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By Email (Comments.Mailbox@njcourts.gov)
Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Attention: Retainer Fee Agreements in Fee-Shifting Cases
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Public Comment on Advisory Committee Report on *Balducci v. Cige*, 240 N.J. 574 (2020)

Dear Judge Grant:

The undersigned submit this correspondence in response to the November 19, 2021 Notice to the Bar requesting comments on the report including recommendations relating to retainer fee agreements in statutory fee-shifting cases (the Report).

We agree with the uncontroversial proposition, in Section 7 of the Report, that a lawyer in a retainer agreement may not prohibit the client from consenting to settle a case when the settlement waives the lawyer's fee award. However, we are concerned that Section 7 of the Report misstates the holding of *Pinto v. Spectrum Chemical and Laboratory Product,* 200 N.J. 580 (2010) and, as a result of that misstatement, will undermine the right to counsel for individuals with valid civil rights claims that will never result in large damages awards. In particular, we present the perspective of attorneys who regularly represent children with disabilities seeking access to appropriate educational programming under the Individuals with Disabilities Education Act (IDEA). In such cases, the end result is compensatory education for the child or provision of appropriate programming prospectively. *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 131 n.7 (3d Cir. 2017) (recognizing money damages not available under IDEA). There is no large damages award from which attorneys who have taken the case on a contingency basis can be compensated. Unlike attorneys who regularly handle personal injury matters resulting in large damages award, there is never a contingency fee that amounts to more than the reasonable hourly rate multiplied by the hours worked. There is only statutory fee-shifting available as a matter of civil rights law. For that reason, the discussion of *Pinto* is particularly relevant to our practice.

The Report incorrectly states that *Pinto* stands for the proposition that, in fee-shifting cases, demands for fee waivers as a condition of settlement "may be presented to plaintiffs by lawyers in private practice." Report at 7 (citing *Pinto*, 200 N.J. at 599-600). *Pinto* held that "a defendant's demand that a plaintiff's attorney waive her statutory fee as the price of a settlement is not only an unwarranted intrusion into the attorney-client relationship, but a thinly disguised ploy to put a plaintiff's attorney at war with her client." 200 N.J. at 599. *Pinto*, explicitly rejecting the reasoning of *Evans v. Jeff D.*, 475 U.S. 717 (1986) as it applies to New Jersey cases, went on to state that "the same logic may apply to private-practice counsel and her client but the case before us involves only a public-interest law firm." *Id.* at 599 n.8. This is a far cry from holding that fee waivers as a condition of settlement are appropriate when demanded of a client who has hired an attorney in private practice.

The Report then compounds this error by failing to recognize that the *clients*, not the attorneys, are the beneficiaries of fee-shifting statutes. The Report observes, "Private lawyers may protect themselves by including alternative fee arrangements in the retainer agreement that require the client to pay reasonable legal fees." Report at 8. However, fee-shifting statutes are not designed to protect attorneys. They are designed to protect the ability of civil rights plaintiffs without economic means to secure competent counsel. An agreement that clients will pay reasonable fees is no protection to the attorney at all if the client simply does not have the money to pay the fees. More importantly, however, allowing defendants to demand fee waivers in settlement in civil rights litigation where there is no possibility of a large money damages award eviscerates fee-shifting statutes designed to protect the *clients'* rights to quality legal representation.

Numerous civil rights statutes rely on private litigants to enforce compliance with the law and thereby vindicate the rights Congress or the state legislature has granted. Fee-shifting provisions are a key component of these statutes, assuring these private litigants' access to the court system, particularly those who are most disenfranchised by poverty and discrimination. The purpose of fee shifting is "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 94-1558, p. 1 (1976)). In his concurring opinion in *Hensley*, Justice Brennan observed: "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court." 461 U.S. at 445 (Brennan, J., concurring). And when a private citizen does not prosecute a valid civil rights claim, the "policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." *City of Riverside v.*

Rivera, 477 U.S. 561, 575 (1986) (quoting 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney)).

Entitlement to fees is particularly important in cases not seeking monetary damages because absent the promise of fees in those cases, there would be no organic market of private attorneys willing to work on a contingent basis as there would be in cases with potentially large monetary awards.. Further, the unavailability of money damages does not undercut the value of cases brought to enforce civil rights statutes. Damage awards "do not reflect fully the public benefit advanced by civil rights litigation" and for that reason, the amount of fees should "not be reduced because the rights involved may be nonpecuniary in nature." *Rivera*, 477 U.S. at 575 (citation omitted).

The fee-shifting provision of the IDEA is particularly important to enforce the rights of students with disabilities living in poverty who face significant barriers to accessing legal representation and are at higher risk of being left behind. It is well documented that low-income students are disproportionately identified for special education and, in turn, are more likely to be placed in segregated school settings that are not appropriate for their needs. See, e.g., Thomas Hehir, *et al.*, Students from Low- Income Families and Special Education, The Century Foundation, Jan. 17, 2019, at https://tcf.org/content/report/students-low-income-families-special-education/ (presenting research findings regarding outcomes for low income students in special education); see also Elisa Hyman *et al.*, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107, 112 (2011) (discussing the disproportionate levels of student poverty among the special education population). Because of IDEA's fee-shifting provision, families living in poverty have the opportunity to safeguard their children's rights under IDEA, not only with the help of the small cadre of public-interest law firms, but also through the much larger pool of highly qualified private practice attorneys who specialize in vindicating these important civil rights.

For the foregoing reasons, while we fully agree with the recommendation in Section 7, we request that the Court repudiate the Report's inaccurate characterization of the holding in *Pinto* and recognize that New Jersey does not allow defendants to demand fee waivers as a condition of settlement of cases when fee-shifting is available.

Respectfully submitted,

s/ Catherine Merino Reisman — *s/ Sarah E. Zuba*

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