

No. 09-55478

**IN THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

**A.M., A MINOR BY AND THROUGH HIS PARENTS DAVID MARSHALL
AND KARLA MARSHALL: ET AL.,
*Plaintiff-Appellants***

v.

**MONROVIA UNIFIED SCHOOL DISTRICT; ET AL.,
*Defendant-Appellees***

**On Appeal from the United States District Court
for the Central District of California
Case No. 2:07-cv-00243-RSWL-JTL
The Honorable Ronald S.W. Lew, Judge Presiding.**

**MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN
SUPPORT OF PLAINTIFF-APPELLANTS AND SEEKING REVERSAL
OF THE DISTRICT COURT'S AWARD OF ATTORNEYS' FEES UNDER
THE IDEA**

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Amicus Curiae, Council of Parent Attorneys and Advocates, Inc.

(“COPAA”), submits this motion for leave to file an amicus brief pursuant to Fed. R. App. P. 29.

INTEREST OF AMICUS

As Amicus, COPAA offers this Court insight on the issue of whether the death of a child during the pendency of litigation involving the Individuals with Disabilities Education Act (“IDEA”) renders a reimbursement claim brought by the child’s parents prior to the child’s death moot and frivolous sufficient to award attorneys’ fees under the IDEA. The death of Appellants’ child during the pendency of the litigation before the district court, which included a parental claim for reimbursement of education-related expenses under the IDEA, was the sole basis for the district court’s award of attorneys fees under the IDEA.

COPAA is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes the key to effective educational programs for children with disabilities lies in collaboration between parents and educators as equal parties. To this end, COPAA does not undertake individual representation for children with disabilities but provides training and resources for advocates and attorneys to help each child obtain the free appropriate public education guaranteed by the IDEA.

REASONS WHY FILING AN AMICUS BRIEF IS DESIRABLE

Amicus's brief is relevant and desirable, *see* Fed. R. App. P. 29(b)(2), because it presents arguments that the right to seek a claim for reimbursement is a clear protection provided to all parents under the IDEA and promotes the fundamental principle that a free and appropriate public education be provided at no cost to parents. Amicus will provide a distinct and relevant analysis that a parent's independent claim for reimbursement of education-related expenses under the IDEA may not be rendered moot solely because a child has died during the pendency of litigation involving the parent's right to recover those expenses, even if prospective educational relief for the child is no longer necessary because of the child's death. Amicus offers this brief to inform and advise the Court about the significant legal and policy implications the district court's attorney fee award has on all parents of children with disabilities. Because Amicus's brief "brings

relevant matter to the attention of the Court that has not already been brought to its attention by the parties,” Amicus’s motion should be granted. Fed. R. App. P. 29 Advisory Comm. Note; *Funbus Systems, Inc. v. Cal. Pub. Util. Comm’n*, 801 F.2d 1120, 1124-1125 (9th Cir. 1986). .

CONCLUSION

For these reasons, Amicus respectfully requests that the Court grant its motion to file the attached Amicus Curiae brief.

Dated: October 7, 2009

Respectfully submitted,

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9th Circuit Case Number(s)

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**CONCISE STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE,
THEIR INTEREST IN THE CASE AND THE SOURCE OF THEIR
AUTHORITY TO FILE**

The *Council of Parent Attorneys and Advocates, Inc.* (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes the key to effective educational programs for children with disabilities lies in collaboration between parents and educators as equal parties. To this end, COPAA does not undertake individual representation for children with disabilities, but provides training and resources for advocates and attorneys to help each child obtain the free appropriate public education guaranteed by the Individuals with Disabilities Education Act.

ARGUMENT

The unfortunate death of a child with a disability during the pendency of litigation involving the IDEA does not render moot a parent's claim under IDEA for reimbursement of education-related expenses. Parents are granted independent, enforceable rights under the IDEA, and are entitled to vindicate those rights if violated. The claim for reimbursement is retrospective, seeking the recovery of education-related expenses already incurred by parents as a result of a school district's failure to comply with the mandates of the IDEA. Reimbursement claims are independent of any claims seeking to address prospectively the substantive educational rights of a child. These claims, therefore, are unaffected by the death

of the child with a disability.

The district court erred in granting attorneys' fees to the school district under the IDEA solely on the basis that the death of the Marshalls' son rendered their claim for reimbursement under the IDEA moot.¹ Whether the Marshalls are able to establish a right to reimbursement is not the relevant question here, nor was it a factor in the district court's decision. Rather, the district court expressly predicated its award of attorneys' fees for the continued prosecution by the Marshalls of their reimbursement claim on the death of their son, and for no other reason:

The Court finds that this Matter became moot upon the death of minor Plaintiff, A.M., on January 22, 2008. Therefore, the Court finds that the litigation should not have continued after this time. Therefore, pursuant to 20 U.S.C. § 1415(i)(3)(B)(i)(II), the Court awards attorneys' fees to Defendant Monrovia Unified School District for fees accumulated after February 13, 2008, when Plaintiffs' counsel informed counsel for Defendant that the litigation would continue.

Court's Order Granting Defendant's Motion for Award of Reasonable Attorneys' Fees, March 20, 2009, pg. 2.

The sole issue is therefore whether *proceeding* with a claim for

¹ Although there are additional issues raised by the Marshalls, COPAA is only addressing, on behalf of its constituent parents of children with disabilities, the issue of whether the death of a child renders a reimbursement claim under the IDEA moot and therefore frivolous under the attorneys' fee provision in the IDEA. COPAA offers this amicus brief because the impact the district court's fee award has on parents of children with disabilities seeking reimbursement is significant, as it directly strips parents of a reimbursement right specifically granted to them under the IDEA.

reimbursement after the child's death is frivolous, and therefore justifies awarding of attorneys' fees under the IDEA. The district court's decision fails to recognize the independent and separate nature of the Marshalls' claim for reimbursement from any claim related to their son's substantive educational program, and links the validity of such a claim to an event – the death of the child – that is legally irrelevant. Upholding the district court's decision would obviate the clear right of parents under the IDEA to be reimbursed for expenses unnecessarily paid because of a school's failure to provide a student with the education guaranteed under the IDEA.

I. The Purpose and Policy Of The IDEA Mandate That The Marshalls' Independent Reimbursement Claim Survives The Death of Their Son.

The goals of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, (“IDEA”) include “ensur[ing] that all children with disabilities have available to them a free appropriate public education” and “ensur[ing] that the rights of children with disabilities and parents of such children are protected.” 20 U.S.C. §§ 1400(d)(1)(A)-(B); *see Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 529 (2007) (the IDEA “includes provisions conveying rights to parents as well as to children.”)² To meet these goals, the IDEA sets forth criteria governing

² COPAA was also an amicus party to the *Winkelman* case before the United States Supreme Court because the issue of enforcing the legal rights afforded to parents under the IDEA, which includes the issue of who can legally bring claims in court, is an issue of great significance to COPAA and its constituent parent members.

the sufficiency of an education provided to a child with a disability, as well as procedures and mechanisms to develop and review an education plan developed for a child with disabilities. *Id.* at 523 (citing relevant IDEA sections).

The IDEA is designed to fulfill “our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” *Winkelman*, 550 U.S. at 529, quoting 20 U.S.C. § 1400(c)(1). The United States Supreme Court has recognized that this policy is most readily espoused by parents, who, because of their “particular and personal interest in fulfilling [this] national policy,” have been entrusted with the right to seek redress when a child’s entitlement to a public education is abridged. *Id.*

Fundamental to the IDEA is the requirement that a free appropriate public education (“FAPE”) be provided “at no cost to parents.” 20 U.S.C. §1401(9); (29), *see Winkelman*, 550 U.S. at 532. When a parent incurs an out-of-pocket expense related to education or supportive services for their child as a result of a school district’s failure to provide a FAPE, the parent has the right to seek reimbursement of those expenses. 20 U.S.C. § 1412(a)(10)(C)(ii); *see Zorbest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13-14 (1993) (supportive services); *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 895 (9th Cir. 1995) (private special education); *Emery v. Roanoke City Sch. Bd.*, 432 F.3d 294, 299 (4th Cir. 2005) (private special education). The IDEA guarantees a specific means of cost

recovery if a FAPE is not provided by a school, including a parent's right to reimbursement for the cost of private school enrollment if the court or hearing officer finds that the agency had not made a FAPE available to the child. 20 U.S.C. § 1412(a)(10)(C)(ii); *see Sch. Comm. of the Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370-71 (1985).³

The IDEA grants parents the right to bring a civil suit to enforce the procedural and cost recovery rights specifically granted to them. *Winkelman*, 550 U.S. at 527 (parents may seek “to vindicate the rights accorded to them once the time comes to file a civil action.”)⁴ Nothing about the reimbursement claim, and whether or not the parents may pursue such a claim, is dependent upon whether a child is in school or even whether the child is alive. *See, e.g., Malone v. Nielson*, 474 F.3d 934, 937 (7th Cir. 2007) (right to reimbursement survives child’s death,

³ Reimbursement for education-related expenses awarded to parents under the IDEA in this Circuit have included costs of transportation and lodging near a non-residential school, *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1528 (9th Cir. 1994), and evaluation costs, *J.G. v. Douglas County Sch. Dist.*, 552 F.3d 786, 795 (9th Cir. 2008) (parents recovered costs pursuant to the IDEA’s equitable reimbursement provision, renumbered as 20 U.S.C. § 1415(i)(2)(C)(iii), for evaluating their child for eligibility for services under the IDEA).

⁴ The United States Supreme Court has also made it clear that parents are granted an “independent stake not only in the procedures and costs implicated by this process but also in the substantive decisions to be made” about a child’s education. *Winkelman*, 550 U.S. at 531. The unfortunate death of the Marshalls’ son rendered any prospective substantive decisions regarding his education unnecessary. However, his death has no impact on whether the school’s failure to comply with the mandates of the IDEA during his life entitles the Marshalls to reimbursement of education-related expenses.

and belongs to student's estate where student incurred reimbursable expenses related to psychological, counseling, and medical services). "Reimbursement merely requires the [district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Burlington*, 471 U.S. at 370-71.

A claim for reimbursement is retrospective, not prospective. Whether the parents would continue to incur such costs is irrelevant to whether they are entitled to recover costs already expended. Such a claim should not be rendered meritless solely because a child has died. The policies, goals, and very meaning of the IDEA – for both parents and children – is threatened by any interpretation that would let a school district "off the hook" for reimbursement of its past violations of the IDEA because a child dies or changes circumstances before litigation concludes.

Congress enacted a statutory scheme that provided specific protections to parents, which are essential to the overall goal of ensuring that all children with disabilities have available to them a FAPE. *See* 20 U.S.C. § 1400(d)(1)(A)-(B); *see also Winkelman*, 550 U.S. at 530. This right to a FAPE necessarily encompasses the right to be made whole when a school district fails to satisfy its obligation to provide a FAPE, whether through the provision of compensatory educational services or through the reimbursement of sums spent by an individual

that rightfully should have been incurred by a school district. *See Indep. Sch. Dist. No. 284, Wayzata Area Schs. v. A.C.*, 258 F.3d 769, 774-775 (8th Cir. 2001) (explaining that if a parent had paid the cost of private placement before leaving a school district and had then sued the District for reimbursement, the claim would not be moot), *citing Zobrest*, 509 U.S. at 4 n. 3.

Several circuits agree that a right to FAPE, once violated, supports a claim for reimbursement that cannot later be eviscerated by facts that have no retroactive legal significance. *See, e.g., Pihl v. Mass. Dep't of Educ.*, 9 F.3d 184, 189 (1st Cir. 1993) (not enforcing the right to reimbursement because a child ages out of special education services would allow school districts to “stop providing required services to older teenagers, relying on the Act’s time-consuming review process to protect them from further obligations”); *Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir. 1988) (an individual’s attainment of the age of 22 does not change the fact that such person was entitled to a FAPE at age 20 and must be compensated to the extent to which such services were denied to him), *vacated and remanded sub nom. Sobol v. Burr*, 492 U.S. 902 (1989), *aff’d on reconsideration* 888 F.2d 258 (1989). The Eleventh Circuit explained that retroactive reimbursement is necessary because “[w]ithout it, the child's right would depend upon his or her parent's ability to fund the education during the years of administrative proceedings and federal court litigation.” *Jefferson County Bd. of Educ. v. Breen*, 853 F.2d

853, 857-58 (11th Cir. 1988).

Relieving a school district of its IDEA obligations upon the untimely death of a child would run contrary to our national policy of ensuring access to appropriate public education for all. *See Burr v. Ambach*, 863 F.2d at 1078. Just as the termination of these rights under the IDEA upon the attainment of age 22 would create a perverse incentive to stop providing services to older teenagers, the termination of the right to reimbursement upon the death of a child would also create a perverse incentive to limit services to children with significant terminal illnesses. Such a result cannot have been intended by Congress.

II. Because the Marshalls' Reimbursement Claim is Not Moot, It Is Not Frivolous and the District Court Erred In Awarding Attorneys' Fees Solely on that Ground.

The district court improperly granted attorneys' fees under the IDEA solely because the Marshalls continued to prosecute their IDEA reimbursement claim following the death of their child. The district court essentially found that a valid claim for reimbursement becomes frivolous upon the death of the child.

The IDEA specifically provides that a prevailing-defendant educational agency may be awarded attorneys' fees only where the complaint was "frivolous, unreasonable, or without foundation," or where the parent "continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation." 20 U.S.C. § 1415(i)(3)(B)(i)(II). With respect to prevailing-defendant educational

agencies, Congress explicitly adopted the standard applicable to prevailing defendants in civil rights cases established in *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). See *Mr. L. v. Sloan*, 449 F.3d 405, 407 (2d Cir. 2006); *Hawkins v. Berkeley Unified Sch. Dist.*, 250 F.R.D. 459, 464 (N.D. Cal. 2008).

When analyzing requests for attorneys' fees at either the appellate or trial level, the action is considered frivolous when the arguments "are wholly without merit." *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981). "Without merit" means groundless or without foundation, rather than simply that the plaintiff will lose his case. *Christianburg*, 434 U.S. at 421-22; *Patton v. County of Kings*, 857 F.2d 1379, 1381 (9th Cir. 1988).⁵ The reimbursement claim here, which survived a motion to dismiss, has merit because it survives the death of the Marshalls' son.

To determine the applicable standard for judicial discretion to award attorneys' fees, the United States Supreme Court has considered the policies and goals of the relevant statute. See *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139-40 (2005); *Christianburg*, 434 U.S. at 419- 420. The policies and goals of the IDEA with respect to ensuring parents independent, enforceable rights, including

⁵ In *Christianburg*, the Supreme Court cautioned district courts to "resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christianburg*, 434 U.S. at 421-22.

the right of reimbursement, under the IDEA are only met by the preservation of a valid reimbursement claim following the death of their child. Courts should award defendants attorneys' fees only in exceptional circumstances. *Mitchell v. Office of the L.A. County Superintendent of Schs.*, 805 F.2d 844, 848 (9th Cir. 1986). The district court's fee award not only violates the clear mandates, goals and policies of the IDEA, but it also will have a "chilling effect upon civil rights plaintiffs [that] would be disproportionate to any protection defendants might receive." *Id.*

COPAA members and families of children with disabilities, know first-hand that many parents are at an economic disadvantage in pursuing special education cases, and the prospect of attorneys' fees makes the task of securing counsel especially daunting. Upholding the district court's award of attorneys' fees renders a reimbursement claim moot in contradiction to the plain language of the IDEA. It places certain parents, particularly those of children with life-threatening health issues, in the untenable position of not providing private education services to their child because of the risk that they would not be able to recover those expenses if their child dies while litigating an IDEA claim. It would only further encumber parents who already face an uphill battle in pursuing special education matters, finding qualified and affordable lawyers, and covering the costs associated with the process.

CONCLUSION

COPAA offers this brief to inform and advise the Court about the significant legal and policy implications of allowing the district court's erroneous award of attorneys' fees to stand. The extensive experience of both our family and attorney members supports the preservation of FAPE principles even in the face of the tragedy of a child's death. The reimbursement right remains exactly as it did before the tragedy – with the parents who expended their funds for education-related expenses only because the school district failed to provide a FAPE to their child with a disability.

COPAA urges this Court to overturn the district court's award of attorneys' fees as legally erroneous, and to hold that the parents' claim for reimbursement under the IDEA is not rendered moot by the death of the parents' child. In such circumstances, the parents' prosecution of such a claim is not frivolous – it is their right.

Dated: October 7, 2009

Respectfully submitted,

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Form 8. Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 09-55478

(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *and attached to the back of each copy of the brief*

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October 7, 2009

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