ORAL ARGUMENT SCHEDULED FOR APRIL 17, 2015

NOS. 14-7133, 14-7138

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

ANGELA PRICE, JEROME PARKER, AND LASHAWN WEEMS,
Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA,
Defendant-Appellee.

On Appeal from a Final Order of the
U.S. District Court for the District of Columbia
(Honorable Richard J. Leon)

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

GLOSSARY iv

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 2

A. The IDEA Requires Attorneys' Fees to Be Based on Market Rates. 3

B. The CJA Rate Does Not Apply to the Parents' Claims for Attorneys' Fees Under the IDEA 3

C. Attorney Fee Arrangements Do Not Determine the Rates for Fee Awards Under Fee-Shifting Statutes. 7

D. $90 Is Not the Market Rate. 11

E. Denying Indigent Parents Market Rates Would Undermine the Purposes of the IDEA's Fee-Shifting Provision. 13

CONCLUSION 16

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Blanchard v. Bergeron,
489 U.S. 87 (1989).....8, 9, 14

* *Blum v. Stenson*,
465 U.S. 886 (1984).....7, 8

Board of Trustees of Hotel & Restaurant Employees Local 25 v. JPR, Inc.,
136 F.3d 794 (D.C. Cir. 1998).....9

Covington v. District of Columbia,
57 F.3d 1101 (D.C. Cir. 1995).....11, 12

Douglas v. District of Columbia,
-- F. Supp. 2d --, 2014 WL 4359192 (D.D.C. Sept. 4, 2014).....4

Missouri v. Jenkins,
491 U.S. 274 (1989).....12

* *Save our Cumberland Mountains, Inc. v. Hodel*,
857 F.2d 1516 (D.C. Cir. 1988) (en banc).....8, 12, 13, 15

STATUTES

District of Columbia Criminal Justice Act
D.C. Code § 11-2601 *et seq.* 1
D.C. Code § 11-2604(a) 4
D.C. Code § 11-2606(b) 5
D.C. Code § 11-2607 4

Individuals with Disabilities Education Act
20 U.S.C. § 1415(i)(3)(B)(i).....3
* 20 U.S.C. § 1415(i)(3)(C).....1, 3, 6, 7, 10, 12

42 U.S.C. § 1988.....7, 12

* *Authorities upon which we chiefly rely are marked with asterisks.*

MISCELLANEOUS

Superior Court of the District of Columbia, Administrative Order 14-19, *available at* http://www.dccourts.gov/internet/documents/14-19-Compensation-for-Special-Education-Attorneys-Nov-17-2014.pdf.....6

GLOSSARY

CJA	Criminal Justice Act
DCPS	District of Columbia Public Schools
IDEA	Individuals with Disabilities Education Act
JA	Joint Appendix

INTRODUCTION AND SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA) requires fee awards under its fee-shifting provision to "be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." 20 U.S.C. § 1415(i)(3)(C). Despite this provision, when plaintiffs-appellants Angela Price, Jerome Parker, and Lashawn Weems[1] moved for an award of attorneys' fees as prevailing parties under the IDEA, the district court did not consider the prevailing market rate for IDEA cases. Rather, it held that because the attorney who represented the parents in their IDEA proceedings was appointed pursuant to the D.C. Criminal Justice Act (CJA), D.C. Code § 11-2601 *et seq.*, the CJA's $90 hourly rate "govern[ed]." JA 108.

The District of Columbia contends that the district court did not "abuse its discretion" in taking "the rate specified in the CJA into account in setting the rate here" because the parents and their counsel "voluntarily accepted" the attorney's appointment at that rate. Brief for Appellee District of Columbia (DC Br.) 7, 12. The district court, however, did not just take the rate "into account"; it held that the rate was binding. Moreover, under the IDEA, courts do not have "discretion" to base fees on rates other than market rates. And although the parents agreed to

[1] Although Jerome Parker is Angela Price's son, for simplicity's sake, this brief, like the defendant-appellee's brief, refers to all three appellants collectively as "the parents."

accept the attorney's appointment under the CJA, it is well-established that market rates are available to prevailing parties under fee-shifting provisions even where the parties' attorneys agreed to represent them at lower rates or even *pro bono*.

The IDEA's provision of market-rate fee awards for prevailing parties is important to ensure that, even when they cannot afford to pay their lawyers market rates out of pocket, parents of children with disabilities are able to retain competent counsel so that their children can receive the services they need. Regardless of the their lawyer's appointment under the CJA, the parents' fee awards should have been based on the prevailing market rate in the community.

ARGUMENT

The District of Columbia contends that the question in this case is whether the district court "abused its discretion" in "setting the rate" at the $90 hourly rate in the CJA. DC Br. 1, 12. The district court, however, did not exercise discretion to set an hourly rate; it determined that the CJA rate was binding. *See* JA 103 (stating that the CJA set a "mandatory compensation rate"); DC Br. 1-2 (conceding that the district court "concluded that the rate of compensation was *controlled* by the statute" (emphasis added)). That determination was a legal error that should be reversed. Moreover, if the court had exercised discretion in setting the $90 rate, it would have erred as a matter of law in failing to base the award on market rates in the community.

A. The IDEA Requires Attorneys' Fees to Be Based on Market Rates.

The District of Columbia emphasizes that the IDEA gives courts discretion to award "reasonable attorneys' fees," *see* DC Br. 7-8 (quoting 20 U.S.C. § 1415(i)(3)(B)(i)), and argues that the court did not abuse its discretion "in tying the reasonable rate to the CJA rate." DC Br. 23. However, although the IDEA gives courts discretion in awarding fees, that discretion is not unfettered. Under the statute, attorneys' fees must be based "on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." 20 U.S.C. § 1415(i)(3)(C). Accordingly, a court has no discretion to base fees on anything other than prevailing market rates. Thus, here, the district court erred in basing attorneys' fees on the rate provided in the CJA instead of on market rates in the community.

B. The CJA Rate Does Not Apply to the Parents' Claims for Attorneys' Fees Under the IDEA.

The District of Columbia contends that the CJA "impos[es] a fixed rate" on compensation for CJA-appointed counsel and that any fee award must "abide by th[at] fixed rate requirement." DC Br. 12, 21. That is not so. The CJA does not contain a provision under which prevailing parties can seek fees from their opponents, nor does it discuss the fees that would be appropriate in the event of fee shifting. Instead, like an attorney/client fee agreement, the CJA supplies the rate at which the District of Columbia court system will compensate

attorneys appointed under the statute, whether or not their clients prevail. *See* D.C. Code § 11-2604(a) (setting the compensation rate); *id*. § 11-2607 (explaining that the expenditures necessary for furnishing CJA representation should be included within budget requests for the District of Columbia court system). Because it sets the rate that the *courts* will pay *attorneys*, not the rate at which prevailing parties can recover fees from their opponents under a fee-shifting statute, the CJA does not provide the rate for the parents' fee requests here. As another D.C. district court recently stated, expressly disagreeing with the district court below, "The rate at which the Superior Court caps reimbursement has no bearing whatsoever on the hourly rate at which a prevailing party may recover attorneys' fees in this Court." *Douglas v. District of Columbia*, -- F. Supp. 2d --, 2014 WL 4359192, at *5 & n.3 (D.D.C. Sept. 4, 2014); *see also id.* at *5 ("While the Superior Court appointment guarantees an attorney $90 per hour whether a party wins or loses, the IDEA, the Superior Court Appointment Order, and this Circuit's case law make clear that a 'prevailing party' is entitled to reasonable market rates[.]").

The appointment orders in Jerome Parker's and Angela Price's proceedings and the Superior Court's recent administrative order on compensation for special education attorneys confirm that the CJA rate does not apply to IDEA fee awards. The appointment orders state that "the District of Columbia Courts will compensate the Educational Attorney pursuant to the Criminal Justice Act *if he is*

not compensated by the District of Columbia Public Schools." JA 98, 100 (emphasis added). Thus, contrary to the District of Columbia's argument that the parents' attorney "agree[d] not to seek more than [the CJA] rate," DC Br. 15, the orders expressly recognized that the appointed attorney's compensation would not be limited to compensation "pursuant to the Criminal Justice Act"; the attorney could receive other fees and would only be compensated pursuant to the CJA if he was not otherwise compensated by the District of Columbia Public Schools (DCPS).[2]

The District of Columbia responds that "nothing in this language [of the appointment orders] indicates 'that DCPS is obligated to pay anything higher than the CJA rate when plaintiffs prevail.'" DC Br. 11 (quoting JA 109). The District is correct on this point as far as it goes, but that is because the appointment orders *do not address* the appropriate rate if DCPS pays attorneys' fees under the fee-shifting provision of the IDEA. Like the obligation to pay fees at all, the rate for such

[2] Although it repeatedly states that the district court did not rely on the provision, the District of Columbia appears to be basing its claim that the parents' attorney agreed not to seek more than the CJA rate in part on D.C. Code § 11-2606(b), which states that an attorney appointed under the CJA may not "seek, ask, demand, receive, or offer to receive, any money, goods, or services . . . from or on behalf of a defendant or respondent" in return for services rendered. *See* DC Br. 9. As the parents explained in their opening brief (at 17-18), that provision, which serves to ensure that an indigent defendant's criminal defense does not depend on his ability to gather funds to pay his attorney, does not apply here, where prevailing parents are seeking fees from DCPS.

payment is provided, not by the CJA or appointment orders, but by the IDEA, which, by its terms, requires courts to apply market rates. 20 U.S.C. § 1415(i)(3)(C).

The Superior Court's administrative order on compensation for special education attorneys makes even clearer that the CJA, including the CJA hourly rate, does not apply when fees are sought from DCPS under the IDEA. The order states that special education attorneys appointed under the CJA "may be compensated pursuant to the . . . CJA Plan, to the extent not compensated for such services through the District of Columbia Public Schools (DCPS), pursuant to the Individuals with Disabilities Education Act." Superior Court of the District of Columbia, Administrative Order 14-19, at 1.[3] By providing for compensation pursuant to the CJA only if DCPS does not provide compensation pursuant to the IDEA, the order underscores both that parents with CJA-appointed attorneys may seek fees under the IDEA, and that IDEA fee awards are not made "pursuant to the . . . CJA plan" and therefore are not governed by the CJA rate.

In response, the District argues that "it is the CJA, not the Superior Court's appointment order, which establishes the rate of payment," and that the administrative order "cannot be read to nullify the statutory language imposing a

[3] *Available at* http://www.dccourts.gov/internet/documents/14-19-Compensation-for-Special-Education-Attorneys-Nov-17-2014.pdf (last visited February 24, 2015).

fixed rate." DC. Br. 11-12. The orders do not nullify the CJA rate, however; rather, they confirm that where, as here, the parents seek fees from DCPS under the IDEA, the CJA rate does not apply.

In any event, regardless of the orders, federal law sets the basis for determining fee awards under the IDEA: "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 parents here moved for fees under the IDEA, and their fee awards should have been based on prevailing market rates.

C. Attorney Fee Arrangements Do Not Determine the Rates for Fee Awards Under Fee-Shifting Statutes.

The District of Columbia argues that the district court reasonably set the attorneys' fees at $90 per hour because "counsel for the parents voluntarily undertook representation with the CJA rate." DC Br. 12. It is well-established, however, that the rate at which an attorney agrees to be paid does not necessarily constitute a "reasonable" fee for the purpose of an award under a fee-shifting statute.

In *Blum v. Stenson*, 465 U.S. 886, 895 (1984), the United States Supreme Court held that "'reasonable fees' under [42 U.S.C.] § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." The Court explained that "Congress did not intend the calculation of fee awards to vary

depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." *Id*. at 894. Thus, even where a prevailing party's attorney has agreed to represent a client *pro bono*, market rates apply to a request for fees.

In *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1520 (D.C. Cir. 1988) (en banc) (*SOCM*), this Court made clear that *Blum* applies not only to *pro bono* counsel, but also to "privately practicing but public interest motivated attorneys who intentionally charge their poorer clients reduced rates." The Court explained that "Congress did not intend the private but public-spirited rate-cutting attorney to be penalized for his public spiritedness by being paid on a lower scale than either his higher priced fellow barrister from a more established firm or his salaried neighbor at a legal services clinic." *Id*. at 1524. Thus, the reasonable rate for an attorney who charges "reduced rates reflecting non-economic goals," *id.*, is the prevailing market rate, rather than the amount specified in the attorney's fee agreement.

The Supreme Court's decision in *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989), reflects this same conclusion. There, the Court held that a contingency fee agreement between the attorney and client did not cap the amount of attorneys' fees to be awarded. "Should a fee agreement provide less than a reasonable fee,"

the Court explained, "the defendant should nevertheless be required to pay the higher amount." *Id*. at 93.

Despite this well-established authority, the District of Columbia contends that the district court properly set the rate at $90 because that is the rate "the parents and their attorney . . . agreed upon." DC Br. 15. Attempting to avoid the precedent, the District argues that there is no evidence that the parents' attorney, Mr. Bergeron, charges below-market rates for non-economic reasons. DC Br. 22. To the contrary, Mr. Bergeron submitted a declaration to the district court explaining that "Plaintiffs, my clients, are indigent individuals in need of legal services," and that even the $250 hourly rate he sought in the invoices he submitted to DCPS represented "reduced fees" "[d]ue to the nature of my special education practice." JA 92 ¶ 12. Moreover, "[a]n important part of th[e] inquiry" into whether an attorney has a public-spirited reason for representing a client should "focus on whether the fee charged in fact differs significantly from the market value of the attorney's services." *Bd. of Trustees of Hotel & Rest. Employees Local 25 v. JPR, Inc.*, 136 F.3d 794, 807 (D.C. Cir. 1998). Here, it cannot seriously be argued that the $90 CJA fee does not differ significantly from the market value of

an attorney of Mr. Bergeron's skill and experience. *See* JA 91-92 (describing Mr. Bergeron's experience in special education law); JA 96 (*Laffey* matrix).[4]

Thus, if the parents are required to show that Mr. Bergeron charged reduced rates for public interest reasons, they have met their burden. In fact, however, the parents do not need to make such a showing. When fees are sought under the IDEA, the Court does not need to consider whether the attorney charged below market rates for public interest purposes, because Congress has specified that fee awards "shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." 20 U.S.C. § 1415(i)(3)(C). In other words, particular parents do not need to demonstrate that market rates supply a reasonable fee for their attorneys because Congress has already made that determination. Regardless of the rate in the attorney's fee

[4] The District's argument that Mr. Bergeron is unlike other attorneys who "may agree to provide representation at less than market rates" because other attorneys "are unlikely to agree to cap their rates as the CJA provides here," DC Br. 21, is hard to understand. Attorneys and clients often agree to a specific fixed rate at which the attorney will be paid. As discussed above, the rates set in such fee agreements are not necessarily reasonable fees for fee-award purposes. To the extent that the District is arguing that public interest attorneys do not generally waive the right for their clients to seek higher rates under a fee-shifting statute if they prevail, Mr. Bergeron did not waive that right here. And to the extent that the District is arguing that Mr. Bergeron and the parents implicitly waived that right by agreeing to CJA appointment, that argument misunderstands the nature of the CJA fee provision, which supplies the rate at which the District of Columbia courts will compensate attorneys, not the rate at which prevailing parties can recover fees from their opponents under a fee-shifting statute.

agreement, Congress has specified that IDEA fee awards must be based on prevailing market rates, and an award based on such rates should have been awarded here.

D. $90 Is Not the Market Rate.

Seeming to recognize that the IDEA required the parents' fee award to be based on prevailing market rates, the District of Columbia asserts that the district court made an "implicit determination" that the market rate for Mr. Bergeron's services was $90 per hour. DC Br. 13. The district court did no such thing. The court did not discuss how much attorneys in the community charged for similar services; it did not even mention the words "market rate." Rather, it concluded that because Mr. Bergeron had accepted appointment pursuant to the CJA, the CJA rate governed. JA 108. As discussed above, that conclusion is wrong.

In any event, that some attorneys are willing to accept the CJA rate when they represent indigent clients in family court proceedings does not make it the prevailing market rate. *See* DC Br. 17-18 (conceding that, in most IDEA cases, fees are not based on the CJA rate). Indeed, this Court has rejected the argument that, when attorneys charge below market rates for public interest purposes, those reduced "rates are in fact the prevailing market rates," explaining that such an argument "merits little attention." *Covington v. District of Columbia*, 57 F.3d 1101, 1111 (D.C. Cir. 1995). Prevailing market rates are not the rates accepted by

CJA-appointed counsel, but those charged by the broader legal community for work of the "kind and quality" of the work performed. 20 U.S.C. § 1415(i)(3)(C); *see Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (in the context of a request for fees under 42 U.S.C. § 1988, equating a prevailing market rate with a rate "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation, and one that grants the successful civil rights plaintiff a fully compensatory fee, comparable to what is traditional with attorneys compensated by a fee-paying client" (internal quotation marks and citations omitted)).

This Court has recognized that, in establishing market rates, "plaintiffs may point to such evidence as an updated version of the *Laffey* matrix or the U.S. Attorney's Office matrix, or their own survey of prevailing market rates in the community." *Covington*, 57 F.3d at 1109; *see also SOCM*, 857 F.2d at 1525 ("We commend [the *Laffey* matrix's] use for the year to which it applies."). Here, the parents submitted the then-current *Laffey* matrix to the district court, JA 96, and provided information about Mr. Bergeron's years of experience to allow application of the matrix. The District of Columbia did not demonstrate that the *Laffey* rate inaccurately represented the market rate for the kind and quality of services Mr. Bergeron performed. *See Covington*, 57 F.3d at 1110.

E. Denying Indigent Parents Market Rates Would Undermine the Purposes of the IDEA's Fee-Shifting Provision.

In *SOCM*, this Court explained that basing fee awards for attorneys who "customarily charge[] below the prevailing community rate in order to serve a particular type of client" on the rates the attorneys charge, as opposed to on prevailing market rates, would have a "negative impact" on the lawyers' clients, 857 F.2d at 1517, 1521 (internal citation omitted). If fee awards for such lawyers were not based on prevailing market rates, the Court explained, lawyers outside of large law firms might avoid representing poorer clients, denying those clients the benefits of representation by "reduced profit public interest lawyers [who] often acquire particular experience and expertise in specific public interest areas." *Id*. at 1521.

Despite the Court's analysis in *SOCM*, and despite Congress's express direction that fee awards in IDEA cases should be based on prevailing market rates, the District of Columbia contends that "the district court's decision to base its award on the CJA rate was consistent with and satisfied the purpose of IDEA's fee-shifting provision." DC Br. 19. According to the District, the fact that the parents here were able to obtain competent counsel demonstrates that the CJA rate is sufficient for fee awards. *Id*. The Supreme Court, however, has expressly rejected the argument that the fact that "a plaintiff is able to secure an attorney on

the basis of a . . . fee agreement" means that "the purpose of the statute is served" if the attorney is paid the amount in that agreement. *Blanchard*, 489 U.S. at 93-94.

Moreover, from 2004 until this case, DCPS paid attorneys' fees to Mr. Bergeron at his requested rate, without question, when he submitted invoices for attorneys' fees on behalf of his clients. JA 92 ¶ 13. DCPS started insisting that the hourly rate should be $90 only after Mr. Bergeron submitted invoices for the parents in this case in 2011. *Id.* Because DCPS previously paid a higher rate when parents prevailed, the facts that the parents here were able to obtain competent counsel, that Mr. Bergeron has been on the panel for years, and that "he is only one of 35 attorneys listed on the panel," DC Br. 19, do not demonstrate that competent counsel will remain sufficiently available if fee awards in IDEA cases are limited to $90 whenever the counsel is appointed under the CJA. To the contrary, if the far-below-market CJA rates become the measure of compensation for appointed attorneys not only in cases in which their clients do not prevail, but also in cases in which they do prevail, attorneys will be less likely to be willing to undertake such representation.[5]

[5] *See generally* Brief of Amicus Curiae Council of Parent Attorneys and Advocates, Inc. in Support of Appellants and Reversal 7-19 (discussing roles of IDEA fees and CJA rates and explaining how the combination of the two is needed to put indigent parents on equal footing with wealthier parents who agree to pay their lawyer a reduced hourly rate in the event that statutory fees are not collected).

The District of Columbia notes that appointment under the CJA provides some benefits that are not provided to IDEA lawyers who provide their services entirely *pro bono*, including "certainty of payment for all reasonable hours worked and expenses incurred, regardless of the outcome." DC Br. 16. Because of these benefits, the District argues, fee awards "at rates higher than that specified in the CJA are not required to ensure that competent counsel are available to represent individuals in administrative proceedings brought against DCPS under IDEA." *Id*. at 17. The District offers no evidence, however, that these incentives are sufficient to ensure that indigent parents of children with disabilities will be able to obtain competent counsel. And this Court made clear in *SOCM* that attorneys should not have to choose between providing representation to indigent clients free of charge, with the possibility of receiving market rates if the client prevails, and charging a low hourly rate to indigent clients, but forgoing the statutory promise of market rates if the client prevails. *See* 857 F.2d at 1520-21.

In any event, the question here is not whether attorneys would prefer to represent indigent parents for nothing with the possibility of receiving market rates if they prevail or to represent indigent parents at a reduced rate without such a possibility. The question is whether, when an attorney accepts representation of an indigent parent at a reduced rate, the hourly rate for a statutory fee award when the parents prevail is limited to that rate. The answer to that question, under both the

case law and the IDEA, is no. The prevailing party is entitled to a fee award based on the prevailing market rate, and the district court erred in holding that the fee award here should be based on the CJA rate instead.

CONCLUSION

This Court should reverse the district court's order granting summary judgment to the District of Columbia and denying Ms. Price, Mr. Parker, and Ms. Weems's motion for summary judgment and remand to the district court for proceedings not inconsistent with its order.

Dated: February 25, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: The type face is fourteen-point Times New Roman font, and the word count is 3,894.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I certify that on February 25, 2015, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Adina H. Rosenbaum
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