ORAL ARGUMENT NOT YET SCHEDULED

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' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

(1) Parties and Amici. Angela Price, Jerome Parker, and Lashawn Weems were the plaintiffs in the district court. Angela Price and Lashawn Weems are the appellants in Case No. 14-7133 and Jerome Parker is the appellant in Case No. 14-7138 in this Court. On September 18, 2014, this Court ordered the two cases consolidated. The District of Columbia was the defendant in the district court and is the appellee in this Court. No amici curiae appeared in the district court. Council of Parent Attorneys and Advocates, Inc. is amicus curiae in this Court in support of appellants.

(2) Rulings Under Review. The rulings under review are the order (Dist. Ct. Doc. 18) and accompanying memorandum opinion (Dist. Ct. Doc. 17) entered by the Honorable Richard J. Leon on July 31, 2014, in *Price v. District of Columbia*, No. 13-1069-RJL (D.D.C.), granting defendant's cross-motion for summary judgment and denying plaintiffs' motion for summary judgment. These rulings are reproduced on pages 103 to 111 of the Joint Appendix. The memorandum opinion was also selected for publication and is available on Westlaw. *See Price v. District of Columbia*, -- F. Supp. 2d --, 2014 WL 3766390 (D.D.C. July 31, 2014).

(3) Related Cases. This case has not previously come before this Court or any other court.

/s/ Jehan A. Patterson
Jehan A. Patterson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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

STATUTES

RULES AND REGULATIONS

CONGRESSIONAL RECORD

MISCELLANEOUS

GLOSSARY

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

INTRODUCTION

This case presents the question whether fee-shifting at market-based rates under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, is available to a prevailing plaintiff whose counsel is appointed by the District of Columbia Superior Court pursuant to the D.C. Criminal Justice Act (CJA), D.C. Code § 11-2601 *et seq*.

Plaintiffs Angela Price, Jerome Parker, and Lashawn Weems were represented in administrative due process proceedings under the IDEA against District of Columbia Public Schools (DCPS)[1] by counsel appointed under the CJA. After prevailing, plaintiffs requested attorneys' fees and costs, relying on the IDEA's fee-shifting provision. Unable to settle the matter, plaintiffs filed an action in district court, seeking fees under the IDEA at the market-based *Laffey* rate of $505. DCPS contended, however, that the IDEA fee-shifting provision did not apply in this case and that plaintiffs' attorneys' fees should be calculated at the $90 hourly rate provided by the CJA. The district court agreed with DCPS.

The district court's decision is at odds with the IDEA's text and purpose, and is contrary to precedent of the Supreme Court and this Court holding that market rates are available to prevailing parties whose counsel represent them at no

[1] This memorandum refers to defendant the District of Columbia as DCPS, the entity against which plaintiffs brought their administrative due process claims under the IDEA.

cost or reduced rates for public interest purposes. The decision below should be reversed.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction to consider Appellants' claim under 20 U.S.C. § 1400 *et seq*. and 28 U.S.C. § 1331. It entered a final order and memorandum opinion on July 31, 2014. Joint Appendix (JA) 103-111. Ms. Price and Ms. Weems timely appealed on August 28, 2014, and Mr. Parker timely appealed on September 10, 2014. JA 112-113; *see* Fed. R. App. P. 4(a)(1)(A) and 4(a)(3). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATUTES AND REGULATIONS

The fee-shifting provision of the Individual with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(i)(3)(B)(i), provides in pertinent part:

> In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—
> **(I)** to a prevailing party who is the parent of a child with a disability.

20 U.S.C. § 1415(i)(3)(C) further provides in pertinent part:

> Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished.

The District of Columbia Criminal Justice Act (CJA), D.C. Code § 11-2604(a) provides in pertinent part:

> Any attorney appointed pursuant to this chapter shall, at the conclusion of the representation or any segment thereof, be compensated at a fixed rate of $90 per hour.

STATEMENT OF ISSUE

Whether the IDEA's fee-shifting provision, which allows prevailing parties to recover market-rate attorneys' fees, applies to prevailing parties represented by counsel appointed under the CJA.

STATEMENT OF FACTS AND OF THE CASE

I. District of Columbia Superior Court's Authority to Appoint Counsel in Special Education Proceedings

The CJA grants the District of Columbia courts the authority to appoint pro bono counsel to represent indigent criminal defendants. *See* D.C. Code § 11-2601(1). The CJA extends that authority to appoint counsel for certain other categories of individuals, including, as relevant here, to juveniles alleged to be delinquent or in need of supervision. *Id.* § 11-2601(5). Pursuant to its authority under the CJA, the District of Columbia Superior Court established a Family Court Panels Committee charged with creating panels of attorneys to represent indigent children in family court proceedings in the Superior Court. *See* Superior Court of the District of Columbia, Administrative Order No. 02-15 at 3.[2] Among other things, the Family Court Panels Committee was tasked with recommending to the

[2] *Available at* http://www.dccourts.gov/internet/documents/02-15.pdf (last visited Dec. 16, 2014).

Chief Judge of the Superior Court a panel of attorneys who could serve as special education advocates, *id.*, recognizing that such advocates were sometimes necessary "to promote the best interests of children" in neglect and delinquency proceedings *Id.* at 1-2.

The Superior Court's belief that special education attorneys might be necessary to promote the best interests of children enmeshed in the juvenile justice system has ample support. Across the nation, an increasing reliance on law enforcement by schools to address school disciplinary issues has resulted in a greater number of arrests and referrals to the juvenile justice system, *see* Justice Policy Institute, *Education Under Arrest: The Case Against Police in Schools* 13-14 (Nov. 2011),[3] and children with disabilities are at particular risk of referral.

"[C]hildren with disabilities who are not receiving appropriate education or services could have difficulty adapting to and learning in a more traditional classroom setting" and thus are likely to disrupt their classes and be removed from the educational setting. Justice Policy Institute, *supra* note 3 at 23. "[S]ome [school] districts have decided to bring out the heavy guns for handling disruptions associated with disabled students; from outbursts in class to tantrums in the hall, the new go-to solution in many districts is to call the police." S.E. Smith,

[3] *Available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf (last visited Dec. 16, 2014).

Disabled—and handcuffed at school, Salon, May 23, 2012.[4] Indeed, the U.S. Department of Education found, based on an analysis of data from the 2009-2010 school year, that students with disabilities "are over twice as likely [as non-disabled students] to receive one or more out-of-school suspensions." U.S. Department of Education, Office for Civil Rights, *The Transformed Civil Rights Data Collection*, at 3, Mar. 2012.[5] A student who stops attending school, in turn, increases his or her likelihood of engaging in delinquent behavior that may result in subsequent encounters with the juvenile justice system, *see* Lisa M. Geis, *An IEP For the Juvenile Justice System: Incorporating Special Education Law Throughout the Delinquency Process*, 44 U. Mem. L. Rev. 869, 879 (2014), including incarceration. *See* Justice Policy Institute, *supra* note 3 at 18. These referrals to the juvenile justice system can have devastating consequences for students with learning disabilities, because high school students who have encounters with the juvenile justice system are three times more likely than others eventually to drop out of school. *See* Gary Sweeten, *Who Will Graduate?*

[4] *Available at* http://www.salon.com/2012/05/23/disabled_and_handcuffed_at_school/ (last visited Dec. 16, 2014).

[5] *Available at* http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf (last visited Dec. 16, 2014).

Disruption of High School Education by Arrest and Court Involvement, 23 Justice Quarterly 462, 463 (Dec. 2006).[6]

II. Administrative Due Process Proceedings for Jerome Parker and D.W.

In 2010, the Superior Court appointed Pierre Bergeron as counsel to represent Angela Price, Mr. Parker's mother, and Lashawn Weems, D.W.'s mother, on matters concerning "special education issues with the District of Columbia Public Schools."[7] JA 97-98, 101-102. Among other things, Mr. Bergeron was "granted the power to authorize testing, screening, an administrative hearing [under the IDEA] and whatever else is necessary to perform duties incidental to the appointment," JA 98, and to represent plaintiffs "at any dispute resolution meetings/mediations convened by D.C. Public Schools pursuant to IDEA." JA 98; *see also* JA 101 (authorizing Mr. Bergeron to represent Ms. Weems "in any administrative proceedings" including those against DCPS). The appointment orders for Ms. Price and Mr. Parker provided "that the District of Columbia Courts will compensate the Educational Attorney pursuant to the Criminal Justice Act *if*

[6] *Available at* http://www.masslegalservices.org/system/files/library/H.S.ed_and_arrest_-_ct_involvement_study_by_Sweeten.pdf (last visited Dec. 16, 2014).

[7] Because Mr. Parker turned 18 during the pendency of the administrative proceeding, he was substituted for his mother as petitioner in the IDEA administrative proceedings and was one of the plaintiffs in the district court below. The Superior Court issued an appointment order for Mr. Bergeron to represent Mr. Parker. JA 99-100.

he is not compensated by the District of Columbia Public Schools." JA 98 & 100 (emphasis added). Mr. Bergeron filed administrative due process claims against DCPS in each case.

A. Jerome Parker

Ms. Price's son, plaintiff Jerome Parker, attended seven DCPS schools from pre-kindergarten through the age of 18. JA 22. In 2005, when he was in the fifth grade, Mr. Parker received an evaluation that recommended "a low student-teacher ratio, highly structured environment, and multisensory approaches to education" to accommodate his "borderline to low average intellectual ability" and four-year lag behind his peers in academic performance. *Id.* DCPS failed to implement these recommendations and conducted no further clinical evaluations of Mr. Parker. *Id.* Because "he did not receive the specialized instruction he required, and DCPS failed to meet his cognitive and social-emotional needs, he became depressed and avoided school." *Id.* As a result, Mr. Parker gained only "four months' academic growth between 2005 and 2010." *Id.* Indeed, in 2009, when he was approximately 16, Mr. Parker functioned at the second grade level in reading fluency, at the third grade level in writing fluency and math fluency, at the first grade level in spelling, and at the fourth grade level in applied problems. JA 24.

The hearing officer held that DCPS denied Mr. Parker a free appropriate public education and ordered DCPS to revise his Individualized Education Plan to

provide funding for and transportation to a non-public day school for students with emotional disturbance and learning disabilities. JA 37-39, 42. The hearing officer specifically found that DCPS's failure to assess Mr. Parker for an intellectual disability "likely impeded the Student's academic progress," JA 23-24, and faulted DCPS for making no efforts prior to May 2010 to contact Mr. Parker or Ms. Price "to ascertain why he was not attending school." JA 28. DCPS also was ordered to provide wrap-around services, described as "a holistic approach to helping a student and his family gain an understanding of the student's disability and utilize community resources to achieve self-sufficiency," intended to "break [Mr. Parker's] cycle of school avoidance." JA 32. The order required the services to include support to encourage Mr. Parker's school attendance, assistance with homework, and behavioral mentoring and counseling to address his antisocial behaviors and facilitate healthier and positive social interactions with his peers. JA 32-33.

B. D.W.

Despite struggling academically since the second grade and being moved by his mother, plaintiff Lashawn Weems, to multiple schools, and despite repeated requests by Ms. Weems to DCPS for educational assistance, D.W. was not diagnosed with depressional disorder and a learning disorder until January 2011, when he was 15. JA 47-48. His diagnoses came only after D.W.'s 2010 arrest for

being a passenger in a stolen car and subsequent referral by the Superior Court to a child guidance clinic. JA 48. D.W.'s learning disorder "resulted in academic failures which then fed depressive manifestations such as embarrassment, shame, resentment, and anger due to not being able to achieve academically with his peers without special education and related services." *Id.* At the time his learning disorder was identified, he "rarely stay[ed] in or attend[ed] his classes[,] … [was] often suspended[,] … respond[ed] aggressively towards peers when challenged or teased, [was] non-compliant with adults, … and [h]is most recent progress report showed all failing grades." *Id.*

The hearing officer held that D.W. had been denied a free appropriate public education because his Individualized Education Plan was "not reasonably calculated to provide educational benefit." JA 57. The hearing officer ordered DCPS to revise D.W.'s Individualized Education Plan to implement appropriate functional goals to improve D.W.'s class attendance and class assignments, compliance with adult instructions, and relationships with his peers. JA 57-58. The hearing officer also ordered DCPS to provide D.W. with specialized instruction in a structured day school and wrap-around services, including therapy, to address certain behavioral issues. JA 58.

C. Plaintiffs' Requests for Attorneys' Fees and Costs

After Ms. Price, Mr. Parker, and Ms. Weems prevailed in their administrative due process hearings, Mr. Bergeron submitted invoices documenting his work and hours expended to DCPS and requested attorneys' fees in the amount of $70,431.34, based on an hourly rate of $250. JA 60-90. DCPS agreed to compensate Mr. Bergeron for 205.7 hours in connection with his work on Ms. Price's and Mr. Parker's IDEA claim (reduced from 219.5 hours sought by Mr. Bergeron) and 55.5 hours on Ms. Weems's claim (reduced from 61.5 hours). JA 78, 88. DCPS insisted, however, that Mr. Bergeron be limited to an hourly rate of $90—the CJA statutory rate that the Superior Court would pay if Mr. Bergeron were not compensated by DCPS, as referenced by the appointment orders. *Id.*

III. The District Court Proceedings

Ms. Price, Mr. Parker, and Ms. Weems filed suit against District of Columbia seeking attorneys' fees and costs pursuant to the IDEA, 20 U.S.C. § 1415(i)(3)(B)(i). The attorneys' fees sought were based on the then-current *Laffey* matrix,[8] which stated a rate of $505 per hour for an attorney with Mr. Bergeron's experience. JA 96. The parties cross-moved for summary judgment.

[8] *See Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984). The current *Laffey* matrix is available at http://www.justice.gov/usao/dc/divisions/Laffey_Matrix%202014.pdf (last visited Dec. 17, 2014).

After demonstrating that they prevailed on their administrative due process claims, plaintiffs documented, as relevant here, Mr. Bergeron's requested hourly rate and usual practice of reducing his rates in IDEA cases for indigent clients. Relying on this Court's precedent, plaintiffs argued that, although Mr. Bergeron represented them at no cost pursuant to a Superior Court appointment, they were entitled to attorneys' fees based on a market rate.

The district court denied plaintiffs' motion for summary judgment and granted summary judgment for DCPS, holding that fee-shifting under the IDEA was not available to plaintiffs despite their status as prevailing parties. Describing the issue presented as "whether Mr. Bergeron is entitled to fees above the CJA's statutory rate of $90/hour," JA 107, the district court viewed the text of the CJA as "the beginning and end of the inquiry." *Id.* It stated that both section 11-2604(a) of the CJA, which provides the statutory hourly rate for appointed counsel, and section 11-2606(b), which subjects appointed counsel who seek compensation in excess of the statutory hourly rate "from or on behalf of a defendant or respondent" to criminal penalties, are "abundantly clear" in limiting plaintiffs' counsel to $90 per hour. JA 108.

The district court made no attempt to interpret the attorneys' fee provision of the IDEA, nor did it cite any authority to support its holding that the IDEA fee-shifting provisions did not apply to this case. The district court likewise ignored

plaintiffs' argument that a prevailing party may seek reasonable attorneys' fees at market-based rates under fee-shifting statutes regardless of whether that party's counsel charged him a reduced fee or even no fee at all.

SUMMARY OF ARGUMENT

The IDEA fee-shifting provision applies to Ms. Price, Mr. Parker, and Ms. Weems's claims for attorneys' fees as prevailing parties on their administrative due process claims against DCPS. Under the IDEA, those fees are based on market rates. The CJA provides an hourly rate for compensation by the Superior Court to appointed counsel who are not otherwise compensated. The CJA, however, has no effect on the obligation of DCPS, as the losing party in an IDEA proceeding, to pay reasonable attorneys' fees to prevailing plaintiffs, nor does it determine the rate at which those fees are to be calculated.

I. The IDEA's fee-shifting provision provides the appropriate legal standard by which to decide plaintiffs' summary judgment motion for attorneys' fees and costs. The text of the statute makes plain that the right to seek attorneys' fees is afforded to a prevailing party in an IDEA proceeding. As the Supreme Court has recognized, the prospect of statutory fee awards to plaintiffs in civil rights cases ensures that aggrieved parties will be able to obtain competent legal representation. The district court erred by failing to apply the IDEA's fee-shifting

provisions to plaintiffs' application for attorneys' fees on the basis that their attorney was appointed pursuant to the CJA.

II. The CJA contains no language suggesting that it supersedes DCPS's obligation as a losing party in an IDEA proceeding to pay attorneys' fees and costs to prevailing plaintiffs. That statute is intended primarily to ensure that the Superior Court complies with its constitutional obligations to provide competent representation to indigent criminal defendants. And the CJA's statutory prohibition on an attorney seeking compensation from or on behalf of a defendant—on which the district court relied in part for its holding that fee-shifting under the IDEA was unavailable—exists to prevent an indigent individual's criminal defense from turning on his ability to pay his counsel. That concern is wholly inapplicable to a plaintiff who has prevailed in a civil rights action and seeks attorneys' fees from the losing party. Indeed, both the district court and DCPS agree that plaintiffs are entitled to attorneys' fees from DCPS.

III. The IDEA's fee-shifting provisions provide for compensation at market-based rates regardless of the terms of an attorney's engagement. The relevant language of § 1415(i)(3)(B)(i) borrows from 42 U.S.C. § 1988, the fee-shifting statute that provides attorneys' fees to prevailing plaintiffs in other federal civil rights actions. The U.S. Supreme Court has interpreted a reasonable attorneys' fee under § 1988 to provide for market rates, thus counseling in favor of

an identical construction of the IDEA's fee-shifting provision. Moreover, the legislative history makes clear that Congress intended the IDEA's fee-shifting provisions to hew to the Supreme Court's interpretation of § 1988, and specifically endorses *Blum v. Stenson*, 465 U.S. 886, 895 (1984), in which the Court held that market-based rates must be used to calculate attorney's fees under fee-shifting civil rights statutes notwithstanding the fact that the prevailing parties were represented by public interest lawyers who did not charge fees to their clients. This Court has recognized that *Blum* applies to the calculation of fee awards to prevailing parties whose counsel represented them at below-market rates for noneconomic, public interest motivated purposes.

IV. The district court's holding, if affirmed, would place indigent parents with appointed counsel at a distinct disadvantage in enforcing their children's right to a free appropriate public education, both by reducing the number of competent and experienced counsel available to accept appointments and by removing financial incentives for DCPS to settle meritorious IDEA due process claims without undue delay. That outcome would run counter to the remedial purpose of the IDEA, which seeks to provide appropriate educational services to all children, regardless of their parents' ability to pay for counsel to enforce their rights.

STANDARD OF REVIEW

This Court reviews "*de novo* whether the district court applied the correct legal standard" on fee applications. *Conservation Force v. Salazar*, 699 F.3d 538, 542 (D.C. Cir. 2012) (quoting *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 524 (D.C. Cir. 2011)).

ARGUMENT

I. The IDEA Applies to Claims for Attorneys' Fees by Prevailing Plaintiffs.

The IDEA provides, as relevant here, that "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs-- **(I)** to a prevailing party who is the parent of a child with a disability." 20 U.S.C. § 1415(i)(3)(B)(i). *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297 (2006) (stating that prevailing parents are entitled to recover attorneys' fees under § 1415(i)(3)(B)).

As Congress and the courts recognize, fee-shifting provides a powerful tool to plaintiffs for private enforcement of civil rights. *See Evans v. Jeff D.*, 475 U.S. 717, 731 (1986) (describing § 1988 as an "'integral part of the remedies necessary to obtain' compliance with civil rights laws." (quoting S. Rep. No. 94-1011, at 5 (1976))). Fee-shifting enables "private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*,

478 U.S. 546, 565 (1986); *accord Jeff D.*, 475 U.S. at 731 ("Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights").

The IDEA's fee-shifting provisions apply here notwithstanding the fact that plaintiffs' counsel was appointed. In *Blum*, the Supreme Court held that the calculation of attorneys' fees under 42 U.S.C. § 1988 did not "vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization" at no cost to the plaintiff. 465 U.S. at 894. Because the "purposes behind both [§ 1415] and § 1988 are nearly identical," *Delaware Valley*, 478 U.S. at 559 (citation omitted),"they should be interpreted in a similar manner," to ensure plaintiffs will be able to obtain competent counsel to vindicate their civil rights. *Id.* Mr. Bergeron's willingness to represent Ms. Price, Mr. Parker, and Ms. Weems without assurance of payment other than a reduced fee to be paid by a third party does not alter or impair plaintiffs' entitlement to attorneys' fees under the IDEA.

II. The District Court Erred in Applying the CJA to the Prevailing Parties' Claims for Attorneys' Fees.

The CJA does not supersede the plaintiffs' entitlement to attorneys' fees under the IDEA. The CJA provides that appointed counsel "shall, at the conclusion of the representation or any segment thereof, be compensated at a fixed rate of $90 per hour." D.C. Code § 11-2604(a). This compensation is paid by the District of

Columbia courts, the entity that appointed the attorney. *See* D.C. Code § 11-2602 ("[T]he court, if satisfied after appropriate inquiry that the defendant or respondent is financially unable to obtain counsel, shall appoint counsel to represent that person."). The CJA has no language suggesting that its scheme to compensate appointed counsel displaces a prevailing party's right to seek attorneys' fees under the IDEA (or any other fee-shifting statute) from the losing party.

The district court's reliance on a CJA provision that imposes criminal penalties on attorneys who seek compensation in excess of the $90 hourly rate likewise is misplaced. That provision states that an attorney appointed under the CJA may not "seek, ask, demand, receive, or offer to receive, any money, goods, or services in return therefor from or on behalf of a defendant or respondent … for any services rendered." D.C. Code § 11-2606(b). Ms. Price, Mr. Parker, and Ms. Weems are plaintiffs who seek to enforce *their* claims for attorneys' fees under the IDEA. They are not "defendant[s] or respondent[s]," as § 11-2606(b) requires, nor does Mr. Bergeron seek money from them or on their behalf. Moreover, this provision serves to ensure that a criminal defendant has no misconception "that the quality of his representation may yet depend upon 'gather[ing] together funds to compensate the attorney whom he has not selected …'" *In re L.R.*, 640 A.2d 697, 701 (D.C. 1994) (citation omitted) (analyzing similar prohibition in D.C. Code

§ 11-2606(a)). This concern is not relevant to a plaintiff who has prevailed on his or her IDEA claims who then seeks a fee award under the IDEA.

Other district courts have held correctly that the CJA "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" under the IDEA. *Douglas v. District of Columbia*, -- F. Supp. 2d --, 2014 WL 4359192, at *5 (D.D.C. Sept. 4, 2014); *see also Wood v. District of Columbia*, No. 13-0769, 2014 WL 5438409, at *6 (D.D.C. Oct. 27, 2014) (finding argument that CJA rate applies "unpersuasive"); *Staton v. District of Columbia*, No. 13-0773, 2014 WL 2700894, at *4 (D.D.C. June 11, 2014) (noting that "[d]efendant offers no new argument or authority in support of its position" that "the proper hourly rate is $90 in accordance with" the CJA); *Clay v. District of Columbia*, No. 09-1612, 2014 WL 322017, at *6 (D.D.C. Jan. 28, 2014) (same); *Eley v. District of Columbia*, 999 F. Supp. 2d 137, 157 n.9 (D.D.C. 2013) (rejecting defendant's argument that CJA rate applied to plaintiff's attorneys' fees claim as "spurious").

That the CJA has no relevance to the calculation of attorneys' fees in an IDEA case is reflected by the appointment orders in Ms. Price and Mr. Parker's proceedings. Those orders provide 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). Payments "pursuant to the Criminal Justice Act" are payments made by the Superior Court, not DCPS. Accordingly, payment to the attorney at the CJA rate by the Superior Court occurs only when DCPS does not pay attorneys' fees. In light of DCPS's contrary argument in recent cases, Superior Court Chief Judge Satterfield last month issued an order clarifying that appointed special education attorneys "may be compensated [by the Superior Court pursuant to the CJA or equivalent plan for individuals in neglect proceedings] … 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.[9] The order, scheduled to take effect January 1, 2015, rejects the district court's conclusion that the appointment orders that apply to this case do "not indicate … that DCPS is obligated to pay anything higher than the CJA rate when plaintiffs prevail," JA 109.

Accordingly, the Court should reverse the district court's holding that the IDEA's fee-shifting provision does not apply where counsel to prevailing plaintiffs was appointed by the Superior Court pursuant to the CJA.

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

III. The IDEA's Text, Its Legislative History, and this Court's Case Law Make Clear That "Reasonable Attorneys' Fees" Are Calculated Based on Market Rates.

The IDEA provides for a discretionary court award of "reasonable attorneys' fees as part of the costs" to prevailing parents of children with disabilities, 20 U.S.C. § 1415(i)(3)(B)(i), and directs that those fees be "based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." *Id.* § 1415(i)(3)(C). As with fee-shifting provisions in other federal civil rights statutes, attorneys' fees under the IDEA must be calculated according to market rates.

"[T]he determination of an award of reasonable attorneys' fees is at bottom a question of statutory interpretation." *Save our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1518 (D.C. Cir. 1988) (en banc) (*SOCM*); *see also Blum*, 465 U.S. at 893 (stating that resolution of question whether market rates are used to calculate attorneys' fees for nonprofit counsel under 42 U.S.C. § 1988 "begins and ends with an interpretation of the attorney's fee statute."). The Education of Handicapped Children Act of 1975, the former name of the IDEA, was amended in 1986 to include a provision for attorneys' fees to a prevailing party. The provision borrows language from § 1988(b), which provides, in relevant part, that "the court, in its discretion, may allow the prevailing party, other than the United States, a

reasonable attorney's fee as part of the costs," thus counseling in favor of an identical interpretation of § 1415. As the joint explanatory statement issued in connection with the conference report on the amendments to the Education of Handicapped Children Act made clear, attorneys' fees under the IDEA are to be calculated according to the methods provided by the Supreme Court's decisions interpreting § 1988 in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Blum*. H.R. Rep. No. 99-687, at 6 (1986) (Conf. Rep.). *See also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 590 (2010) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its … judicial interpretations as well.'" (citation omitted)).

In *Hensley*, the Supreme Court held that a reasonable attorneys' fee under § 1988 is the lodestar—the product of the number of hours reasonably expended on the litigation and a reasonable hourly rate, with adjustments as necessary to account, in part, for the degree of relief obtained by a plaintiff as compared to what he sought to achieve. 461 U.S. at 433-34. Fee awards under § 1988—and the IDEA—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." *Blum*, 465 U.S. at 895. Thus, pro bono attorneys compensated under the IDEA's fee-shifting provision are entitled to market rates.

As this Court has stated, "a fee award based on prevailing market rates … accomplishes Congress' express goals" of attracting competent counsel and avoiding windfalls to attorneys. *SOCM*, 857 F.2d at 1521. *SOCM* recognized that, under *Blum*, market rates should apply to fee awards sought by prevailing plaintiffs whose for-profit counsel represented them at below-market rates reflecting public interest purposes. *SOCM*, 857 F.2d at 1524; *accord Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995) ("[W]e think it is quite clear that plaintiffs' [for-profit] attorneys are entitled to an award based on the prevailing market rates."). In particular, *SOCM* rejected the argument that "the willingness of counsel to undertake the representation at his stated rate proved the adequacy of that rate to attract competent counsel." *SOCM*, 857 F.2d at 1519; *see also Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989) ("As we understand § 1988's provision for allowing a 'reasonable attorney's fee,' it contemplates reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less. Should a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount."). Indeed, "[a] reasonable attorney's fee … [is] 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.'" *Covington*, 57 F.3d at 1109 (quoting *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989)).

Accepting DCPS's argument that the market rate for appointed counsel in IDEA cases is the CJA rate would create the same anomalous result that *SOCM* sought to avoid: A "highly paid commercial, for-profit law firm" and pro bono legal aid attorney both could receive fee awards at the former's "handsome rates," while "privately practicing but public interest motivated attorneys" who represent indigent plaintiffs at no cost pursuant to court appointments would "receive … reduced rates as statutory fees." *SOCM*, 857 F.2d at 1520. As this Court recognized, fee awards at below-market rates could lead "the practitioner outside the large or established firm [to] … eschew pro bono representation." *Id.* Indigent parents who cannot afford counsel thus would be denied access to "reduced profit public interest lawyers [who] often acquire particular experience and expertise in specific public interest areas." *Id.* at 1521.

This risk applies fully in the area of special education law, an area in which "counsel must know far more than IDEA law … to be effective—i.e., to get services, education, and treatment for their young clients—it is essential that counsel understand the bureaucratic workings of [the public school] system, know competent and caring individuals in that system who can break logjams and obtain necessary evaluations, reports, and materials, and then assure provision of

whatever [free appropriate public education] is deemed appropriate." *Cox v. District of Columbia*, 754 F. Supp. 2d 66, 76 (D.D.C. 2010). Indeed, special education firms in the District of Columbia have reduced operations or shuttered entirely as a result of DCPS's failure to pay invoices and court-ordered fee awards on time or in full, *see Thomas v. District of Columbia*, 908 F. Supp. 2d 233, 245-46 (D.D.C. 2012), leading the *Thomas* court to observe that "[DCPS's] consistently dismal track record [on payment of fees] compels the conclusion that higher fees may need to be awarded in [IDEA] cases in order to ensure that competent counsel continues to be attracted …." *Id.* at 246.

In this circuit, market rates for the purposes of a lodestar calculation are furnished by the *Laffey* matrix. *See SOCM*, 857 F.2d at 1525 (remanding case to district court for "new findings as to reasonable hourly rates at the time the services were performed … Perhaps the most desirable result of the present litigation would be the compiling of a similar schedule of prevailing community rates for other relevant years."); *Covington*, 57 F.3d at 1109, 1111 (approving the *Laffey* matrix as evidence of rates prevailing in the community and rejecting defendant's argument that "a civil rights … market actually exists independent of attorneys who handle other types of complex federal litigation.").

Below, DCPS did not challenge Mr. Bergeron's statement that he "charge[s] reduced rates for non-economic reasons," did not challenge Mr. Bergeron's

"competence, experience, reputation, or performance in the instant case," and did not challenge Mr. Bergeron's "market data, in an effort to show that the submitted market rates are inaccurate." *Covington*, 57 F.3d at 1110. DCPS did, however, argue that Ms. Price, Mr. Parker, and Ms. Weems failed to demonstrate that their cases were sufficiently complex to warrant *Laffey* rates, ignoring both that the District of Columbia bears the burden of showing that "a lower rate would be appropriate," *id.*, once plaintiffs have "provided support for the requested rate," *id.* at 1109 (citation omitted), and that "the novelty and complexity of a case ... 'presumably [are] fully reflected in the number of billable hours recorded by counsel.'" *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553 (2010) (citation omitted). Further, the IDEA, 20 U.S.C. § 1415(i)(3)(B), does not distinguish between work done at the administrative level and work done in litigation for purposes of determining a reasonable fee. *See Delaware Valley*, 478 U.S. at 560 (holding that attorneys' fees may be awarded for work done outside "the context of traditional judicial litigation"); *cf. Webb v. Bd. of Educ. of Dyer County, Tenn.*, 471 U.S. 234, 243 (1985) (holding that compensability of time spent on optional administrative proceedings turned on whether the work "was both useful and of a type ordinarily necessary to advance the civil rights litigation"). Because exhaustion of the administrative due process procedures for claims relating to a child's right to a free appropriate education or placement in an alternative

educational setting is a mandatory prerequisite to a civil action under the IDEA, *see* 20 U.S.C. § 1415(l), plaintiffs here can recover attorneys' fees at market rates for the underlying administrative actions.

DCPS's alternative argument below that Mr. Bergeron should be limited to the $250 hourly rate he sought in the invoices he submitted to DCPS prior to the commencement of this action likewise is meritless. "Settlements, by definition, are compromises in which plaintiffs accept less than their full claim" of attorneys' fees "in exchange for avoiding the risks of further proceedings and trial." *Keepseagle v. Vilsack*, -- F. Supp. 3d --, 2014 WL 5796751, at *13 (D.D.C. Nov. 7, 2014). Mr. Bergeron attested to the fact that he reduced his hourly rate because plaintiffs were "indigent individuals in need of legal services." JA 92 at ¶ 12. DCPS cannot use the rate at which plaintiffs would have settled their claim to attorneys' fees as evidence of the prevailing market rate. *See* Fed. R. Ev. 408(a)(1) (prohibiting evidence of an offer to accept valuable consideration in attempt to compromise claim to prove the amount of a disputed claim). Ms. Price, Mr. Parker, and Ms. Weems are entitled to seek attorneys' fees under the IDEA at market rates notwithstanding their offer to settle their claims at a reduced rate.

IV. The Decision Below Upends the IDEA's Remedial Purpose by Denying Indigent Parents Access to Competent Counsel to Enforce Their Educational Rights.

The district court's holding that the mere acceptance of court-appointed counsel constitutes an effective waiver of the right to attorneys' fees under the IDEA uniquely prejudices indigent parents of disabled students by denying them the statutory remedy that gives teeth to their IDEA due process rights. An effective waiver of attorneys' fees under the IDEA would deter skilled and experienced special education attorneys from joining or continuing their service on the Superior Court's CJA panel, depriving indigent parents from obtaining competent counsel to advocate for their education rights. *See Jeff D.*, 475 U.S. at 743 n.34 (noting that diminished "expectations of statutory fees in civil rights cases" may result in "the pool of lawyers willing to represent plaintiffs in such cases" to shrink). The district court's statement that appointed counsel "does [not] need to expend resources to identify potential clients and compete for the opportunity to represent them," JA 109, turns on its head the purpose of fee-shifting statutes, which is to ensure that "plaintiffs … find it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee.'" *Delaware Valley*, 478 U.S. at 565. Moreover, the district court's focus on the lawyer's ability to retain clients—rather than the plaintiff's ability to attract competent counsel—ignores that fee-shifting "statutes were not designed as a form of economic relief to improve the financial

lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client." *Id.* And without the prospect of statutory attorneys' fees that accrue as the proceedings continue, indigent parents would be unable to apply pressure to DCPS to settle their meritorious claims in an expeditious manner that ensures that their children have educational resources appropriate for their disabilities. *See* S. Rep. 99-112, at 17 (1986) ("Schools not faced with having to pay more substantial attorneys' fees at the fair market rate will have an incentive to draw judicial proceedings out in an attempt to force plaintiffs to abandon their cases.").

If affirmed, the district court's holding would create a two-tier system of enforcement of IDEA rights in which indigent parents would lack the mechanism that motivates school districts to comply with the law, a result "at odds with the general remedial purpose underlying [the] IDEA," which is to "'ensure that *all* children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.'" *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 (2009) (citing 20 U.S.C. § 1400(d)(1)(A)) (emphasis added) (favoring construction of statute consistent with its purpose); *see also* S. Rep. 99-112, at 2 (amending the Education of Handicapped Children Act to provide fee-shifting so "that due process procedures, including the right to litigation if that became necessary, [would] be

available to *all* parents." (emphasis added)). In *Forest Grove*, the Supreme Court held that parents were entitled to reimbursement under 20 U.S.C. § 1415(i)(2)(C)(iii) for private school tuition even though their child had never received any special education services from the public school district, observing that "[w]ithout the remedy respondent seeks, a 'child's right to a *free* appropriate education … would be less than complete.'" *Forest Grove*, 557 U.S. at 244-45 (citing *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370 (1985)). Likewise, without the prospect of recovering attorneys' fees for their appointed counsel, indigent parents' enforcement of their children's rights to a free appropriate public education would be inadequate. Their disabled children, in turn, are more likely to be removed from their educational settings if their needs are not met and be referred to the juvenile justice system, undermining the IDEA's objective to remedy "a school's failure to provide a [free appropriate public education] … with the speed necessary to avoid detriment to the child's education." *Forest Grove*, 557 U.S. at 245. This result is particularly untenable given that the IDEA contains no limitations on the availability of fee-shifting that turn on a prevailing party's ability to pay for legal counsel.

CONCLUSION

For the foregoing reasons, 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.

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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 6,682.

/s/ Jehan A. Patterson
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CERTIFICATE OF SERVICE

I certify that on December 22, 2014, 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/ Jehan A. Patterson
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