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Are Courts Authorized by the Individuals with Disabilities Act to Award Expert Fees to Prevailing Parents?

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Case at a Glance

After the parents of a disabled child prevailed in a due process administrative hearing over the educational placement of their child, a federal court ordered the school district to reimburse them for the cost of their non-attorney educational consultant. The school district challenges this award, arguing that the parents are not entitled to reimbursement for the costs of non-attorney advocates.

SPECIAL EDUCATION

Are Courts Authorized by the Individuals with Disabilities Act to Award Expert Fees to Prevailing Parents?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 382–385

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ISSUE

The Supreme Court in this case is asked to determine whether the fee-shifting provision of the Individuals with Disabilities Education Act, which provides that the court may "award reasonable attorneys' fees as part of the costs" to a prevailing party, authorizes an award of expert fees for the services of a "non-attorney representative" during administrative hearings.

FACTS

In 1994, Joseph was identified as a child with a disability and a student who required special education under the Individuals with Disabilities Education Act (IDEA). Joseph completed the 1997–1998 school year in the Arlington High School, in Lagrangeville, New York. An individualized education program (IEP) was prepared for the 1998–1999 school year that continued to place Joseph at the Arlington High School. Joseph's parents, Pearl and Theodore Murphy, rejected the IEP and requested a due process hearing. According to the "stay-put" provision under IDEA, Joseph should have remained in his then-current educational placement, Arlington High School, pending the hearings requested by the parents. Because they were unwilling to allow their son to remain in what they felt was an inappropriate educational placement, the parents unilaterally withdrew Joseph from Arlington High School and enrolled him at Kildonan, a private school. Joseph attended Kildonan for the 1998–1999 school year at his parents' expense.

During the 1998–1999 school year, the parents continued to pursue their administrative remedies. In July 1999, the impartial hearing officer ruled that the proposed IEP was inadequate to meet Joseph's special needs. He found that Kildonan was an appropriate placement and that the parents were entitled to reimbursement for Joseph's tuition and the costs of a private speech pathologist.

The Arlington Central School District Board of Education (the District) sought administrative

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review of the hearing officer's decision. In August 1999, while the District's appeal was pending, the parents filed an action in the U.S. District Court for the Northern District of New York seeking a temporary restraining order requiring the District to pay Joseph's tuition at Kildonan during the pendency of the District's appeal. The case was then transferred to the U.S. District Court for the Southern District of New York.

Before the administrative review of the hearing officer's decision was concluded, a meeting was convened in September 1999 to discuss Joseph's placement for the 1999–2000 term. An IEP was proposed placing Joseph back at Arlington High School. Joseph's parents did not accept this IEP and continued to enroll Joseph at Kildonan at their expense.

In December 1999, the state review officer ruled on the District's appeal. The review officer found that the District had not met its burden to demonstrate that the IEP proposed for the 1998–1999 school year was properly tailored to meet Joseph's needs and that the services provided by Kildonan were appropriate. The review officer upheld the hearing officer's award of tuition to the parents but reversed the award of reimbursement for the services of the speech pathologist.

As a result of the review officer's decision, the District reimbursed the parents for Joseph's tuition for the 1998–1999 school year. In January 2000, the parents requested a due process hearing seeking tuition reimbursement for the 1999–2000 school year, and challenging the appropriateness of the recommended public school program and placement for Joseph for the 1999–2000 term. Contending that Kildonan was Joseph's current educational placement and that Joseph should remain there during the pendency of these proceedings, the parents argued that the District had an ongoing financial responsibility to fund Joseph's tuition at Kildonan until Joseph's placement was changed by agreement, a final administrative decision, or a court decision. The District asserted that Joseph's current educational placement was the Arlington High School, claiming the review officer's decision was limited to the 1998–1999 school year.

Rejecting the District's argument, the district court held that Joseph's "current educational placement" was Kildonan, once the review officer's decision was issued in favor of private school placement for that year. The court ordered the District to continue to fund the tuition as long as Kildonan remained the current educational placement. *Murphy v. Arlington Central School District Board of Education,* 86 F. Supp. 2d 354 (S.D.N.Y. 2000).

The District appealed the district court's decision to the Second Circuit, which affirmed the district court's decision. *Murphy v. Arlington Central School District Board of Education,* 297 F. 3d 195 (2d Cir. 2002).

The parents wrote several letters requesting the district court to order the school district to pay the fees and costs incurred by the parents during the course of the due process hearing. Included among the parents' expenses were $29,350 in fees for the services of their "non-attorney representative." At the hearing, the expert performed many of the functions traditionally attributed to licensed attorneys, including making an opening statement, conducting direct and cross-examination of witnesses, making motions and objections, and preparing a post-hearing memorandum of law.

The district court granted the parents' request in part. *Murphy v. Arlington Central School District Board of Education,* 2003 WL 21694398 (S.D.N.Y. July 22, 2003). The district court reasoned that at impartial due process hearings, a party has the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities and that the IDEA permits a district court, in its discretion, to award a prevailing party reasonable attorneys' fees. The district court concluded that unlicensed individuals such as the parent's representative cannot collect "attorneys' fees" for doing work similar to that of an attorney but instead can collect for related work as "expert consulting services." Determining that the parents' representative was an "expert," the district court reduced the requested fee and awarded the parents $8,650 for their representative's services.

The District appealed the district court's fee determination. The Second Circuit affirmed the district court, finding that the IDEA's reference to "attorneys' fees" was intended to include reasonable expenses and fees of expert witnesses. *Murphy v. Arlington Central School District Board of Education,* 402 F. 3d (332 (2d Cir. 2005). The court concluded the parents were entitled to recover the costs of their non-attorney educational consultant. The Second Circuit found a statement in the House Conference Committee Report on IDEA's predecessor, the Handicapped Children's Protection Act of 1986, that the "conferees intended that the term 'attorneys' fees as part of the costs'

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include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the ... case." It concluded that this demonstrated that Congress intended that expert fees be compensable under the IDEA. The court reasoned that that awarding expert fees was consistent with IDEA's purpose of ensuring that all children with disabilities obtain a free appropriate public education.

The District then sought review of the Second Circuit's decision by the U.S. Supreme Court. The Supreme Court granted the petition for a writ of certiorari. 126 S.Ct. 978 (2006).

Case Analysis

The IDEA (20 U.S.C. § 1400 et seq.) seeks to ensure that all disabled children have available to them a free appropriate public education. (The IDEA was amended by the Individuals with Disabilities Education Improvement Act of 2004 effective July 1, 2005—after the events in this case occurred.) Under the IDEA, school districts must create an IEP for each disabled child. If parents believe their child's IEP is inappropriate, they may request an impartial due process hearing. A party dissatisfied at the conclusion of an impartial due process hearing may seek further administrative review of the dispute by the state educational agency. If still dissatisfied, a party may pursue a civil action in either state or federal court. A court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party. 20 U.S.C. § 1415(i)(3)(B).

The District argues that the IDEA does not authorize prevailing parents to recover from public school districts the costs of experts whom parents have paid to participate in litigation over special education placement. Contending that the statutory language must be constructed strictly because the IDEA was enacted under Congress's spending power, the District reasons that the IDEA provides only for the shifting of "reasonable attorneys' fees as part of the costs."

According to the District, the Second Circuit erred by looking at legislative intent in the absence of any ambiguity to determine the meaning of a statute and again by concluding that Congress intended to authorize reimbursement of expert fees in IDEA actions based on a single sentence in the 1986 House Conference Report. The District stresses that the language of the conference report cannot trump the plain language of the statute, which is silent with respect to expert fees. Disagreeing, the parents assert that Congress, in the IDEA's legislative history, left no doubt that it intended expert fees to be included within the term *costs* under the IDEA.

The parents claim that the U.S. Supreme Court in *West Virginia University Hospital, Inc. v. Casey,* 499 U.S. 83 (1991), looked to the IDEA's legislative history to differentiate the IDEA from 42 U.S.C. § 1988, in which there was no indication that Congress intended the word *costs* to include expert witness fees.

It is the District's position that the IDEA's promise of a free appropriate public education is not dependent on parents' ability to recover expert fees. The District points out that the IDEA ensures parents' access to an expert who can evaluate all the materials a school must make available and who give an independent opinion at the school's expense. The District says that a holding that the IDEA authorizes the award of expert fees would violate Congress's intent to focus resources on teaching and learning while reducing litigation-related costs.

Stressing the importance of experts in IDEA cases, the parents assert that expert testimony is often critical in IDEA cases, which are fact-intensive inquiries about the child's disability and the effectiveness of the measures school boards have offered to secure a free appropriate public education. According to the parents, the availability of expert fees would be in keeping with the IDEA's remedial purpose.

Significance

In *West Virginia University Hospital, Inc. v. Casey,* 499 U.S. 83 (1991), the Supreme Court held that nearly identical language in the then-current version of the Civil Rights Attorneys' Fees Awards Act (42 U.S.C. § 1988) did not authorize an award of expert fees because "there was no 'explicit statutory authority' indicating that Congress intended for that sort of fee-shifting." The Second Circuit concluded that the Supreme Court's reference to the IDEA's legislative history in a footnote required it to distinguish IDEA from Section 1988 as construed by *Casey*. The Second Circuit found it instructive that after *Casey*, Congress amended Section 1988 to allow recovery of expert fees in civil rights actions, but took no similar action with respect to the IDEA. The Second Circuit believed it reasonable to infer that Congress, on the basis of the Supreme Court's decision in *Casey,* saw no need to amend the IDEA because the Court had recognized that in enacting the IDEA, Congress had sufficiently indicated in the committee report that prevailing parties could recover expert fees under IDEA.

Relying on *Casey*, the Seventh, Eighth, and D.C. Circuits have held that the IDEA does not authorize an award of expert fees to prevailing parties. *LaGrange School District No. 102,* 349 F.3d 469 (7th Cir. 2003); *Neosho R-V School District v. Clark,* 315 F.3d 1022 (8th Cir. 2003); *Goldring v. District of Columbia,* 416 F.3d 70, rehearing en banc denied (D.C. Cir. 2005). In addition to the Second Circuit, the Third Circuit has suggested that expert fees are recoverable under the IDEA's fee-shifting provision. *Arons v. New Jersey State Board of Education,* 842 F.2d 58 (3d Cir.), cert. denied, 488 U.S. 942 (1988). See also *Pazik v. Gateway Regional School District,* 130 F. Supp. 2d 217 (D.Mass. 2001); *Brillon v. Klein Independent School District,* 274 F. Supp. 2d 864 (S.D.Tex. 2003), reversed in part on other grounds, 100 F3d. Appx. 309 (5th Cir. 2005); *Verginia McC. v. Corrigan-Camden Independent School District,* 909 F. Supp. 1023 (E.D.Tex. 1995); *Gross v. Perrysburg Exempted Village School District,* 306 F. Supp. 2d 726 (N.D.Ohio 2004).

A decision by the Supreme Court should resolve the split among the circuits. A ruling in favor of the parents may ease the financial burden incurred in using educational consultants to challenge special education placements, but it would increase the special education costs of public school districts by diverting funds to experts rather than educational programs. Such a ruling could also engender additional litigation to resolve fee disputes. A ruling in favor of the District would increase the financial burden of parents who use educational consultants in challenging school placement decisions, but it would reduce the litigation costs of public schools.

This case may also provide an opportunity to observe the approaches of the justices with respect to the use of legislative history as a tool of statutory interpretation. Some justices, including Justice Scalia, have expressed skepticism over the use of legislative history. See Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997).

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