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ATTORNEYS' FEES IN SPECIAL EDUCATION DISPUTES: 2006**Overview**

In recent years, the sources of remedy available to parents of children with educational disabilities have expanded. Depending on the facts and issues present in the controversy, parents can request various forms of relief. Of the many forms of remedy awarded by courts, reimbursement of tuition and costs, and requests for payment of attorneys' fees have become popular in special education cases.

Parents and their advocates know that taking a special education dispute through the administrative and/or litigation processes is not inexpensive. Petitioners (usually parents of children with disabilities) must be prepared to expend their time and personal funds. In a majority of special education disputes a major expenditure more often than not involves legal fees. As Weber, Mawdsley, and Redfield remind us, "[t]he presence of an attorney is important for parents, and the availability of fees is designed to make representation easier to obtain." Weber, Mawdsley, and Redfield (2005) The key question to ask, however, is who pays for the expertise and time of the attorney?

Attorneys' Fees Under IDEA

The Handicapped Children's Protection Act. The Education for Handicapped Children Act, 20 U.S.C. 1401, et seq., (1975), did not provide for awards of attorneys' fees. However, in 1986, the United States Congress passed the Handicapped Children's Protection Act (HCPA), 20 U.S.C. 1415 (e) (4), et seq., as an amendment to the Education for All Handicapped Children Act (EAHCA). The HCPA allows "prevailing parties" to petition the court for recovery of reasonable attorneys' fees. Following the enactment of the HCPA (1986), in cases where attorneys' fees were requested, courts had to apply the "prevailing parties" rule. Because courts struggled with this determination (prevailing party status), cases filed in the late 1980s and early 1990s produced mixed results. For example, while some courts awarded attorneys' fees to parents, *Fontenot v Board of Elementary and Secondary Education* (5th Cir. 1986), *Holms v District of Columbia* (D.D.C. 1988), and *Howley v Tippecanoe School Corp.* (N.D. Ind. 1990); other courts found parents not to be prevailing parties, *Brown v Griggsville Community Union* (C.D. Ill. 1993), and *S1 and S2 v North Carolina State Board* (4th Cir. 1994).

Subsequently, as decisions grew in number, courts developed and applied a four-pronged standard to use in establishing prevailing party status. A party does not have to prevail on all of the issues. However, to be awarded attorney fees, a party must show that (1) the relationship between the parties was altered, (2) the altered relationship resulted from the action taken, (3) some benefit was realized on at least one significant issue involved in the case, and (4) the result of the formal action taken (either in court or in the administrative process) is legally enforceable. *Buckhannon Board and Care Home v West Virginia Department of Health and Human Services* (2001) Additionally, the party requesting the award of fees carries the burden of establishing the “reasonableness” of the amount requested. In some states the amount awarded might be subject to a statutory cap.

IDEA 2004 prohibits the award of attorneys’ fees “for services performed subsequent to a written offer of settlement, under specified conditions.” IDEA Reauthorized 2005 Edition (LexisNexis, 2005) A voluntary settlement does not satisfy the standard. IDEA 2004 also provides for “a reduction of award of attorneys’ fees under certain circumstances, including where the parent or parent’s attorney unreasonably protracted the final resolution of the controversy.” IDEA Reauthorized 2005 Edition (LexisNexis, 2005)

Prevailing Parties and the Administrative Process. As special education law moved into the late 1990s and early 2000s, the prevailing party status expanded from courts of law to the administrative process. *Pazik v Gateway Regional School District* (D. Mass. 2001) Thus, recovery of attorneys’ fees became possible for parties (either parents or school officials) who prevail in the administrative process. *Vacca and Bosher* (2003) As Professor Mark Weber recently summarized, the IDEA 2004 “permits school districts and states that prevail at due process to recover attorneys’ fees against parents or their attorneys, not just for court activities but also for the due process hearing itself.” Weber (2006) In his opinion, this change merely brings to actions that go to due process the liability for fees for frivolous litigation that had previously existed for actions filed in court....” Weber (2006) However, he then clarifies that “[a]lthough school districts or other defending parties may be entitled to fees when parents file a case in court that is frivolous,... there is no provision for a fees award for a parent’s frivolous due process hearing request.” Weber (2006)

Non-Attorney Fees Awards

Because IDEA authorizes a court to award costs, requests for fees have expanded in scope. For example, in *Lopez v District of Columbia Public Schools* (D.D.C. 2005), parents asked the court to include clerical fees in the reimbursement award. Other courts have been asked to award reimbursement for expert witness fees. In 2005, however, the following question emerged in special education case out of New York State: Is it possible for a prevailing party to request and receive court awarded reimbursement of fees for services rendered by an expert (non-attorney) educational consultant. In this case the expert acted as a consultant and did not testify as an expert witness in court.

As of this writing, the generally accepted rule involving non-attorney consultants is clear. “Statutory provisions for attorneys’ fees do not extend to special education lay advocates who are not lawyers. To permit such fees would...allow a plethora of unlicensed legal practitioners to have access to public resources, which would not be in the public’s best interests.” *Alexander and Alexander* (2005)

Change May Be Coming: The Arlington Central Case? This past April 2006 the United States Supreme Court heard oral arguments in a decision out of the Second Circuit in which parents of a student covered by IDEA, who went into a federal district court seeking tuition reimbursement for their child’s education in a private school, also requested reimbursement for fees paid to a non-attorney expert/educational consultant. The non-

attorney expert had helped them throughout their lawsuit against a local school system. The United States Court of Appeals for the Second Circuit affirmed a federal district court decision (2003 U.S. Dist. LEXIS 12764 [D.D.N.Y. 2003]) in the parents' favor. *Arlington Central School District v Murphy* (2nd Cir. 2005) The United States Supreme Court granted certiorari (at 126 S.Ct. 978), and oral arguments were heard last month (April 19, 2006). The narrow question in the *Arlington Central* is whether a prevailing party under IDEA may recover fees paid to an educational consultant?

The *Arlington Central* case is intriguing for the following reasons: (1) the parents acted pro se in court (i.e., for themselves and without the assistance of a trained lawyer), (2) they depended on the advice of a non-attorney during the entire course of the administrative and legal processes, (3) the Second Circuit in its opinion stated that a party has "the right to be accompanied by counsel and by individuals with special knowledge or training with regard to problems of children with disabilities," (at 12764, note 13), and (4) the court showed a willingness to reimburse the lay consultant using a rationale usually reserved for determining attorneys' fees.

As reported in *NSBA Legal Clips* (2/23/06), the American Association of School Administrators, the New York State School Boards Association, and New York State Council of School Superintendents joined the National School Boards Association in an amicus brief arguing against the payment of such fees. In essence, they question the ramifications and implications of the high court's decision in this case. The traditional rule (and one that consistently has prevented fee-shifting in IDEA cases) could change. Suffice it to say, the *Arlington Central* case is an important one for local public school officials to track.

Policy Implications

Because IDEA is silent on reimbursement of expert fees, we wait for a July decision in the *Arlington Central* case. The amount requested in this case (@ \$200 per hour) totaled approximately \$30,000. In my opinion, if the high court affirms the Second Circuit a floodgate could open. While I recognize the critical need for parents to have help, assistance, and advice in taking their child's case into a court of law, and I applaud the efforts of the many well prepared lay advocates and special education consultants, I take a narrow view of what the IDEA 2004 specifically permits; namely, reimbursement of attorneys' fees for prevailing parties. In my professional opinion, the broad nature of the Second Circuit's language legally sanctions the possible reimbursement of a new category of individuals (persons who possess "special knowledge or training" in special education), and opens a window of financial opportunity to a wide variety of lay consultants.

In my view, the policy implications of the *Arlington Central* decision are clear. A proactive approach must be taken to prevent circumstances that give rise to special education disputes. A first step to take is to make sure that school system policies:

- Demonstrate a commitment to provide for the best interests of all children in the school system; especially students with educational disabilities.
- Emphasize a commitment to work cooperatively with all parents and guardians; especially those who represent the interests of students with educational disabilities.
- Demonstrate a commitment to reach early resolution (i.e., formal settlement) of special education disputes.
- Emphasize a desire to seek early resolution of disputes through non-adversarial, non-litigious, alternative means such as mediation.
- Demonstrate a respect for and compliance with special education statutes and regulations (federal and state).

Resources Cited

Alexander, Kern and Alexander, M. David, AMERICAN PUBLIC SCHOOL LAW, Sixth Edition (Thompson-West 2005)

Arlington Central School District, 402 F.3d 332 (2nd Cir. 2005), cert. granted, 126 S.Ct. 928 (2005)

Brown v Griggsville Community Union, 817 F.Supp.734 (C.D. Ill.1993)

Buckhannon Board and Care Home v West Virginia Department of Health and Human Services, 532 U.S. 598 (2001)

Education for All Handicapped Children Act, 20 U.S.C. 1401, et seq. (1975)

Fontenot v Board of Elementary and Secondary Education, 805 F.2d 1222 (5th Cir. 1986)

Handicapped Children's Protection Act, 20 U.S.C. 1415 (e)(4), et seq. (1986)

Holms v District of Columbia, 680 F.Supp.40 (D.D.C. 1988)

Howley v Tippecanoe School Corp., 734 F.Supp. 1485 (N.D. Ind. 1990)

IDEA REAUTHORIZATION 2004: 2005: Amendments of IDEA 2004 (LexisNexis 2005)

Lopez v District of Columbia Public Schools, 383 F.Supp2d 18 (D.D.C. 2005)

NASB LEGAL CLIPS, Special Education and Disabilities (March 30, 2006)
Pazik v Gateway Regional School District, 130 F.Supp.2d 217 (D.Mass. 2001)

S1 and S2 v North Carolina State Board, 21 F.3d 49 (4th Cir. 1994)

Vacca, Richard S. and Bosher, William C., Jr., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS., Sixth Edition (LexisNexis 2003)

Weber, Mark C., Reflections on the New Individuals with Disabilities Education Improvement Act, 58 Florida Law Review 8 (January 2006)

Weber, Mark C., Mawdsley, Ralph, and Redfield, Sarah, SPECIAL EDUCATION LAW: CASES AND MATERIALS (LexisNexis 2004)

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Note: The views expressed in this commentary are those of the author.