

It works to uphold the Colorado Constitution's guarantee of a "thorough and uniform" public education for each child and fights for the funding necessary to provide each child the quality education the state constitution requires. Children's Voices, Inc. also advocates for the rights of children of poverty, minority children, and children with disabilities, who are often the most severely affected by lack of financial resources and other support.

Disability Rights Advocates (DRA) is a non-profit public interest law firm based in Berkeley, California, that strives to protect the civil and human rights of people with disabilities throughout the United States and worldwide. DRA specializes in class action civil rights litigation and works to end discrimination in areas such as education access to public accommodations, employment, transportation, and housing.

The Education Law Center ("ELC") is a not-for-profit law firm in New Jersey specializing in education law. Since its founding in 1973, ELC has acted on behalf of disadvantaged students and students with disabilities to achieve education reform, school improvement and protection of individual rights. ELC seeks to accomplish these goals through research, public education, technical assistance, advocacy and legal representation. In addition to serving as lead counsel to 300,000 urban school children who are the plaintiffs in New Jersey's school funding case, Abbott v. Burke, ELC provides a full range of direct legal

services to parents involved in disputes with public school officials. ELC serves approximately 600 individual clients each year, primarily in the area of special education law.

The Education Law Center of Pennsylvania (ELC-PA) is a non-profit legal service organization dedicated to ensuring that all Pennsylvania children have access to a quality education. The education of children with disabilities is a major focus for ELC-PA, which has appeared in this Court many times in cases brought under the Individuals With Disabilities Education Act (IDEA) and related statutes. Because so many families need legal representation in this complex area, ELC-PA has an interest in ensuring that the fee-shifting provisions of IDEA are interpreted in ways that provide private attorneys, as well as non-profit agencies, with fair compensation for their work.

New Jersey Special Education Practitioners ("NJSEP") is an association of attorneys and advocates who practice in the area of special education in New Jersey. NJSEP focuses on matters related to the representation of parents and children under the Individuals with Disabilities Education Improvement Act ('IDEA') and the Americans with Disabilities Act ('ADA'). Membership in the NJSEP is restricted to those attorneys and advocates who only represent parents and students in matters related to special education and the rights of individuals with disabilities.

The Special Education Clinic At Rutgers University School Of Law-Newark was created in 1995, with a grant from the New Jersey State Bar Foundation, to address the critical shortage of legal assistance available to indigent parents of children with disabilities in New Jersey. Since its inception, the Clinic has developed into an influential program with three goals: to provide free legal representation and advocacy to indigent parents and caregivers of children with disabilities seeking to obtain appropriate early intervention and special education programs and services; to train law students in this vital area; and to educate parents, advocates and others involved in the lives of children with disabilities about the early intervention and special education systems, and the rights of parents and children to access needed services. Additionally, the Clinic regularly provides information, consultation and direct legal representation for persons advocating on behalf of children with disabilities who are involved in the child welfare system.

The Special Education Leadership Council Of New Jersey ("SELC-NJ") is a statewide organization comprised of special education parent leaders and advocates. The primary goal of SELC-NJ is to advocate for the rights of students with disabilities and their families throughout the State. SELC-NJ works to accomplish this by providing educational programs and advocacy work to enable parent leaders to better support students and families.

AUTHORITY TO FILE UNDER FED R. APP. P. 29(a)

The parties have agreed not to object to the submission of this brief pursuant to Federal Rule of Appellate Procedure 29(a).

SUMMARY OF ARGUMENT

The Supreme Court has recognized that fee-shifting statutes, such as the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, enable economically disadvantaged individuals to vindicate their rights as successfully as litigants who employ private practice attorneys at full market rates. Blum v. Stenson, 465 U.S. 886, 897 (1984) ("[A] reasonable attorney's fee is one that is adequate to attract competent counsel.") The proper calculation of a reasonable hourly rate under IDEA begins by determining 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 requested rates should be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum, 465 U.S. at 895 n.11.

The District Court decided the reasonable hourly rate for Plaintiffs-Appellants' attorney, Jamie Epstein, by taking judicial notice of three special education decisions in New Jersey. It did not make findings comparing Mr. Epstein's experience with the experience of the attorneys in those proceedings; it improperly limited the fee awards considered to those awarded in special education cases; and it failed to evaluate the relative complexity of the cases it did consider

with the instant case. The approach employed by the District Court is fundamentally in conflict with Third Circuit precedent.

The law is well-settled that attorneys are not fungible, and their unique skill, experience and reputation must be considered when determining a reasonable rate. Moreover, courts considering a reasonable hourly rate should not confine their analysis to the narrow field of law at issue in the particular case. The District Court improperly chose not to take judicial notice of, and to reject evidence related to, rates awarded in other cases of similar complexity.

Amici file this brief solely to address the improper standard used by the District Court in deciding a reasonable hourly rate under IDEA. *Amici* do not comment on, nor take a position on, the reasonableness of Plaintiffs-Appellants' attorney's hourly rate, the District Court's discretion to reduce a reasonable hourly rate or the sufficiency of evidence provided by the parties. *Amici* file this brief to urge the Circuit Court to restate its law and clarify any ambiguities regarding the proper calculation of a reasonable hourly rate under IDEA.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED THIRD CIRCUIT LAW IN DETERMINING THE ATTORNEY'S FEE RATE

The District Court found that the affidavits submitted by Plaintiffs-Appellants to show that the requested hourly rate was reasonable, were "entirely irrelevant" or did not support the reasonableness of the requested hourly rate. (Op. at 27-29, L.J. v. Audubon Bd. of Educ., No. 06-5350 (JBS) (D.N.J. 2006) ("Doc. 106").) The Court's holding does not refer to any evidence submitted by Defendants, not does it rely upon any.[1] (Doc. 106 at 29-30.) Instead, the Court analyzed a reasonable hourly rate for Plaintiffs-Appellants' attorney by taking judicial notice of other recent special education decisions that awarded fees:

> The Court takes judicial notice of recent decisions of courts in this District, which have awarded attorney's fees to practitioners in Mr. Epstein's area of practice at the hourly rate of between $250 and $300. See, e.g., A.V., 2008 WL 4126254, at *5 ("$250 is a generous hourly fee" for education law practitioners in the southern New Jersey market)(citation omitted); S.A. v. Riverside Delanco School Dist. Bd. Of Educ., No. 04-4710, 2006 WL 827798, at *5 (D.N.J. Mar. 30, 2006) (same); J.N. v. Mt. Ephraim Board of Educ., No. 05-2520, 2007 WL 4570051, at *3 (D.N.J. Dec. 21, 2007) ($300 hourly rate for same market).
>
> (Doc. 106 at 30.)

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[1] *Amici* do not comment on whether Plaintiffs-Appellants carried their burden of proof on this issue, however it should be noted that "once the plaintiff has carried this burden, defendant may contest that prima facie case only with appropriate record evidence. In the absence of such evidence, the plaintiff must be awarded attorney's fees at her requested rate." Hurley, v. Atl. City Police Dep't, 174 F.3d 95, 131 (3d. Cir. 1998).

This reflects an improper method of setting a reasonable hourly rate in the absence of persuasive evidence submitted by the parties. Once the District Court rejected Plaintiffs-Appellants' affidavits and chose to take judicial notice of other decisions, it should have compared the experience and expertise of the attorneys in the cited cases, with that of Plaintiffs-Appellants' attorney here. The District Court also should not have limited its consideration to special education cases, because public interest attorneys – as here – operate in depressed markets, charging lower hourly rates than otherwise. Finally, once it had taken judicial notice of other fee decisions, the District Court should have at least compared the complexity of those cases to the case here to ensure that they were comparable. The District Court did not take any of these steps.

A. The Court Misapplied Third Circuit Law When It Did Not Make Findings Comparing the Experience and Expertise of the Attorneys in Question

The court should "assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Maldonado v. Houstoun, 256 F.3d 181, 184 (3d Cir. 2001) citing Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990); Blum, 465 U.S. at 895 n.11. In the context of comparing attorney's fees, "attorneys are not fungible." Black Grievance Comm. v. Philadelphia Elec. Co., 802 F.2d 648, 652 (3d Cir.

1986). Here, the District Court did not make findings of fact to ensure that it was considering cases requiring "similar services by lawyers of reasonably comparable skill, experience, and reputation," Blum, 465 U.S. at 895 n.11, but simply cited to other cases "in the area of practice" and implicitly assumed that those attorneys had similar experience and expertise as Plaintiffs-Appellants' attorney here.[2] (Doc. 106 at 30.)

The District Court took judicial notice of three opinions, without discussing the expertise or experience of the attorneys involved and how they compared with Mr. Epstein's experience. This is disturbing in light of the clear differences between those decisions and the case-at-hand that the District Court should have acknowledged and discussed. The first decision has limited relevance because it does not provide any information about the attorney's experience. S.A., 2006 WL 827798, at *5. The second decision, citing an earlier opinion in that case, contains incomplete and ambiguous information -- the attorney is described as having "ten years experience as a member of the New Jersey bar," but the opinion also states the fee is justified if the attorney "shows the efficiency normally associated with fifteen years of specialized practice in the field"). A.V. v. Burlington Twp. Bd. of

[2] The District Court also failed to compare the level of complexity of the cases (see infra at § I.B.) and failed to consider the geographic community when it rejected an affidavit submitted by an attorney from Philadelphia - a city only minutes away from the courthouse in Camden, New Jersey and from the office of Plaintiffs-Appellants' attorney in Cherry Hill, New Jersey. (Doc. 106 at 28.) See Blum, 465 U.S. at 895 (requiring assessment of the relevant geographic community).

Educ., No. 06-1534, 2008 WL 4126254, at *5 (D.N.J. Sept. 3, 2008) citing A.V. v. Burlington Twp. Bd. of Educ., No. 06-01534, 2007 WL 1892469, at *9 (D.N.J. June 27, 2007).[3] Strangely, the District Court found notable a difference of nine years of bar membership when it rejected the affidavit of Mr. McAndrews (Doc. 106 at 28), but then did not discuss, or apparently find significant, an apparent difference of ten years of bar membership between Plaintiffs-Appellants' counsel and the attorney in A.V., 2008 WL 412654, at *5. (Doc. 106 at 30-31.)[4]

The District Court must make factual findings comparing the relative experience and expertise of Mr. Epstein and the attorneys in the other decisions, in order to use the rate adopted in those cases rather than a higher amount sought by Plaintiffs-Appellants. The District Court's decision plainly ignored U.S. Supreme Court and Third Circuit mandates to compare an attorney's "skill, experience and reputation." Blum, 465 U.S. at 895 n.11; Maldonado, 256 F.3d at 184.

In considering the third case, J.N., 2007 WL 4570051, which awarded fees to Mr. Epstein, the District Court did not discuss the merits of the requested change in Mr. Epstein's rate subsequent to J.N., which may have been due to increased experience or other potential reasons, such as inflation. Instead, the District Court

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[3] Both A.V. decisions were also decided by Judge Simandle.

[4] The District Court acknowledged Mr. Epstein's 20 years of bar membership when it stated that "Mr. McAndrews has been a member of the bar for nine years longer than Mr. Epstein" (Doc. 106 at p. 28 citing the McAndrews Affidavit at p. 2 (referencing Mr. McAndrews' 29 years of membership in the bar)).

wrongly stated that, even if Mr. Epstein had sustained his burden to show that his requested rate was reasonable, "that rate would not apply to the majority of billings in this action since Mr. Epstein's $400 hourly rate did not 'bec[o]me effective' until January 1, 2008." (Doc. 106 at 26, n.11.) See Lanni v. State of N.J., 259 F.3d 146, 150 (3d Cir. 2001) (holding that "the current market rate is the rate at the time of the fee petition, not the rate at the time the services were performed" in order to take account of delays in payment).

B. The Court Misapplied Third Circuit Law When It Limited Its Analysis to Special Education Decisions

IDEA mandates that an appropriate hourly rate is one "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 requested rates should be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Blum, 465 U.S. at 895 n.11. In setting the rate here, the District Court limited its review to three cases involving attorneys specializing in special education litigation. The District Court's approach is supported neither by the statute itself, which does not place any limitation on the types of cases to consider, nor by the law of this Circuit. To the contrary, the District Court's approach is at odds with the reasoning of this Court in Student Pub. Interest Research Group of N.J., Inc. v. AT&T Bell Labs., 842 F.2d 1436, 1445-46 (3d Cir. 1988) ("SPIRG").

The Court in SPIRG affirmed a district court decision that had awarded fees based on "market rates for legal work of equivalent complexity and quality." SPIRG, 842 F.2d at 1440. In doing so, the Court adopted the "community market rate rule." Id. at 1447-48. The community market rate is the "billing rate charged by attorneys of equivalent skill and experience performing work of similar complexity." Id. at 1450.

Notably, the Court in SPIRG specifically rejected the "micro-market rule." Id. at 1445-46. This would have determined rates for public interest work solely by reference to rates charged for such public interest work. Id. The Court reasoned that relying on such rates "perpetuate[s] a court-established rate as a market when that rate in fact bears no necessary relationship to the underlying purpose" of a market based rule; namely "to calculate a reasonable fee sufficient to attract competent counsel." Id. at 1446. As the Court emphasized, the micro market rule fails to incorporate the reality that attorneys who practice public interest law "often depress their rates to accommodate plaintiffs who otherwise would be unable to sue." Id. at 1445.

This Circuit's requirement that the rates of public interest attorneys be set by reference to rates of "comparable lawyers in the private business sphere" and not by reference to public interest attorneys (e.g. the "micro-market rule") necessarily forbids reliance on an even narrower public interest market consisting solely of

special education attorneys. Id. at 1445-447. The Eleventh Circuit has similarly held that "the amount of attorneys' fees must be determined according to rates customarily charged for similarly complex litigation, and is not to be limited by the amounts charged in actions brought under the same statute." Watford v. Heckler, 765 F.2d 1562, 1568 (11th Cir. 1985).

The dangers posed by the "micro-market rule" and identified in SPIRG are particularly acute in the special education context. A disproportionate number of children with disabilities come from economically disadvantaged families. See Twenty-Second Annual Report to Congress of the Implementation of the Individuals with Disabilities Education Act, at II-37 (2000) (citations omitted) ("DOE Report") and United States General Accounting Office, Special Education: The Attorney Fees Provision of Public Law 99-372, Rep. No. HRD-90-22BR, Nov. 24, 1989, at 26 ("GAO Report"). Students receiving special education services "have different demographic characteristics from school-aged children overall. Students with disabilities are more likely than other students to be . . . from low-income families," DOE Report at II-37, with "42% of children with disabilities receiving some kind of public assistance." Id. at IV, 9-10. In short, the market for attorneys specializing in representing children with disabilities is undoubtedly depressed -- when such attorneys charge fees, they charge fees less than someone with comparable skill, experience and expertise.

By looking only at special education fee awards the District Court relied on a sub-market of the public interest market -- an approach this Circuit found to be an unacceptable proxy for actual market rates in SPIRG. To properly determine the market rate, the District Court should have considered decisions beyond special education law of similar complexity to the case at-hand (see infra at § I.C.), such as environmental law decisions, which the court rejected with minimal analysis.

C. The Court Misapplied Third Circuit Law When It Did Not Make Findings Comparing the Underlying Complexity of the Decisions with this Case

The District Court also failed to consider whether the cases on which it relied involved comparable complexity and required comparable skill to this one, as required by Third Circuit precedent.

The community market rule demands consideration of "the community billing rate charged by attorneys of equivalent skill and experience performing work of similar complexity, rather than the firm's billing rate." SPIRG, 842 F.2d at 1450. The analysis must address the underlying complexity of the case, because "cases vary greatly in nature, and in complexity," Tobin v. Haverford Sch., 936 F. Supp. 284, 290-291 (E.D. Pa. 1996) (internal citations omitted), aff'd 118 F.3d 1578 (3d Cir. 1997) (table), "rang[ing] from prosecution of a complex class actions to a demand that a leaky toilet be fixed in the home of a single public housing tenant." Becker v. Arco Chem. Co., 15 F. Supp. 2d 621, 629 (E.D. Pa. 1998).

"Thus, no single rate is applicable to all types of cases." Tobin, 936 F. Supp. at 291.

Here, the District Court did not discuss or compare the underlying complexity of the litigation in the three decisions it considered with the complexity of the litigation in the case at hand. The District Court only stated that these are "recent decisions . . . which have awarded attorney's fees to practitioners in Mr. Epstein's area of practice." (Doc. 106 at 30.) Without further explanation or comparison, this discussion fails to meet the Third Circuit's clear requirements for setting an hourly rate for reasonable attorneys' fees. SPIRG, 842 F.2d at 1145-46. The District Court should have expressly articulated reasons why the decisions considered are of comparable complexity.

II. FEE-SHIFTING IS CRITICAL TO THE ENFORCEMENT OF RIGHTS UNDER IDEA

In Smith v. Robinson, 468 U.S. 992 (1984), the Supreme Court held that parents who prevailed in disputes under the Education For All Handicapped Children Act, Pub. L. No. 94-142 ("EHA") -- the precursor to IDEA -- could not recover attorney's fees, because the EHA did not specifically provide for them. Concluding that Smith "seriously impairs the ability of parents to enforce their handicapped child's right under P.L. 94-142," Congress enacted the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, which adopted the fee

shifting provision now codified in IDEA at 20 U.S.C. § 1415(i)(3)(B) and at issue in this case.

The availability of legal counsel is critical to the enforcement of IDEA's provisions. "There was a noticeable difference in parents' success rates in administrative hearings when they were represented by attorneys in their disputes with school districts." GAO Report, p. 26 (finding that between 1984 and 1988, 59% of children with disabilities who were prevailing parties were represented by counsel.) See also M. Archer, Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997-2002 (Dec. 2002) (50.4% of parents represented by counsel prevailed, compared to 16.8% of parents without lawyers). The availability of legal counsel is particularly critical for indigent persons as Congress recognized when adding IDEA's fee provision specifically to "increase the possibility that poor parents will have access to the procedural rights in EHA, thereby making the laws' protections available to all." H.R. Rep. No. 99-296, at 5 (1985). See supra at § I.B.

CONCLUSION

For the reasons stated in this brief, *Amici* respectfully urge this Court to restate and clarify the law with respect to the proper calculation of a reasonable hourly rate under IDEA.

Dated: September 15, 2009

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CERTIFICATION OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7) AND 29(d)

I, Robert Counihan, hereby certify, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 29(d), that the foregoing brief contains no more than 7,000 words. In making this determination, I relied upon the word count function of Microsoft Word ®, the word processing software used to prepare this brief. According to that word count, the brief contains 2,531 words.

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I, Robert Counihan, hereby certify that the text of the electronic version of this brief filed in PDF format with the Court is identical to the text in the paper copies filed and served, and that a virus identification detection program (Symantec Antivirus version 10.1.6.6010) was run on the PDF file that has been filed electronically with the Court, and no virus was detected.

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