

Special Education Attorney’s Fees: of *Buckhannon*, the IDEA Reauthorization Bills, and the IDEA as Civil Rights Statute

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Introduction

In the 1980s, Congress amended the Individuals with Disabilities Education Act (IDEA), the federal special education statute, in order to overturn a Supreme Court decision. In its amendment, Congress provided that parents who “prevailed” in IDEA “actions or proceedings” against schools could, like other successful civil rights plaintiffs, recover their reasonable attorney’s fees and related costs. Almost twenty years later, courts are examining the impact of a new Supreme Court case, *Buckhannon Board and Care Home, Incorporated v. West Virginia Department of Health Resources* (hereinafter *Buckhannon*) on the IDEA.¹ *Buckhannon* limits the scope of the term “prevailing” under certain other civil rights statutes.² At the same time, an IDEA fee cap is proposed as part of the pending Congressional reauthorization of the IDEA. Each of these developments has the potential to significantly alter the IDEA’s attorneys’ fees terrain, and in turn, the dynamics of special education dispute resolution. Each issue will be resolved by a different branch

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¹ 532 U.S. 598 (2001).

² *Id.*

of the federal government, but both resolutions will depend in large part on whether the IDEA is treated the same as, or differently from, other civil rights statutes.

Part I of this Article provides an overview of some of the federal education and civil rights laws regulating schools. Part II briefly surveys the IDEA and its history concerning attorney's fees. Part III provides an overview of the current IDEA fee-shifting provisions and court interpretations of them. Part IV summarizes relevant findings of some empirical research concerning IDEA disputes and the impact of fee availability on these disputes. Part V examines the *Buckhannon* decision, addressing unsettled questions concerning its applicability to the IDEA, its scope, and its likely impact on IDEA disputes. Part VI explores the fee capping provision of the IDEA reauthorization bill recently passed by the House, and its likely impact on IDEA disputes.

The Article concludes that the two new developments present a conundrum. With regard to *Buckhannon*'s impact on the scope of "prevailing" under the IDEA, courts have begun to address whether the IDEA should be considered in essence a civil rights statute. If so, *Buckhannon* would limit fee eligibility for parents. On the other hand, if Congress finally adopts the fee cap proposal, the IDEA fee-shifting provisions will work differently than those under other civil rights statutes (but yet again in a way that limits fees for parents). Two different branches of the federal government are thus being asked to decide whether to treat the IDEA consistently with other civil rights statutes. The two "sides" to IDEA disputes, schools and parents, each want the IDEA treated as other civil rights statutes in one, but not the other, situation (schools, with regard to *Buckhannon*, and parents with regard to the proposed fees). Moreover, there is every possibility that one branch of government will treat the IDEA like other civil rights laws, while the other branch will consider it to be different from those same statutes.

I. Federal Education and Civil Rights Statutes Regulating Schools

The Supreme Court has held that education is not a fundamental right under the federal Constitution,³ but tells us “education is perhaps the most important function of state and local governments.”⁴ Education is primarily funded and governed at the state and local level, but Congress has enacted (and in some cases modestly funded) several statutes regulating public schools and their students.

A. Spending Clause-based Education Regulation

Using its Spending Clause power, Congress has enacted education legislation such as the Family Education Rights and Privacy Act (FERPA),⁵ the Protection of Pupil Rights Act (PPRA)⁶ and most recently the No Child Left Behind Act (NCLB).⁷ These statutes purport, in quite detailed language, to provide students and their parents with certain positive individual rights. For example, FERPA protects the accessibility and confidentiality of school records, opting out of certain surveys, medical examinations and other activities by PPRA, and receiving tutoring and other supplemental services and/or to transfer to another school if a student's school is failing under the NCLB.

These federal education statutes provide parents with, at most, limited and informal enforcement avenues for these “rights,” and certainly do not offer a remedy of attorneys' fees reimbursement. In fact, none of these three laws explicitly

³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973).

⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

⁵ 20 U.S.C. § 1232(g) (2000 & Supp. 2001) (regulating student records as condition on receipt of federal education funds generally).

⁶ *Id.* § 1232(h) (providing parents with some access and veto rights, and also condition on receipt of federal education funds generally).

⁷ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (imposing extensive conditions on receipt of federal Elementary and Secondary Education Act funds). The NCLB is the second reauthorization of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. § 6301 (Supp. 2001)).

provides a private cause of action. The Supreme Court recently held that there was no enforcement of FERPA under 42 U.S.C. § 1983,⁸ a decision which likely also forecloses section 1983 enforcement of the PPRA. FERPA and PPRA enforcement is limited to an informal complaint process with an office of the Department of Education, which does not involve a hearing, and in which the Department lacks authority to do anything but seek voluntary compliance by an offending school.⁹ NCLB does not even contain this sort of informal administrative complaint process.

B. Commerce Clause and Fourteenth Amendment-based Civil Rights Statutes which Govern Schools

Congress has also used its Commerce Clause and Fourteenth Amendment enforcement powers to write general civil rights employment discrimination laws (which also apply to schools) such as Title VII of the 1964 Civil Rights Act (race, color, national origin, gender and religion),¹⁰ the Americans with Disabilities Act (disability; also applies to students),¹¹ and the Age Discrimination in Employment Act (protecting employees over age forty).¹² Similarly, school-focused Spending Clause civil rights discrimination statutes, notably section 504 of the Rehabilitation Act of 1973 (disability),¹³ Title VI of the Civil Rights Act of 1964 (race)¹⁴ and Title IX of the Education Amendments of 1972 (gender),¹⁵ are conditioned upon the receipt of federal education funds and apply to both students and employees. Under all of these statutes, private lawsuits are available and reimbursement of attorneys' fees is a remedy for prevailing

⁸ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 319 (2002) (holding that section 1983 claims are not available for violations of confidentiality provisions of FERPA, federal student records statute, and noting that no private cause of action is available under FERPA).

⁹ 34 C.F.R. §§ 99.62-66 (2003).

¹⁰ 42 U.S.C. § 2000e-5 (2000).

¹¹ *Id.* §§ 12101-213.

¹² 29 U.S.C. §§ 621-34 (2000).

¹³ *Id.* § 794.

¹⁴ *E.g.*, 42 U.S.C. §§ 2000d - d7 (2000 & Supp. 2001).

¹⁵ *E.g.*, 20 U.S.C. § 1681 (2000).

plaintiffs.¹⁶ Except for reasonable accommodation and similar obligations for disability and employee religious practices, this group of laws does not generally provide individual positive rights. Instead they prohibit certain forms of discrimination, in most cases in much more general language than is so under the student “rights” statutes. None of these laws apply only to students, and none allocate any specific federal funds to insure compliance.

C. *The IDEA: An Uneasy Hybrid*

The IDEA was enacted by Congress in 1975 and took effect with the 1978-79 school year.¹⁷ Part B is extremely detailed and covers students beginning at age 3 until they graduate from high school or reach the age of 21.¹⁸ Eligible students must have one or more of a list of disabilities and need special education instruction.¹⁹ Covered students are entitled to a free appropriate public education (FAPE)²⁰ in the least restrictive environment (LRE), which is determined by a team that includes their parents and is memorialized in an individual education plan (IEP).²¹ The IDEA sets up an elaborate system of procedural safeguards and parent participation.²² Parents who disagree with any aspect of their child's special education program can file for a due process hearing,²³ a formal evidentiary proceeding conducted by a state hearing officer. Appeal to state or federal court is available.²⁴ Absent unusual circumstances, parents must

¹⁶ See 42 U.S.C. § 2000e-5(k) (Title VII); *id.* § 12117d (ADA employees; referring to Title VII); *id.* § 12133 (ADA students; referring to section 504); 29 U.S.C. § 626(b) (ADEA, referring to FLSA); 20 U.S.C. § 794a (section 504); 42 U.S.C. § 1988 (Title VI and Title IX).

¹⁷ Individuals with Disabilities Education Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, *amended by* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 1, 111 Stat. 37.

¹⁸ 20 U.S.C. § 1401(a)(3) (2000 & Supp. 2001).

¹⁹ *Id.*

²⁰ *Id.* § 1401(a)(8).

²¹ *Id.* § 1412(a)(5).

²² See generally *id.* § 1415.

²³ *Id.* § 1415(f).

²⁴ *Id.* § 1415(g).

proceed through the administrative hearing before going to court.

The IDEA has never fallen comfortably under either of Congress' two approaches to education legislation. Like other student-specific laws, it is modestly funded Spending Clause legislation purporting to provide positive, individual education-related rights to students. However, it goes beyond the education regulation statutes in terms both of the rights-based language it uses and the elaborateness of the enforcement mechanisms it establishes. The IDEA is also essentially different from the general civil rights laws which confer negative rights (limiting government from certain forms of discrimination). The IDEA is sometimes called the "last federal entitlement"²⁵ since it provides positive and enforceable rights (e.g. to a free appropriate public education). However, the IDEA has a basis in (disability) discrimination as do those general civil rights laws. Moreover, achieving equality on the basis of (dis)ability is qualitatively different than is equality on most other bases. Equality of opportunity on the basis of race or gender, for example, does not cost money. In contrast, equality of opportunity on the basis of (dis)ability requires schools to take sometimes costly affirmative steps (for example providing specialized instruction). Hence, general civil rights disability discrimination laws do impose reasonable accommodation and similar obligations.

The IDEA's attorney's fees provision is a statutory feature that renders it like the general civil rights statutes, but the specific fee language is different in some respects from that in other civil rights discrimination laws. As the Supreme Court has recently narrowed its interpretation of fee eligibility under other civil rights laws, courts must now decide whether the new, narrower interpretation applies to the IDEA. At the same time, Congress is considering adding a fee cap to the

²⁵ See, e.g., Margaret Tebo, *Seeking the Right Equation: Educators and Parents Seek Legal Answers on How to Balance Students' Special Needs with Broader School Goals*, 88 A.B.A.J. 48, 50 (2002) (quoting Bruce Boyer of Loyola University Law School in Chicago).

IDEA, which would separate it from other fee shifting laws, which are uncapped. Making these decisions requires reflection on the nature of the IDEA as a civil rights statute, and the ultimate decisions will likely move the IDEA further in the direction of the student “rights” education regulation statutes on the one hand, or toward general civil rights laws on the other.

II. History of Fee-shifting Under the IDEA

As regards attorney’s fees generally, the so-called “American Rule” provides that parties to civil litigation pay their own attorney’s fees, win or lose.²⁶ Under narrow exceptions, for example when a court finds litigation to be frivolous, the court may make an award of attorney’s fees.²⁷ Certain civil rights statutes comprise an exception to the American Rule, providing that prevailing plaintiffs may recover their reasonable attorney’s fees from the defendant(s). Schools defend claims under a number of these “fee-shifting” civil rights statutes, such as Title VII,²⁸ section 504,²⁹ the ADA,³⁰ the ADEA,³¹ Title VI, Title IX, and section 1983.³²

The IDEA as originally enacted in 1975 did not include fee-shifting language. In 1984, the Supreme Court held that the IDEA was not a fee shifting statute.³³ In response to that decision, Congress amended part B of the IDEA in 1986 with the Handicapped Children’s Protection Act (HCPA) to add fee-shifting language. In pertinent part, that amendment reads: “In any action or proceeding brought under this section, the court, in its discretion, may award

²⁶ *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 247 (1975).

²⁷ *Id.* at 258-59 (citations omitted).

²⁸ 42 U.S.C. § 2000e-5 (2000).

²⁹ 29 U.S.C. § 794 (2000).

³⁰ 42 U.S.C. §§ 12101-213.

³¹ 29 U.S.C. §§ 621-34.

³² 42 U.S.C. §§ 1983, 1988.

³³ *Smith v. Robinson*, 468 U.S. 992, 1021 (1984) (holding IDEA’s remedy to be exclusive, whereas claims could not be brought under other statutes such as section 504 or section 1983).

reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party."³⁴

The IDEA's fee language is modeled on that contained in other civil rights statutes,³⁵ and is generally interpreted in keeping with those other laws. However, the IDEA fee language has some unique provisions discussed in detail below in Part III.

Congress made the fee-shifting language retroactive to 1984, specifically to the date of the *Tatro* decision,³⁶ in order that the plaintiffs in that case might recover their attorney's fees, which were several hundred thousand dollars.³⁷ The IDEA attorney's fees provision³⁸ was added for several reasons. First, Congress wanted the IDEA to be consistent with other civil rights statutes. Second, Congress wanted parents of students with disabilities to have access to attorneys without regard to income. Third, Congress thought that parents of disabled students performed an important service to the public by acting as private attorneys general and bringing IDEA claims to enforce the statute.³⁹

³⁴ Pub. L. No. 99-372. Part C of the IDEA, which provides birth to three services, does not contain fee shifting language, although state law may provide for eligibility for fees for these claims. *Bucks County Dep't of Mental Health v. De Mora*, 2002 WL 31750199 at *1 (E.D. Pa. Dec. 6, 2002).

³⁵ See, e.g., S. REP. NO. 99-112 at 12-14, reprinted in 1986 U.S.C.C.A.N. 1798, 1803-04; 131 CONG. REC. H9964-02 (Nov. 12, 1985) (Representatives Bartlett and Williams); 131 CONG. REC. S10396 (July 30, 1985) (Senator Simon).

³⁶ *Tatro v. Irving Indep. Sch. Dist.*, 468 U.S. 883, 891-92 (1984) (holding that IDEA related services requirements obligate school to perform catheterization services on Amber Tatro, student with spina bifida).

³⁷ S. REP. NO. 99-112, at 17.

³⁸ The HCPA attorney's fees language was originally codified at 20 U.S.C. § 1415(e)(4) and is now found at 20 U.S.C. § 1415(i)(3).

³⁹ See generally S. REP. NO. 99-112. Due process hearings can also identify "service gaps" for school districts. See Kevin Lanigan *et al.*, *Nasty, Brutish . . . and Often Not Very Short: The Attorney Perspective on Due Process*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY (Chester Finn *et al.*, eds., 2001) at 225, available at http://www.edexcellence.net/library/special_ed/ (last visited Jan. 16, 2004).

In the 1997 IDEA overhaul and reauthorization, Congress limited eligibility for IDEA attorney's fees in two respects. First, fees are not available for attorney presence at team meetings to develop a student's Individual Education Plan (IEP), nor are they available for mediations prior to a due process complaint being filed.⁴⁰ Second, fees are not available when the parent-attorney has not provided the school with the information required in the due process complaint.⁴¹ A proposal to limit fees more generally (by requiring courts "to take into consideration what impact that award will have on all of the students in the district or in the particular classrooms") was defeated.⁴²

III. Overview of Attorney's Fees Reimbursement Under the IDEA⁴³

⁴⁰ 20 U.S.C. § 1415(i)(3)(D) (2003).

⁴¹ *Id.* § 1415(i)(3)(F).

⁴² 143 CONG. REC. S4401 (May 14, 1997) (amendment proposed by Sen. Smith).

⁴³ The text of the current IDEA attorney's fees statutory language is as follows:

JURISDICTION OF DISTRICT COURTS; ATTORNEYS' FEES (A) IN GENERAL the district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy. (B) AWARD OF ATTORNEYS' FEES in any action or proceeding brought under this section, the 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. (C) DETERMINATION OF AMOUNT OF ATTORNEYS' 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. No bonus or multiplier may be used in calculating the fees awarded under this subsection. (D) PROHIBITION OF ATTORNEYS' FEES AND RELATED COSTS FOR CERTAIN SERVICES. (i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if-- (I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins; (II) the offer is not accepted within 10 days; and (III) the court or administrative hearing officer finds that the relief finally

The IDEA does not provide specific funds for schools to use to pay parents' attorneys' fees. In fact, IDEA regulations preclude the use of federal IDEA funds to pay parents' attorney's fees.⁴⁴

A. Eligibility for Fees – “Prevailing” Status

The text of the IDEA provides that “the court, *in its discretion*, may award reasonable attorneys' fees” to prevailing

obtained by the parents is not more favorable to the parents than the offer of settlement. (ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) of this section that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section. (E) EXCEPTION TO PROHIBITION ON ATTORNEYS' FEES AND RELATED COSTS notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer. (F) REDUCTION IN AMOUNT OF ATTORNEYS' FEES except as provided in subparagraph (G), whenever the court finds that— (i) the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy; (ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience; (iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or (iv) the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7) of this section; the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section. (G) EXCEPTION TO REDUCTION IN AMOUNT OF ATTORNEYS' FEES the provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.” 20 U.S.C. § 1415(i)(3) (2003). IDEA reauthorization and change is once again pending in Congress. Potential changes to the IDEA fees provisions are discussed below in Part VI.

⁴⁴ 34 C.F.R. § 300.513(b) (2003) (“(1) Funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to an action or proceeding under section 615 of the Act and subpart E of this part. (2) Paragraph (b)(1) of this section does not preclude a public agency from using funds under Part B of the Act for conducting an action or proceeding under section 615 of the Act.”).

parents.⁴⁵ However, courts deciding fee requests have held that if prevailing status is established, there is an entitlement to a fee award.⁴⁶ The IDEA provides for fee awards to prevailing parents, not to prevailing schools. Absent very unusual circumstances, defendants pay their own attorney whether or not they prevail.⁴⁷ In short, a school district defending an IDEA claim pays their own lawyer win or lose, and may also end up paying the plaintiff's attorney.

I. Partial Success

Parents need not prevail on every issue to be eligible for fees. In the HCPA, Congress expressed its intent that “prevail” be interpreted consistently with *Hensley v. Eckerhart*,⁴⁸ in which the Supreme Court held that a civil rights plaintiff prevailed if she achieved success on any significant issue in her lawsuit and achieved some of the benefit sought.⁴⁹ Notably, the language quoted from *Hensley* does not adopt the “catalyst theory” (in which the plaintiff's claim acts as a catalyst for voluntary change by the defendant), but rather focuses on partial success as sufficient for prevailing status. In other words, that legislative history indicates when Congress enacted the HCPA, it was likely aware of the catalyst theory. However, Congress did not memorialize this understanding either in statutory text or in an explicit statement in the legislative history.

⁴⁵ 20 U.S.C. § 1415 (I)(3)(B) (emphasis added).

⁴⁶ See *Barlow-Gresham Union Sch. Dist. v. Mitchell*, 940 F.2d 1280, 1284-85 (9th Cir. 1991) (holding neither good faith of school district nor safety concerns which caused school to exclude student are special circumstances justifying denial of fees); *Abu-Sayhun v. Palo Alto Unified Sch. Dist.*, 843 F.2d 1250, 1252 (9th Cir. 1988) (noting fees must be awarded to IDEA prevailing parties “absent special circumstances” delineated as whether purpose of IDEA is served by fee award and balancing of equities).

⁴⁷ See S. REP. NO. 99-112, at 13-14, reprinted in 1986 U.S.C.C.A.N. 1798, 1804 (1986).

⁴⁸ S. REP. NO. 99-112, at 13 (citing standard set forth in *Hensley*, 461 U.S. 424, 433 (1983)). This was reiterated in the Senate Report accompanying the 1997 IDEA reauthorization. S. Rep. No. 105-17, at 26 (1997).

⁴⁹ See *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1498 (9th Cir. 1994) (citing *Hensley* prevailing standard. See *supra* note 48).

Partial success may result in reduction of fees, but it does not bar them. In fact, the parent may still be awarded fees although she did not succeed on the central issue in her dispute.⁵⁰ However, in the event of only partial success the court may either deny fees for time spent on unsuccessful issues, or reduce overall fees by a percentage.⁵¹ On the other hand, and in contrast to other fee-shifting civil rights statutes, the IDEA explicitly bars enhancement of fees in cases, for example, of unusually resounding success, or which present novel claims.⁵² Such circumstances may factor in, however, to the reasonable hourly rate and number of hours for the case. While partial success normally results in a fee award, merely *de minimis* or technical success is insufficient to confer prevailing status.⁵³ The fact that the school in good faith disagrees with the parent's claim is not a bar to fees.⁵⁴ Finally, although maintaining the status quo is generally insufficient

⁵⁰ *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 757-58 (2d Cir. 1998).

⁵¹ See *Harris v. Nenana Publ. Sch.*, 50 F.3d 14 (9th Cir. 1995) (unpublished table decision) (noting that with partial success, court should award no fees for unsuccessful claims; if all claims are interrelated court may reduce award); *Edwin K. v. Jackson*, No. 01-C-7115, 2002 U.S. Dist. WL 23981 at *6-8 (N.D. Ill. Dec. 12, 2003) (limited success, and lack of success on major issue in litigation, justified reduction of award from \$186,000 to \$28,000).

⁵² 20 U.S.C. § 1415(i)(3)(C) (2000).

⁵³ *Puyallup*, 31 F.3d at 1498 (stating that where parents had lost on their central issues and claims, hearing officer order, which arguably directed school to hold IEP meeting 6-8 weeks earlier than they had offered, did not make parent prevailing party; fees denied, causal link between litigation and relief is required); see also *Norton v. Orinda Union Sch. Dist.*, 168 F.3d 500 (9th Cir. 1999) (unpublished table decision) (holding that parents seeking special education for their child proved, at due process hearing, that he had learning disability, but not that he needed special education; hearing officer awarded reimbursement for independent evaluations; parents unsuccessfully appealed on eligibility issue and also sought tuition reimbursement; also holding that parents had not prevailed and were not entitled to fees).

⁵⁴ *Barlow-Gresham Union Sch. Dist. v. Mitchell*, 940 F.2d 1284, 1286 (9th Cir. 1991) (good faith disagreement is not special circumstance justifying denial of fees); see also *Eggers v. Bullitt County Sch. Dist.*, 854 F.2d 892, 899 (6th Cir. 1988); *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1377 (8th Cir. 1996).

for prevailing status,⁵⁵ the successful defense of a suit brought by the school district does confer prevailing status.⁵⁶

2. Administrative Success

Unlike other civil rights statutes,⁵⁷ the IDEA requires parents to initiate and prosecute an administrative due process hearing before bringing an IDEA claim to court. As a consequence of this difference, success at the IDEA administrative level (due process hearing) is held to be sufficient for prevailing status.⁵⁸ This is in contrast to other civil right statutes.⁵⁹

3. Success in State Complaint Resolution Procedure

Courts are split as to whether parents who are successful using the state complaint resolution procedure (CRP) established in IDEA regulations have prevailed and can

⁵⁵For example, when a parent initiates a due process hearing, the IDEA's "stay put" provision is triggered and the student remains in last educational placement while the hearing and any appeals are pending. 20 U.S.C. § 1415(e)(3) (2000). This stay put-based maintenance of the status quo would not be sufficient for prevailing status.

⁵⁶ See generally *Maine Sch. Admin. Dist. v. Mr. & Mrs. R.*, 321 F.3d 9, 14-17 (1st Cir. 2003) (school suit to alter stay put placement of student).

⁵⁷ Title VII requires employment discrimination plaintiffs to file a complaint with the EEOC or analogous state agency before proceeding to court. However, once the complaint is filed, the agency has responsibility for investigating it, deciding whether to go forward to a hearing, and prosecuting the hearing for the plaintiff. 42 U.S.C. §§ 2000e-5-6 (2000). Title VI and IX provide, but do not require that administrative complaints may be filed with the Office of Civil Rights (OCR). 34 C.F.R. §§ 100.6-100.11, 106.71 (2003). In the event that OCR is involved, it is responsible for investigation and there is no hearing.

⁵⁸ See, e.g., *Kletzelman v. Capistrano Unified Sch. Dist.*, 91 F.3d 68, 70 (9th Cir. 1996); *Moore v. District of Columbia*, 907 F.2d 165, 166 (D.C. Cir. 1990); *Mitten v. Muscogee County Sch. Dist.*, 877 F.2d 932, 935-36 (11th Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990); *Duane M. v. Orleans Parish Sch. Bd.*, 861 F.2d 115, 119 (5th Cir. 1988); *Eggers*, 854 F.2d at 898 (6th Cir. 1988). The *Moore* case contains a particularly extensive analysis of the issue. 907 F.2d at 167-76.

⁵⁹ See *North Carolina Dep't of Transp. v. Crest St. Comty. Council, Inc.*, 479 U.S. 6, 13-14 (1986) (holding fees for purely administrative success unavailable under another fee-shifting civil rights statute).

recover fees. The Ninth Circuit holds that parents can prevail and be eligible for fees in this circumstance,⁶⁰ while the Second Circuit holds that a CRP is not an IDEA statutory “proceeding,” and therefore cannot be the basis for a fee award.⁶¹

4. Successful Appeal of Unfavorable Hearing Decision

Parents who lose at the due process hearing level, but succeed in a subsequent court appeal, are eligible for fees.⁶² Conversely, where a parent initially wins but then loses on appeal, there is no entitlement to fees.⁶³

5. Interim Relief

Courts are split as to whether securing various forms of interim relief is “on the merits” and thus sufficient for prevailing status. Two recent cases found various forms of interim relief not sufficient for prevailing status.⁶⁴ Notably, in *Buckhannon*, the plaintiffs had gotten a TRO before the

⁶⁰ *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023, 1027 (9th Cir. 2000) (holding CRP, which requires findings of fact and written decision, is “proceeding,” which may entitle parents to fee reimbursement; CRP, which resulted in findings of IDEA violations, entitles parent to fees, including fees for state-ordered IEP team meetings to address them).

⁶¹ See, e.g., *Vultaggio ex rel. Vultaggio v. Bd. of Educ.*, 343 F.3d 598, 602 (2d Cir. 2003) (holding CRP is not action or proceeding under IDEA). The *Vultaggio* court noted that even if the CRP is an IDEA action or proceeding, *Buckhannon* may mean that CRP success is not enough for prevailing status. *Id.*; see also *Johnson ex. rel Johnson v. Fridley Pub. Sch.*, No. CIV 01-1219, 2002 WL 334403, at *3 (D. Minn. Feb, 21, 2002) (no fees for CRP success).

⁶² *Everett v. Santa Barbara High Sch. Dist.*, 28 Fed. Appx. 683 (C.D. Cal. 2000).

⁶³ *Dale M. v. Bd. of Educ.*, 282 F.3d 984, 985-86 (7th Cir. 2002) (holding court has authority to order parent attorney to return fees paid by school after initial success where parent was ultimately unsuccessful).

⁶⁴ *John T. v. Del. County Intermediate Unit.*, 318 F.3d 545, 558-60 (3d Cir. 2003) (holding preliminary injunction, enforced via contempt order, is not on merits and does not confer prevailing status); *J.O. ex rel J.O. v. Orange Township Bd. of Educ.*, 287 F.3d 267, 274 (3d Cir. 2002) (holding temporary hearing officer stay put order was not on merits and does not confer prevailing status; noting that interim relief on merits would be different case).

change in legislation which mooted their claim, and of course were ultimately found not to be eligible for a fee award.⁶⁵

B. Fee Calculation: The Lodestar Method – Reasonable Hours and Reasonable Hourly Rates

The IDEA provides for awards to prevailing parents of “reasonable” fees. These “reasonable” fees are partially statutorily defined as “based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished.”⁶⁶ They are not to exceed “the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience”⁶⁷ nor for hours which are “excessive considering the nature of the action or proceeding.”⁶⁸ The IDEA further provides that “[n]o bonus or multiplier may be used in calculating the fees awarded under this subsection.”⁶⁹

Beyond these textual limits, and as with other civil rights statutes, the court will scrutinize both the number of hours and the hourly rate claimed by the plaintiff’s attorney to come up with a “lodestar” figure, which is a reasonable number of hours times a reasonable hourly rate. A reasonable hourly rate is determined through examination of a number of factors.⁷⁰ The most important factor is the degree of success

⁶⁵ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health*, 532 U.S. 598, 605 (2001).

⁶⁶ 20 U.S.C. § 1415(i)(3)(C) (2000).

⁶⁷ *Id.* § 1415(i)(3)(F)(ii).

⁶⁸ *Id.* § 1415(i)(3)(F)(iii).

⁶⁹ *Id.* § 1415(i)(3)(C).

⁷⁰ See James Lockhart, *Measure and Amounts of Attorney’s Fee Awards Under § 615(i)(3) of Individuals with Disabilities Act*, 174 A.L.R. Fed. 453 (2001 and 2003 supp.) (compiling case law on reimbursed rates and costs); see also Alba Conte, *2 Attorney Fee Awards 2d Ed* § 29:1 (updates through April 2003 available on Westlaw) (compiling information on attorney fee awards under fee-shifting statutes by circuit).

The actual hourly rate charged by the attorney is strong evidence of what is reasonable, but it is not determinative. *Ocean View Elementary. Sch. Dist. v. Peters By & Through Peters*, No. 94-03773-RG(CE), slip. op. at 1 (9th Cir. 1996) (remanding with order to award fees at \$250 per hour where trial court rejected attorney’s \$250 hourly market rate without

obtained, and mere technical or *de minimis* success may not be sufficient for any fee award.⁷¹ The fact that a parent has Legal Services or other free legal representation, or, that representation is on a contingent fee basis, does not bar nor even reduce a fee award.⁷² Such attorneys are still entitled to reimbursement at prevailing community rates.⁷³ A reasonable hourly rate is normally measured at the time the legal services were performed, rather than the time of the fee litigation,⁷⁴ though some courts reimburse travel time at a lower hourly rate.⁷⁵

C. Calculation of Fees – Proof; Reimbursement for Time of Non-lawyers; Reimbursement for Expert Witness Fees and Other Costs; Pro Se and Lay Advocate Representation

1. Proof

Contemporaneous time sheets are essential in documenting fees, and must be detailed (e.g. more specific than “legal research”) without violating attorney-client privilege.⁷⁶ However, the lack of such records apparently does

required explanation, and hourly rate was substantiated). Courts in the Ninth Circuit look at factors from *Kerr v. Screen Actors Guild*, 526 F.2d 67, 70 (9th Cir. 1975) such as rates for attorneys with similar skill, reputation and experience and awards in similar cases. *Gera v. Paramount Unified Sch. Dist.*, 173 F.3d 860 (9th Cir. 1999) (unpublished table decision).

⁷¹ See *Farrar v. Hobby*, 506 U.S. 103, 105 (1992).

⁷² This was a matter debated on the floor of Congress. See 131 CONG. REC. S10396 (1985).

⁷³ See, e.g., *M.S. v. N.Y. City Bd. of Educ.*, 2002 WL 31556385 at *4 (S.D.N.Y. Nov. 18, 2002) (awarding fee of \$350 per hour to Legal Services attorneys).

⁷⁴ *Kerr Ctr. Parents Ass’n v. Charles*, 1990 WL 103709 at *2 (D. Or. July 11, 1990).

⁷⁵ See, e.g., *Mr. X v. N.Y. State. Educ. Dep’t*, 20 F. Supp. 2d 561, 564 (S.D.N.Y. 1998) (awarding travel time reimbursed at 50 percent of normal hourly rate); *Mr. & Mrs. W. v. Malito*, 1993 WL 764591 at *2 (C.D. Ill. Apr. 20, 1993) (same).

⁷⁶ See *Niesz v. Portland Pub. Sch. Dist.*, 684 F. Supp. 1530, 1535 (D. Or. 1988) (reduction of fees because of failure to itemize time spent on case).

not justify entirely denying fees.⁷⁷ The burden of establishing a reasonable community hourly rate is on the plaintiff. Often, affidavits from attorneys with personal knowledge detailing community rates for this type of work are submitted with the fee request.⁷⁸

2. Reimbursement for Time of Non-lawyers

Reimbursement for fees for paralegals and law student interns who assist the attorney with representation is available, and in fact can be substantial.⁷⁹

3. Reimbursement for Expert Witness Fees and Other Costs

Several district courts have awarded fees for expert witnesses who testified at the due process hearing.⁸⁰ Recently, however, the Seventh and Eighth Circuits, in the first federal appeals court decisions on the issue, rejected reimbursement of expert fees under the IDEA,⁸¹ despite HCPA legislative history explicitly indicating Congress intended expert costs to be reimbursable.⁸² The Eighth Circuit recognized that the

⁷⁷ *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) (so holding in an ADA case).

⁷⁸ See, e.g., *Mass. Dep't of Pub. Health v. Sch. Comm.*, 841 F. Supp. 449, 468 (D. Mass. 1993); *C.G. v. New Haven Bd. of Educ.*, 988 F. Supp. 60, 67 (D. Conn. 1997); *Murphy v. Timberlane Reg'l Sch. Dist.*, 1994 WL 392608 at *1 (D.N.H. July 25, 1994).

⁷⁹ See generally *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989) (interpreting fee provision under another civil rights statute).

⁸⁰ *BD v. DeBuono*, 177 F. Supp. 2d 201, 210 (S.D.N.Y. 2001) (awarding more than \$100,000 in expert witness fees as part of \$1.4 million fee award against city, county and state defendants, as well as \$122,000 fees for trial consultants, but denying \$40,000 fee request for Westlaw fees); *Sch. Bd. v. Pacht*, slip-op. No. CIV 02-4065 ADM/AJB (D. Minn. 2003); *Pazik v. Gateway Reg'l Sch. Dist.*, 130 F. Supp. 2d 217, 220 (D. Mass. 2001) (citing HCPA legislative history); *P.G. v. Township County Bd. of Educ.*, 124 F. Supp. 2d 251, 267 (D.N.J. 2000); *Hirsch v. McKenzie*, 1988 WL 78859 at *3 (D.D.C. July 21, 1988).

⁸¹ *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1032-33 (8th Cir. 2003); *T.D. v. Lagrange Sch. Dist.*, 2003 WL 22682466 at *11-12 (7th Cir. Nov. 14, 2003); see also *Eirschele v. Craven County Bd. of Educ.*, 7 F. Supp. 2d 655, 657-60 (E.D.N.C. 1998).

⁸² The conference committee report to the HCPA stated:

IDEA provided for “reasonable attorneys fees as part of the costs” of an IDEA proceeding.⁸³ The court thus recognized that prevailing parents’ entitlement was to something more than lawyer fees. However, the court found “costs” to be a term of art, defined elsewhere in the U.S. Code, to include witness fees, but at a rate of \$40 per day.⁸⁴ The court found that the IDEA’s plain text, which does not define “costs” any differently than this general statutory provision, controlled over its legislative history.⁸⁵ In support of this conclusion, the court cited Supreme Court precedent limiting costs to those in the general statutory definition unless there was “explicit statutory or contractual authorization.”⁸⁶ The court found such explicit authorization only to the extent the IDEA permitted awards for “actions *or proceedings*” which the court interpreted to include success at the administrative hearing level.⁸⁷ The Seventh Circuit adopted the Eighth Circuit’s analysis.⁸⁸ Although not citing that decision, this approach parallels that of the Court in *Buckhannon*, in which the Court labeled “prevailing” as a term of art, found its meaning to be plain on the basis of an entry in a legal dictionary, and thus found no need to resort to legislative history indicating Congress intended a different meaning.

The conferees intend that the term ‘attorney’s fees as part of the costs’ 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 parent or guardian’s case in the action or proceeding, as well as traditional costs incurred in the cost of litigating a case. H.R. CONF. REP. NO. 99-687, at 5 (1986).

⁸³ *Neosho R-V Sch. Dist.*, 315 F.3d at 1031 (citing 20 U.S.C. § 1415(i)(3)(B) (2003)).

⁸⁴ *Id.* (citing 28 U.S.C. §§ 1920(3), 1821(b) (2003)).

⁸⁵ *Id.* at 1031-32.

⁸⁶ *Id.* at 1031 (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)). The court also noted other federal statutes that explicitly and textually shift expert witness fees, in contrast to IDEA. *Id.* at 1032 (citations omitted). Of particular interest to schools are 42 U.S.C. § 1988 (2000) (Sections 1981 & 1983); Tit. VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (2000); 42 U.S.C. § 12117(a) (2002) (ADA employees; referring to Title VII).

⁸⁷ *Neosho R-V Sch. Dist.*, 315 F.3d at 1031-32 (emphasis added).

⁸⁸ *T.D. v. Lagrange Sch. Dist.*, 2003 WL 22682466 at *11 (7th Cir. Nov. 24, 2003).

A dissent in the Eighth Circuit case found the IDEA different enough from other fee-shifting statutes to justify defining costs to include expert fees.⁸⁹ The dissenting judge pointed in particular to the IDEA's unique provisions of a required administrative hearing, its lack of damages remedy, and its necessity for parent expert testimony both to educate the court and to counteract the school's in-house experts, as well as noting the legislative history discounted by the majority. The dissent noted that without so defining "costs," parents could only win by incurring significant non-reimbursable debt for expert witnesses.⁹⁰ Other costs are clearly reimbursable. For example, an award of post-judgment interest is mandatory.⁹¹

4. *Pro Se and Lay Advocate Representation*

While there is a right to be represented by a lay advocate at IDEA due process hearings,⁹² the weight of authority limits reimbursement to cases where an attorney represents the parents. Most courts deny fees where a non-attorney represents the parent,⁹³ where a lay parent is *pro se*, or where the parent-attorney represents herself.⁹⁴

⁸⁹ *Neosho R-V Sch. Dist.*, 315 F.3d at 1035-36 (Pratt, J., concurring & dissenting).

⁹⁰ *Id.* at 1038.

⁹¹ *Gera v. Paramount Unified Sch. Dist.*, 173 F.3d 860 (9th Cir. 1999) (unpublished table decision).

⁹² 20 U.S.C. § 1415(h)(1) (2000); 34 C.F.R. § 300.509 (2003).

⁹³ This may pose ethical unauthorized practice of law concerns as well.

⁹⁴ See *Kay v. Ehrler*, 499 U.S. 432, 437-38 (1991) (no fees to *pro se* attorney in non-IDEA civil rights claim); *Woodside v. Sch. Dist.*, 248 F.3d 129, 131 (3d Cir. 2001) (IDEA encourages independent representation and exercise of independent judgment on behalf of child; no fees for parent-attorney); *Doe v. Bd. of Educ. of Baltimore County.*, 165 F.3d 260, 264-65 (4th Cir. 1998); *Connors v. Mills*, 34 F. Supp. 2d 795, 808 (N.D.N.Y. 1998) (no fees for lay advocate in due process hearing); *Arons v. N.J. St. Bd. of Educ.*, 842 F.2d 58, 62 (3d Cir. 1988) (same). But see *Matthew V. v. DeKalb County Sch.*, 244 F. Supp. 2d 1331, 1338 (N.D. Ga. 2003) (parent-attorney has not prevailed so no fees are awarded, but parent-attorney status does not bar fee award); *Kattan v. District of Columbia*, 995 F.2d 274, 276 (D.C. Cir. 1993) (school waived argument that parent-attorney could not recover fees).

5. Admission to Practice and Other State Law Limitations

The Ninth Circuit denied fees to an attorney for a successful due process hearing where the attorney was not licensed to practice in the state where the hearing was held.⁹⁵ On the other hand since a fee request is a claim under federal law, state law notice of claim requirements are inapplicable.⁹⁶

D. Circumstances which Reduce or Bar Fee Awards

The IDEA incorporates FED. R. CIV. P. 68 principles, but expands them to cover written settlement offers made prior to administrative due process hearings. If the result in a hearing or litigation is not more favorable than that available in a written settlement offer made at least 10 days prior to the proceeding, fees are cut off at the time of the settlement offer.⁹⁷ Thus, for example, a settlement offer could be made at least ten days before a due process hearing, at least ten days before an appeal to court, and/or at least ten days before fee-only litigation, in order to attempt to stop the attorney's fees meter. An exception is made if the parent is "substantially justified" in rejecting the offer.⁹⁸ Fees may be reduced if the parent (or, if the pending Senate bill is enacted, the parent's attorney) "unreasonably protracts" the dispute.⁹⁹ Those

⁹⁵ *Z.A. v. San Bruno Park Sch. Dist.*, 165 F.3d 1273, 1275-76 (9th Cir. 1999) (due process hearing is established by state law and is therefore state rather than federal proceeding, and state law prohibits administrative representation by attorneys not licensed by state; thus attorney admitted to local federal district court but not state court could appear at hearing only as lay advisor and could not recover attorney's fees).

⁹⁶ *Hacienda La Puente Sch. Dist. v. Honig*, 976 F. 2d 487, 496 (9th Cir. 1992) (but denying parent request for sanctions against school for making this argument).

⁹⁷ 20 U.S.C. § 1415(i)(3)(D)(I).

⁹⁸ *Id.* § 1415(i)(3)(E); see *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 894, 897 (9th Cir. 1995) (parent is eligible for fee reimbursement where outcome in due process is more favorable than the school's settlement offer); *James v. Tucson Unified Sch. Dist.*, 70 F.3d 1279 (D. Ariz. 1999) (where school settlement offer included 100 hours of nonspecific compensatory education, and hearing officer made specific compensatory education award of seventy-eight hours of various therapies, parents had prevailed and were eligible for fees).

⁹⁹ 20 U.S.C. § 1415(i)(3)(F)(i).

amendments provide that fees are not available for representing parents at IEP team meetings, unless the team is convened at the order of a hearing officer or court.¹⁰⁰ The 1997 amendments also provide that fees can be reduced if the parents do not provide required information (notably a description of the problem and a proposed solution) to the school.¹⁰¹ However, fees are not to be reduced if the school “unreasonably protracted” the dispute.¹⁰² Finally, unless authorized by state law, fees are not available for mediation where a due process hearing has not yet been requested.¹⁰³

E. Jurisdiction Over and Procedure for Fee Requests

The IDEA gives jurisdiction to both federal and state courts for IDEA disputes, presumably including fee requests. As to fee-only litigation (for example, when the parent has won at the hearing level and there is no appeal to court), the IDEA fee provisions specifically give jurisdiction to the federal courts to award attorney's fees, without regard to the amount in dispute.¹⁰⁴ Although there is an occasional due process hearing decision on attorney's fees, the IDEA does not give special education hearing officers authority to award fees. The IDEA does not provide an explicit statute of limitations for filing fee requests with courts, nor for that matter for IDEA appeals or claims generally. Courts borrow from the analogous state law statute of limitations.¹⁰⁵

¹⁰⁰ *Id.* § 1415(i)(3)(D)(ii); see *Kletzelman v. Capistrano Unified Sch. Dist.*, 91 F.3d 68, 69-70 (9th Cir. 1995) (in case prior to 1997 amendments, parents who were successful in getting changes to son's program in requested IEP team meetings, but who had never requested due process hearing, were not eligible for fees).

¹⁰¹ 20 U.S.C. § 1415(i)(3)(F)(iv).

¹⁰² *Id.* § 1415(i)(3)(G).

¹⁰³ *Id.* § 1415 (i)(3)(D)(ii).

¹⁰⁴ *Id.* § 1415(i)(2). On the issue of state court jurisdiction to award fees, compare *B.K. v. Norwalk Bd. of Educ.*, 34 IDELR 114, 114 (Conn. Super. Ct. 2001) (stating that state court lacks jurisdiction over fee-only litigation) with *W.R. v. Sch. Bd.*, 726 So. 2d 801, 802-04 (Fla. Dist. Ct. App. 1999) (holding that state court has jurisdiction over award of fees).

¹⁰⁵ For a discussion of statute of limitation issues in special education cases and a state by state table of cases adopting various timelines, see generally Perry Zirkel & Peter Maher, *The Statute of Limitations Under the*

Fees for fee-only litigation are reimbursable,¹⁰⁶ and can be substantial.¹⁰⁷ Fee disputes “should not result in a second major litigation,”¹⁰⁸ and fee-only litigation can often be resolved by summary judgment with affidavits and time records. Fees are normally awarded against the LEA, rather than the state. However, when the state or other agency is named as a defendant, fees may be awarded against the state.¹⁰⁹ Attorney’s fees are not “damages,” and thus any Eleventh Amendment immunity a school district, or other defendant, may have does not bar a fee award.¹¹⁰ Appeal of court-ordered fee awards is available, however, the appeals court applies a deferential abuse of discretion standard to its review of the trial court’s findings.¹¹¹

Individuals with Disabilities Education Act, 175 EDUC. L. RPTR. 1 (2003) (also noting that pending IDEA reauthorization may address this issue).

¹⁰⁶ See, e.g., *Harris v. Nenana Pub. Sch.*, 50 F.3d 14 (9th Cir. 1995) (unpublished table decision) (holding that it is error for trial court to fail to award fees for fee-only IDEA litigation where litigation resulted in modest award of fees for limited due process success); *Barlow-Gresham Union Sch. Dist. v. Mitchell*, 940 F.2d 1280, 1284-85 (9th Cir. 1991) (holding that fees for fee-only IDEA litigation are reimbursable).

¹⁰⁷ See, e.g., *Moore v. District of Columbia*, 674 F. Supp. 901, 907-09 (D.D.C. 1990) (awarding fee of \$29,000 for due process hearing and \$19,000 for fee-only litigation in federal court).

¹⁰⁸ *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

¹⁰⁹ See *John & Leigh T. v. Iowa Dep’t of Educ.*, 258 F.3d 860, 865 (8th Cir. 2001); *Jeremy M. v. Cent. Bucks Sch. Dist.*, 2001 WL 177185 at *3 (E.D. Pa. Jan. 31, 2001) (permitting cross claim by LEA against county mental health agency involved with residentially placed student).

¹¹⁰ *Missouri v. Jenkins*, 491 U.S. 274, 284-86 (1989). The IDEA purports to waive Eleventh Amendment immunity. 20 U.S.C. § 1404 (2002).

¹¹¹ See generally *Pierce v. Underwood*, 487 U.S. 552 (1988) (explaining why, under another civil rights statute, deference to trial court is appropriate); *Gera v. Paramount Unified Sch. Dist.*, 173 F.3d 860 (9th Cir. 1999) (unpublished table decision) (appeals court had remanded case to trial court for explanation of reduction of fees from \$80K to \$25K, explanation that hours and rate were excessive found sufficient to justify fee reduction); *Harris*, 50 F.3d 14 (unpublished table decision) (holding abuse of discretion standard for appellate review of trial court findings re fee request;); *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1498 (9th Cir. 1994) (*de novo* review of legal standard applied by trial court to fee request) (also holding trial court must explain fee award); *Barlow-Gresham*, 940 F.2d at 184-85 (clear error standard for appellate

As discussed below in Part VI, IDEA fee provisions may change as a result of the pending IDEA reauthorization. In particular, the House bill (passed April 30, 2003) provides for the governor of each state to set maximum fee rates for parent attorneys.

IV. Empirical Research on IDEA Disputes

Research provides some insight into the prevalence, costs, and dynamic of IDEA disputes. At the time of the HCPA's enactment, Congress noted fees ranging from \$2000 to \$212,000 in single IDEA cases.¹¹² Congress also ordered a study of IDEA attorney's fees as part of the HCPA,¹¹³ and in 1989, the GAO published a report.¹¹⁴

A. The 1989 GAO Report on IDEA Disputes

1. Prevalence and Means of Resolution

The GAO surveyed state special education directors regarding IDEA disputes from fiscal year 1984 to fiscal year 1988,¹¹⁵ immediately before and after the HCPA's 1986 enactment. Nationally, there were 2649 hearing requests in fiscal year 1984, rising by 29 percent to 3426 by fiscal year

review of trial court finding that parent was prevailing party). *But see Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1024, 1032 (8th Cir. 2003) (On appeal) (*de novo* review of trial court's determination of prevailing status).

¹¹² S. REP. No. 99-112 at *3, reprinted in 1986 U.S.C.C.A.N. 1798, 1800.

¹¹³ Pub. L. No. 99-372 § 4(a), 100 Stat. 796 (1986) (uncodified).

¹¹⁴ *Special Education: The Attorney Fees Provision of Public Law 99-372*, HRD-90-22BR (1989), available at www.gao.gov (last visited August 30, 2003) [hereafter GAO REPORT].

¹¹⁵ The chosen survey method limited the results. Because the state administers the due process hearing system, the state special education directors did have access to the number of hearings requested and number of hearing decisions, as well as who prevailed and whether the parent was represented. In many cases, the state special education directors had no information about attorney's fees, which would not be ordered by a state hearing officer and which would be paid by local school districts. Similarly, while all states reported data on IDEA litigation, since the state was not usually a party, lawsuits were likely underreported.

1988. In contrast, actual hearing decisions were fairly constant at 1665 in fiscal year 1984 and 1736 in fiscal year 1988.¹¹⁶ The authors suggest this indicates more disputes being resolved informally.¹¹⁷ At less than 100 per year, the number of lawsuits reported for fiscal years 1984 through 1988 was too small for trend analysis.¹¹⁸

2. Parent Success

In IDEA hearings and litigation, parents succeeded at least partially, 43 percent of the time.¹¹⁹ They were more likely to prevail if they were represented by an attorney,¹²⁰ and were more likely to have an attorney after HCPA's enactment.¹²¹ For example, in fiscal year 1987, parents with an attorney had a 60 percent success rate, while unrepresented parents had a 40 percent success rate. In fiscal year 1988, represented parents succeeded 67 percent of the time, compared with 43 percent of unrepresented parents.¹²²

3. Demographic Differences in Dispute Frequency

The prevalence of IDEA disputes varied greatly from one state to another. For example, in fiscal year 1988, several states had no disputes, while New York topped out with 538 disputes.¹²³ Adjusting for population, however, the District of Columbia had by far the most IDEA disputes in fiscal year 1988, with an almost unimaginable ratio of 1 dispute for every 42 IDEA students.¹²⁴ Calculated on this basis, New York was actually a distant second at 538:1.¹²⁵ Louisiana, at the other end of the spectrum, was at 69,000 to 1.¹²⁶ A more recent

¹¹⁶ GAO REPORT, *supra* note 114, at 3.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 20.

¹¹⁹ *Id.* at 3.

¹²⁰ *Id.* at 3, 5.

¹²¹ *Id.* at 5, 25, 84 (in fiscal year 1984, 41 percent of parents represented, increasing to 54 percent by fiscal year 1988).

¹²² *Id.* at 84.

¹²³ *Id.* at 82.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

GAO study found that these geographic differences in the frequency of IDEA disputes continued.¹²⁷

4. Attorney's Fees

On the actual topic of the study, attorney's fees, only thirteen states reported data. For those states, total reported fee awards jumped from \$157,000 in fiscal year 1987 to \$387,000 in fiscal year 1988.¹²⁸

B. 2003 CSEF Study on IDEA Disputes

1. Costs of IDEA Disputes

More recently, a May 2003 report by the Special Education Expenditure Project (SEEP) of the Center for Special Education Finance (CSEF) commissioned by OSEP attempted to answer the title question *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000?*¹²⁹ Also using a survey method,¹³⁰ CSEF found that during 1999-2000, public schools spent \$146.5 million on special education mediation, due process hearings and litigation.¹³¹ This figure represents three tenths of one percent of the nations' public schools' total \$50 billion special education expenses, or \$24 for each IDEA student.¹³² Average expenditures for mediation and due process were between \$8,000 and \$12,000 per case, while average litigation expenses were \$95,000 per case.¹³³ Unfortunately, the report does not specifically itemize attorney's fees expenses.

¹²⁷ GAO REPORT: Numbers of disputes are generally low and states are using mediation and other strategies to resolve conflicts. GAO-03-897 at 3 (2003) available at www.gao.gov (last visited Oct. 7, 2003) (stating that three-quarters of all IDEA disputes are in 5 states and the District of Columbia).

¹²⁸ *Id.* at 4.

¹²⁹ Available at <http://csef.air.org>.

¹³⁰ The CSEF surveys were mailed to sample districts, and then the results were statistically extrapolated.

¹³¹ GAO REPORT, *supra* note 114, at 5.

¹³² *Id.*

¹³³ *Id.* at 8.

2. Prevalence and Means of Resolution

The CSEF report also estimates the prevalence of IDEA disputes, updating the 1980s GAO data. For 1998-99, CSEF estimates 6,360 complaints,¹³⁴ 4,266 mediations,¹³⁵ 6,763 due process hearings, 301 new lawsuits and 293 ongoing lawsuits.¹³⁶

3. Parent Success

Parents prevailed in whole or in part in 43 percent of cases.¹³⁷

4. Demographic Differences in Dispute Frequency

Disputes were more prevalent in districts that were large, urban, and/or had high median family income.¹³⁸

5. Attorney's Fees

Unfortunately, the CSEF study does not report on the rate and impact of representation parents by attorneys.

C. 2002 NASDSE study of IDEA disputes

The National Association of State Directors of Special Education (NASDSE)¹³⁹ also surveyed all state special education directors regarding IDEA disputes.

1. Prevalence and Means of Resolution

The NASDSE study reports 9,827 hearings requested and 3,315 hearings held in 1998, 9,971 hearings requested and 3,126 held in 1999, and 11,068 hearing requests and 3,020

¹³⁴ An estimated 80 percent of these complaints were dismissed. *Id.* at 7.

¹³⁵ Districts overwhelmingly reported mediation to be more cost effective than due process hearings. *Id.*

¹³⁶ *Id.* at 8.

¹³⁷ *Id.* at 20.

¹³⁸ *Id.* at 10-18.

¹³⁹ EMILY AHEARN, DUE PROCESS HEARINGS: 2001 UPDATE (2002); Project FORUM, National Association of State Directors of Special Education, available at <http://www.nasdse.org/forum> (last visited Sept. 7, 2003).

hearings in 2000.¹⁴⁰ From 1991-1995, hearing requests annually increased by 4 percent and hearings by 10 percent. From 1996 to 2000, hearing requests increased at an even greater annual rate (19 percent), but actual hearings declined slightly (4 percent annual decrease).¹⁴¹ Hearing requests were found to be increasingly likely to be resolved without an actual hearing; in 2000, only 27 percent of hearing requests actually resulted in a hearing.¹⁴²

2. Attorney's Fees

Unfortunately, the NASDSE study does not report on the use of attorneys in, nor the costs, of, IDEA disputes, nor did it examine IDEA litigation.

D. Trends in IDEA Disputes and Their Resolution

Whatever figures are used, the incidence of due process hearing requests, due process hearing decisions, and lawsuits has greatly increased from the late 1980s to the late 1990s. Comparing the GAO and NASDSE studies, both of which are based on surveys of state special education directors, the number of hearing requests has more than tripled,¹⁴³ and the number of hearing decisions has roughly doubled.¹⁴⁴ Comparing data from the GAO and CSEF studies on IDEA lawsuits, the number of lawsuits has increased by 800 percent.¹⁴⁵ The greater increase in hearing requests, as compared with hearing decisions, suggests that informal resolution of disputes continues to increase. This trend is corroborated by the large number of mediations as described above.

E. Trends in Parent Success in IDEA Disputes

While disputes have greatly increased, parent success has remained relatively constant; 43 percent in both the older

¹⁴⁰ *Id.* at 4.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 11,068 in 2000/3426 in 1988=3.23

¹⁴⁴ 3,020 in 2000/1,736 in 1988=1.74.

¹⁴⁵ 594/73=8.13.

GAO study and the recent CSEF report. The available data indicates the parent success rate is about 50 percent higher for parents represented by an attorney.

F. Parent and School Perceptions of IDEA Disputes

A final study interviewed parents to explore their experience as participants on their child's IEP team, as well as when challenging the school in a due process hearing.¹⁴⁶ Interviewed parents reported being "terrified and inarticulate" at IEP team meetings, which they perceive as "judgmental rather than cooperative."¹⁴⁷ They reported their knowledge of their own child being treated by school team members as a bar to their objectivity about their child.¹⁴⁸ Parents reported feeling intimidated by being outnumbered at IEP team meetings and by not speaking the education language of the school team members.¹⁴⁹ School members of some IEP teams reported themselves to be analogous to doctors and the parent as analogous to the patient, whose role it is to receive and take advice from the educational experts.¹⁵⁰

This study's author contrasts the parents' perceived powerlessness at IEP team meetings with the potent legal rights afforded them by the IDEA.¹⁵¹ Specifically, parents are given the right to insist on their child's individual entitlements as a "check and balance" on the school's tendency to try to

¹⁴⁶ David Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 166-69, 179 (1991).

¹⁴⁷ *Id.* at 188.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 194.

¹⁵⁰ *Id.* at 190-91. For a description of the IDEA hearing process from the perspective of some (primarily) school attorneys, see Lanigan, *supra* note 39, at 213-31.

In the author's experience as a practitioner representing school districts in special education hearings, most school personnel perceive themselves to be making their best efforts for children with disabilities and pride themselves on their effort and judgment in special education matters. Faced with an IDEA hearing, school personnel often perceive the hearing request as an attack on their professional judgment, analogous to a malpractice claim, and accordingly respond in a defensive manner.

¹⁵¹ Engel, *supra* note 146, at 197.

allocate resources according to all children's needs.¹⁵² While this may be difficult for parents who do not want to be "selfish," those parents who had gotten an attorney and asserted their child's rights "were enthusiastic about the results," finding "moral vindication," and sometimes a better relationship with the school.¹⁵³

G. Summary

Although a difficult experience for both sides, IDEA disputes are increasingly prevalent.

They are, however, increasingly more often resolved through less formal and adversarial means such as mediation and settlement. Attorney representation is linked to parent success in these disputes. Costs in IDEA disputes, especially in some "hot" geographic areas, represent significant burdens for both parents and schools.

V. "Prevailing" Status and *Buckhannon*

In *Buckhannon*, a case brought under the ADA and Fair Housing Amendments Act, the Supreme Court held that "prevailing" status (and hence eligibility for attorney's fees) required "judicially sanctioned change in the legal relationship of the parties"¹⁵⁴ involving a court judgment or court-approved consent decree. In short, to prevail, the plaintiff must get some relief ordered by a court. Applying this principle to the facts at hand, a 5-member majority of the Court held that a lawsuit serving as a catalyst for enactment of favorable state legislation did not confer "prevailing" status on the plaintiffs, and hence they were not eligible for attorney's fees. The decision overturned a host of federal court decisions holding

¹⁵² *Id.* at 198.

¹⁵³ *Id.* at 199-200.

¹⁵⁴ *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health Res.*, 532 U.S. 598, 605 (2001).

to the contrary.¹⁵⁵ Nine federal appeals courts had upheld the catalyst theory,¹⁵⁶ with only a single Fourth Circuit decision rejecting it.

As has been the Court's tendency recently, the majority's statutory interpretation approach was almost exclusively textual. The majority examined the definition of "prevail" in Black's Law Dictionary,¹⁵⁷ which refers to "a party in whose favor a judgment is rendered."¹⁵⁸ Examining the dictionary definition led the majority to conclude that the language was plain enough so that 1) legislative history indicating that Congress intended prevailing to be determined more broadly was not determinative,¹⁵⁹ and 2) neither the policy implications of the new interpretation,¹⁶⁰ nor 3) the Court's own dictum to the contrary need be considered.¹⁶¹

A lengthy and stinging¹⁶² dissent noted that the decision "impede[s] access to court for the less well heeled,"¹⁶³ and quotes an earlier Court decision indicating that the catalyst theory is "settled law" adopted unanimously by the federal appeals courts,¹⁶⁴ except for dicta in the Fourth

¹⁵⁵ The majority recognized that except in the Fourth Circuit, courts across the country recognized the catalyst theory as sufficient for prevailing status and a fee award. *Id.* at 602 (citations omitted).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 603.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 607-08 (citing H.R. REP. No. 94-1558, at 7 (1976) (Section 1988) "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief").

¹⁶⁰ *Id.* at 608-10.

¹⁶¹ *Id.* at 603-04 (citations omitted).

¹⁶² Indeed, Justice Ginsburg herself ended her dissenting opinion with the words "I dissent" rather than "I respectfully dissent." *Id.* at 644 (also stating that majority's definition of prevailing party is "unsupported by precedent and unaided by history or logic"). *But see*, Laura Krugman Ray, *Justice Ginsburg and the Middle Way*, 68 BROOKLYN L. REV. 629, 663 (2003) (claiming that subsequent to *Bush v. Gore*, 531 U.S. 98, 144 (2002), Justice Ginsburg routinely uses the phrase "I dissent" rather than "I respectfully dissent").

¹⁶³ *Id.* at 623 (Ginsburg, J., dissenting).

¹⁶⁴ *Id.* at 626 n.4 (Ginsburg, J., dissenting) (citing *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987)).

Circuit.¹⁶⁵ The dissenters also suggest that “prevailing” be defined in its context of civil rights statutes and according to its ordinary meaning (which is to win, or in other words to meet one’s objectives, with or without a court order) rather than relying exclusively on Black’s Law Dictionary.¹⁶⁶ *Buckhannon* has been the subject of much criticism.¹⁶⁷ A bill to overrule *Buckhannon* was introduced into the Senate in May 2003.¹⁶⁸

A. Scope of *Buckhannon*¹⁶⁹

1. Do Private Settlements Confer Prevailing Status?

The *Buckhannon* Court stated, in strong dicta, that voluntary private settlements would not confer prevailing status because there was no judicial approval of these settlements.¹⁷⁰ Most lower courts have held in kind.¹⁷¹ The

¹⁶⁵ *Id.* at 628-29 (Ginsburg, J., dissenting) (citations omitted).

¹⁶⁶ *Id.* at 633-34 (Ginsburg, J., dissenting).

¹⁶⁷ For a criticism of *Buckhannon* in the disability context, see Paolo Annino, *The Buckhannon decision: The End of the Catalyst Theory and a Setback to Civil Rights*, 26 MENTAL & PHYSICAL DISABILITY L. RPTR. 11 (2002).

¹⁶⁸ Settlement Encouragement and Fairness Act S.1117 108th Cong. (2003).

¹⁶⁹ For commentary on the impact of *Buckhannon* on IDEA disputes, see Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys’ Fees: Time for a Congressional Response Again*, 2003 B.Y.U. EDUC. & L.J. 519 (2003); Allen Osborne, *Attorneys’ Fees Under the IDEA after Buckhannon: Is the Catalyst Theory Still Viable?*, 175 ED. L. RPTR. 397 (2003); Jennifer Rowe, *Notes and Comments: Implications of Buckhannon Board & Care Home, Incorporated v. West Virginia Department of Health and Human Resources for Due Process Under the Individuals with Disabilities Act*, 2002 B.Y.U. EDUC. & L.J. 333 (2002); Mark Weber, *Special Education Attorneys’ Fees After Buckhannon Board & Care Home, Incorporated v. West Virginia Department of Health and Human Resources*, 2002 B.Y.U. EDUC. & L. J. 273 (2002).

¹⁷⁰ *Buckhannon*, 532 U.S. at 604 n.7.

¹⁷¹ See, e.g., *T.D. v. Lagrange Sch. Dist.*, 2003 WL 22682466 at *8 (7th Cir. Nov. 14, 2003); *J.C. v. Reg’l Sch. Dist.*, 278 F.3d 119, 123-25 (2d Cir. 2002); *Doe v. Boston Pub. Sch.*, 264 F. Supp. 2d 65, 69-73 (D. Mass. 2003) (parent who succeeded through private settlement has not prevailed); *Matthew V. v. DeKalb County.Sch.*, 244 F. Supp. 2d 1331, 1340-44 (N.D. Ga. 2003) (same); *Adams v. District of Columbia*, 807 A.2d 625 (D.D.C.

Ninth Circuit, however, has rejected this suggestion as dicta, and found that plaintiffs who achieve a favorable voluntary settlement have “prevailed” and are eligible for attorney’s fees.¹⁷² In *Barrios v. Cal. Interscholastic Federation*,¹⁷³ the Ninth Circuit awarded attorney’s fees to an ADA plaintiff who had received a voluntary settlement prior to *Buckhannon*, which reserved the questions of prevailing status and attorney’s fees, stating:

Barrios, however does not claim to be a “prevailing party” simply by virtue of his being a catalyst of policy change; rather, his settlement agreement affords him a legally enforceable instrument, which under *Fischer*, makes him a “prevailing party.” While dictum in *Buckhannon* suggests that a plaintiff “prevails” only when he or she receives a favorable judgment on the merits or enters into a court-supervised consent decree, we are not bound by that dictum, particularly when it runs contrary to this court’s holding in *Fischer*, by which we are bound. Moreover, the parties, in their settlement, agreed that the district court would retain jurisdiction over the issue of attorneys’ fees, thus providing sufficient judicial oversight to justify an award of attorneys’ fees and costs.¹⁷⁴

However, in an earlier case discussed below, the Ninth Circuit seemed to indicate that a *judicially sanctioned* change in the parties’ relationship was required.¹⁷⁵ A few federal district courts have followed this approach and held that

2002) (same); *Alegria v. District of Columbia*, 2002 WL 31818925 (D.D.C. Dec. 13, 2002) (same); *Van Aucken v. Skiver*, 38 IDELR 95 (N.D. Ohio 2002) (same).

¹⁷² See *Barrios v. Cal. Interscholastic Fed’n*, 277 F.3d 1128, 1133-34 (9th Cir. 2002), cert. denied, 537 U.S. 820 (2002).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1134 n.5. The Second Circuit recently held that prevailing status is achieved where the court retains jurisdiction to enforce the parties’ settlement agreement. *Roberson v. Giuliani*, 346 F.3d 75, 82 n.8 (No. 02-7306 2d Cir. 2003).

¹⁷⁵ *Bennett v. Yoshina*, 259 F.3d 1097, 1101 (9th Cir. 2001).

settlements continue to confer prevailing status.¹⁷⁶ However, it is worth noting that in the Fourth Circuit decision, which the Court used as the springboard for its rejection of the catalyst theory, it declined to follow this approach in a case involving a private settlement, but did so instead in the context of a dispute where a lawsuit resulted in a legislative change.¹⁷⁷ The Fourth Circuit seemed to use the term “catalyst theory” to refer to legislative changes rather than settlements; while rejecting the “catalyst theory,” the Fourth Circuit noted that “judgments, consent decrees, *or settlements*” altering the legal rights of the parties would confer prevailing status.¹⁷⁸ The *Buckhannon* Court cited this language from the Fourth Circuit.¹⁷⁹ Moreover, in dicta rejecting the catalyst theory in an earlier non-IDEA fees case, the Supreme Court stated that what was instead required for “alteration of the legal relationship between the parties” was “a judgment, consent decree, *or settlement*.”¹⁸⁰ The Fourth Circuit had relied on this earlier Court case.¹⁸¹

The approach adopted by the Ninth Circuit in *Barrios* is ironic. The *Buckhannon* Court disavowed as dicta strong language in its own earlier decisions¹⁸² indicating that the term “prevail” included the creation of voluntary agreements. Now the Ninth Circuit is disavowing the *Buckhannon* Court’s explicit statement indicating that private settlements do not confer “prevailing” status because it is the same kind of dicta the Supreme Court itself rejected in *Buckhannon*.

¹⁷⁶ *Johnson v. District of Columbia*, 190 F. Supp. 2d 34, 45 (D.D.C. 2002) (applying *Buckhannon* to settlements would undermine the purpose of the IDEA); *Brandon K. v. New Lenox Sch. Dist.*, 2001 WL 34049887, at *2 (N.D. Ill. Dec. 3, 2001) (noting settlement entered into due process hearing record as hearing officer “agreed order” is sufficient for prevailing status).

¹⁷⁷ Specifically, North Carolina changed its IDEA hearing rules to permit hearing officers to award tuition reimbursement.

¹⁷⁸ *S-1 & S-2 By & Through P-1 & P-2 v. State Bd.*, 21 F.3d 49, 51 (4th Cir.), *cert. denied*, 513 U.S. 876 (1994) (emphasis added).

¹⁷⁹ *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep’t of Health Res.*, 532 U.S. 598, 602 (2001).

¹⁸⁰ *Farrar v. Hobby*, 506 U.S. 103, 113 (1992) (emphasis added).

¹⁸¹ *S-1 & S-2*, 21 F.3d at 51.

¹⁸² *Farrar*, 506 U.S. at 113.

2. Does *Buckhannon* Apply to IDEA Claims?

The *Buckhannon* Court was careful to point out several times that the attorney's fees language it was interpreting was identical to that in many other fee-shifting civil rights statutes.¹⁸³ For example, the Court cited identical fee language for section 1983 and Title VII claims. The *Buckhannon* Court did not mention the IDEA nor its fees language. However, the Fourth Circuit case the Court noted as being the only appeals court decision rejecting the catalyst theory was a Section 1983 claim asserting IDEA violations.¹⁸⁴

The phrase "prevailing party" in the IDEA is identical to the language used in other civil rights statutes. As discussed above, the HCPA legislative history indicates Congress's intent that this phrase be construed consistently with other fee-shifting civil rights statutes. However, other aspects of the IDEA fee provisions differ from other civil rights laws. The IDEA grants eligibility for fees when parents prevail in "any action *or proceeding*" (emphasis added), and applies FED. R. CIV. P. 68 (offer of settlement principles) to pre-hearing, as well as pre-trial, offers. Thus, under the IDEA, unlike other civil rights laws, courts find fees are available in successful proceedings in administrative hearings. Also, in contrast to other laws' fee-shifting provisions, the IDEA excludes or reduces fees in a number of situations, including most IEP team meetings and some mediations, and also prohibits bonuses or multipliers. Finally, money damages are available under the IDEA in, at most, extremely limited circumstances; in the vast majority of cases the remedy is equitable (e.g. ordering a specific program or service).¹⁸⁵ In contrast to other civil rights laws, IDEA plaintiffs cannot depend on paying their attorney a portion of a damages award,

¹⁸³ *Buckhannon*, 532 U.S. at 603 n.4.

¹⁸⁴ *S-1 & S-2*, 21 F.3d at 50.

¹⁸⁵ See generally Mark Weber, *Damages Liability in Special Education Cases*, 21 REV. LITIG. 83 (2002) (giving an overview of the relevant case law). The leading case supporting damages as an IDEA remedy is *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995). For an example of the more typical holding that damages are not available under the IDEA, see *Witte by Witte v. Clark Country Sch. Dist.*, 197 F.3d 1271, 1275.

and consequently, parent special education attorneys normally do not take cases on a percentage contingency fee basis. Thus, any narrowing of the scope of fee eligibility will impact the IDEA more than other fee-shifting statutes.

In post-*Buckhannon* cases, most lower courts are applying *Buckhannon*'s "prevailing" definition to section 1983 and other civil rights claims, such as those under the IDEA. The three federal appeals courts (the Second, Third and Seventh Circuits) that have addressed the issue have found *Buckhannon* applies to the IDEA.¹⁸⁶ A number of federal trial courts across the country have reached a similar result.¹⁸⁷

However, courts are not unanimous on this point. One district court, later reversed on appeal, found that while a "very close issue," IDEA attorney's fees analysis is not

¹⁸⁶ See *T.D. v. Lagrange Sch. Dist.*, 2003 WL 22682466 at *5-7 (7th Cir. Nov. 14, 2003) ("strong presumption the *Buckhannon* applies to each fee-shifting statute" is not rebutted in the case of the IDEA by text, legislative history, nor public policy); *John T. v. Del. County. Intermediate Unit*, 318 F.3d 545, 552 (3d Cir. 2003) (same; preliminary injunction does not confer prevailing status); *J.C. v. Reg'l Sch. Dist.*, 278 F.3d 119, 124-25 (2d Cir. 2002) (*Buckhannon* applies to IDEA). The Ninth Circuit has held that *Buckhannon* applies to § 1983 claims. *Bennett v. Yoshina*, 259 F.3d 1097, 1100-01 (9th Cir. 2001) ("There can be no doubt that the Court's analysis in *Buckhannon* applies to statutes other than the two in that case.... We hold that to qualify as a 'prevailing party' under 42 U.S.C. § 1988 a party must obtain a 'judicially sanctioned change in the legal relationship of the parties' [citation to *Buckhannon* omitted]. The catalyst theory no longer applies . . . and any of our precedents to the contrary are overturned." Also denying fees to plaintiffs whose litigation had caused a favorable change in state legislation). The Ninth Circuit has apparently not yet addressed *Buckhannon* and the IDEA.

¹⁸⁷ *Alegria v. District of Columbia*, 2002 WL 31818925 (D.C. Cir. Dec. 13, 2002) (same); *Doe v. Boston Pub. Sch.*, 264 F. Supp. 2d 65, 69-73 (D. Mass. 2003) (parent who succeeded through private settlement has not prevailed); *Matthew V. v. DeKalb County. Sch.*, 244 F. Supp. 2d 1331, 1340-44 (N.D. Ga. 2003) (same); *Adams v. District of Columbia*, 2002 WL 31818925 (D.D.C. Dec. 12, 2002) (same; no fees for voluntary IDEA settlement); *Van Aucken v. Skiver*, 38 IDELR 95 (N.D. Ohio 2002) (same); *Luis R. v. Joliet Township High School, Dist.*, 2002 WL 54544 at *2 (N.D. Ill. Jan. 15, 2002) (after *Buckhannon*, IDEA mediation agreement read into record in front of IDEA hearing officer is not a consent decree, does not constitute "prevailing," and does not entitle parents to attorney's fees).

controlled by *Buckhannon*.¹⁸⁸ This court found that IDEA's language specifically defining "actions or proceedings" which may trigger eligibility for attorney's fees as including mediation under some circumstances, and its statutorily-excluded scenarios for attorney's fees such as attendance at IEP team meetings, mean 1) that the IDEA fee language is not governed by *Buckhannon*, and 2) that since the IDEA's special fee language and fee exclusions do not mention settlement, it continues to confer prevailing status.¹⁸⁹ It seems very likely courts will continue to apply *Buckhannon* to the IDEA. Not only is the "prevailing party" language identical, but the legislative history indicates intent that the phrase be construed consistently with other civil rights laws. Arguments that *Buckhannon* does not apply to the IDEA seem actually to be disguised criticism of *Buckhannon* itself.

3. *If Buckhannon Applies to the IDEA What Does it Mean for Administrative Proceedings?*

a. *Are Fees Still Available for a Successful Hearing Decision?*

As discussed above, the *Buckhannon* majority repeatedly refers to "judicially sanctioned" or "court-ordered" changes in the legal relationship between the parties (emphasis added). Moreover, while it is well-settled law at the federal appeals court level¹⁹⁰ that fees are available under the IDEA for favorable hearing officer decisions, the Supreme Court has never so held. It seems inevitable then that in the near future a school will make the argument that fees are limited to success in court. Given the IDEA's "action or proceeding" language

¹⁸⁸ *T.D. v. LaGrange Sch. Dist.*, 222 F. Supp. 2d 1062, 1065 (N.D. Ill. 2002), *reversed*, 2003 WL 22682466 (7th Cir. Nov. 14, 2003).

¹⁸⁹ *T.D.*, 222 F. Supp. 2d at 1064-67. These arguments were considered and rejected on appeal. *T.D.*, 2003 WL 22682466 at *5-7. *See also Akinseye v. District of Columbia*, 193 F. Supp. 2d 134, 139 (D.D.C. 2002) (following *Buckhannon* in IDEA case with "great reservation"); *Johnson v. District of Columbia*, 190 F. Supp. 2d 34, 45 (D.D.C. 2002) (applying *Buckhannon* to settlements would undermine the purpose of the IDEA).

¹⁹⁰ *See, e.g., LaGrange*, 2003 WL 22682466 at *9 (explaining why *Buckhannon* does not change this result).

and its elaborate administrative settlement offer provisions and provisos regarding IEP meetings and mediation, discussed above, this argument seems unlikely to prevail. Indeed, the same recent Seventh and Eighth Circuit decisions rejecting reimbursement for expert witnesses because the text of the IDEA did not explicitly so provide also unanimously affirmed fee reimbursement for purely administrative success because the text of the IDEA provided for reimbursement for success in “action[s] or proceeding[s].”¹⁹¹ However, it should be noted that other civil rights fee-shifting provisions also refer to “actions or proceedings”¹⁹² and have been interpreted to bar fees for administrative success. Unlike those statutes, however, the IDEA requires an administrative hearing before filing a lawsuit. This difference has been the basis for pre-*Buckhannon* courts to award fees to parents who won administrative hearings.

Assuming *Buckhannon* applies to the IDEA, it is clear that a court-sanctioned consent decree is sufficient for prevailing status.¹⁹³ What of a consent decree at the hearing officer level? The Second Circuit has suggested that a hearing-officer approved consent decree is sufficient for prevailing status.¹⁹⁴ Reportedly, the New York City Board of Education is litigating this issue.¹⁹⁵

Exactly how much imprimatur or approval is required? Is reading an agreement into the record enough? Is having the hearing officer sign it sufficient? Is the word “order” determinative? Is it enough that the agreement is enforceable

¹⁹¹ *Id.*; *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1030-31 (8th Cir. 2003) (emphasis added).

¹⁹² *See, e.g.*, 42 U.S.C. § 1988(b) (2002) (Section 1983, Title VI and Title IX claims); 42 U.S.C. § 2000e-5(k) (2002) (Title VII claims). The ADA permits fee reimbursement for “any action or administrative proceeding.” 42 U.S.C. § 12205 (2003).

¹⁹³ *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep’t of Health Res.*, 532 U.S. 598, 603 (2001).

¹⁹⁴ *J.C. v. Reg’l Sch. Dist.*, 278 F.3d 119, 123-25 (2d Cir. 2002).

¹⁹⁵ *See M.S. v. N.Y. City Bd. of Educ.*, 2002 WL 31556385 at *3-4 (S.D.N.Y. Nov. 18, 2002), currently on appeal to the Second Circuit. The appeal on this issue is noted by Michael Hampden, *Attorney’s Fees Under the IDEA*, 130 PRAC. L. INST. N.Y. 235, 245 (2003).

by a hearing officer or court? How about having the mediator sign a mediation agreement, or including in the mediation agreement that it is enforceable in court? Courts have not reached consensus on this issue.¹⁹⁶ The mediation issue may become moot. Under even the more parent-oriented Senate IDEA reauthorization bill, fees would become unavailable for all mediations.¹⁹⁷

b. Does Success in the State Complaint Resolution Procedure Still Confer Prevailing Status?

As discussed above, courts are split as to whether parents who are successful using the state complaint resolution procedure (CRP) established in IDEA regulations have prevailed and are eligible for fees. The Ninth Circuit held in *Lucht* that parents can prevail and be eligible for fees using CRP. In contrast, the Second Circuit held that the CRP is not an action or proceeding under the IDEA, and noted that even if the CRP is an IDEA action or proceeding, *Buckhannon* may

¹⁹⁶ Compare *T.D. v. LaGrange Sch. Dist.*, 2003 WL 22682466 at *8-9 (settlement pursuant to court-conducted settlement conference at which judge “made certain suggestions” does not confer prevailing status where it is not part of court order and court did not retain enforcement jurisdiction; suggesting that court’s signature would also be required), and *Luis R. v. Joliet Township High Sch. Dist.*, 2002 WL 54544 at *2-3 (N.D. Ill. Jan. 15, 2002) (holding after *Buckhannon*, IDEA mediation agreement read into record in front of an IDEA hearing officer is not a consent decree, does not constitute “prevailing,” and does not entitle parents to attorney’s fees), with *Roberson v. Giuliani*, 346 F.3d 75, 80, 82-84 (2d Cir. 2003) (citing *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375 (1994), in Section 1988 case, court’s retention of jurisdiction to enforce settlement agreement in dismissal order, without court review of settlement’s terms, is sufficient judicial imprimatur for “prevailing” status under *Buckhannon*, and reserving question of whether private settlement is itself sufficient), and *Ostby v. Oxnard Union High*, 209 F. Supp. 2d 1035, 1039-42 (C.D. Cal. 2002) (relying heavily on *Barríos v. Cal. Interscholastic Fed’n*, 277 F.3d 1128 (9th Cir. 2002), *cert. denied*, 537 US 820 2002, IDEA mediation agreement is sufficient for prevailing status since it is judicially enforceable) and *Brandon K. v. New Lenox Sch. Dist.*, 2001 WL 34049887 at *2-3(N.D. Ill. 2001) (settlement entered into due process hearing record as hearing officer “agreed order” is sufficient for prevailing status)).

¹⁹⁷ S. 1248, 108th Cong. (2003).

mean that CRP success is not enough for prevailing status.¹⁹⁸ As the *Buckhannon* decision limits fee-shifting to scenarios where there is specific statutory authority, and the IDEA's CRP does not involve the imprimatur of a court nor even a hearing officer, does not involve an evidentiary proceeding, does not provide an explicit right to be represented by counsel, is investigated and pursued by the state rather than the parent, and offers no appeals,¹⁹⁹ schools are expected to argue that CRP success does not confer prevailing status. This argument seems a strong one.

B. Practice Implications of Buckhannon, Assuming it Applies to the IDEA and Private Settlements

1. Availability of Legal Services for Parents

Assuming it applies to the IDEA and private settlements, an obvious result of *Buckhannon* will be reduced access to legal services. Parent attorneys, at least those in private practice, can ill afford to take cases on behalf of parents who are not wealthy enough to pay the lawyer's fees themselves. If parents decide to go pro se and the matter ends up in court, in some circumstances they will be barred from *pro se* representation of their children's claims.²⁰⁰ The research described above in Part IV suggests that reducing legal representation for parents will reduce their success in IDEA disputes. As described immediately below, parent success will be further limited by the shift in power to schools that *Buckhannon* causes.

¹⁹⁸ *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023, 1027 (9th Cir. 2000); see *Vultaggio ex rel. Vultaggio v. Bd. of Educ.*, 343 F.3d 598, 602-04 (2d Cir. 2003).

¹⁹⁹ *Vultaggio*, 343 F.3d. at 603 (noting that "such a streamlined, informal process would not seem to require or benefit from the participation of lawyers").

²⁰⁰ *Johns v. County of San Diego*, 114 F.3d 874, 876-78 (9th Cir. 1997) (holding *pro se* father cannot represent his son's § 1983 claim); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 230-37 (3d Cir. 1998) (holding non-attorney parent has no right to represent his child *pro se* in federal IDEA lawsuit).

2. School Strategies

Assuming it applies to the IDEA and private settlements, *Buckhannon* gives schools involved in IDEA disputes significantly more power and new strategies. The vast majority of IDEA disputes settle without a hearing officer or court decision. In most settlements before *Buckhannon* payment of some parent attorney's fees was involved. Prior to *Buckhannon*, school attorneys trying to limit parent attorneys' fee exposure could attempt to "stop the meter" on the accrual of fees by making an Fed. R. Civ. P. 68-type settlement offer at least ten days before the due process hearing. If the parent accepted the offer, the school could negotiate fees, which would hopefully not be too high since there had not yet been a hearing. If the parent rejected the offer and went to hearing but did not do better than the settlement offer, then again the school's exposure for fees would be reduced. After the 1997 amendments, school districts could also resolve disputes at IEP team meetings, for which fees are in most cases unavailable.

Buckhannon, as most courts are interpreting it, provides schools with a new and powerful opportunity not only to limit, but to completely avoid, exposure for parent attorney's fees. If the school is actually able to privately settle with the parents prior to a due process hearing or court decision, the school is not liable for the parent's attorney's fees. This appears to be so whether the settlement explicitly states that no attorney's fees are to be paid, or whether it is silent on the issue of attorney's fees. Supreme Court precedent under another fee-shifting civil rights statute holds that it is not unethical to make a settlement offer contingent upon the waiver of attorney's fees.²⁰¹ Thus, schools may have little incentive to pay attorney's fees as part of a pre-hearing settlement. Note, however, that one court has held that in an IDEA dispute, fee waivers may violate IDEA if school policy requires waivers for all settlements, or if the waiver offer is

²⁰¹ *Evans v. Jeff D.*, 475 U.S. 717, 730-43 (1986).

intended to coerce counsel into not taking more IDEA cases, or if fee waivers interfere with IDEA right to counsel.²⁰²

Schools may thus attempt to quickly settle cases to both minimize their own fees and avoid paying the parent's fees. Alternatively, schools may make generous settlement offers on the eve of, or in the middle of, a hearing or trial, to moot the dispute and avoid fee liability. For example, at the close of the presentation of evidence in a hearing, but before an actual decision, the school may decide there is a real chance of losing and make a settlement offer.

3. Parent Strategies

As described above, this likely new school approach creates an extremely difficult situation for parent attorneys, who in many cases rely on the fee shifting provision for payment of their fees, and whose clients cannot afford representation otherwise. Thus, one likely consequence of *Buckhannon* is that parents will initiate fewer complaints,²⁰³ and when they do initiate these complaints, will be more likely to represent themselves, and to settle their disputes short of a hearing or litigation, and perhaps to succeed less often. Parents with some financial means may choose to use their funds to privately purchase educational services for their child rather than to hire an attorney.²⁰⁴

If fewer IDEA complaints are filed, there will likely be fewer occasions when the IDEA's stay put provision is triggered. Under the IDEA's "stay put" provision, when a

²⁰² *Johnson v. District of Columbia*, 190 F. Supp. 2d 34, 36-37, 40-41 (D.D.C. 2002) (so concluding in light of *Evans* dicta and its analysis of IDEA).

²⁰³ A prominent parent special education attorney's website identifies "the real danger in [*Buckhannon*] is discouraging parents from even considering challenging their school district." Reed Martin, *Could you "prevail" in your lawsuit but "lose" your attorney's fees and costs? You need to understand how to deal with a new U.S. Supreme Court case*, *Buckhannon v. West Virginia HHR*, at <http://www.reedmartin.com/buckhannonvwestvirginiahhr.html> (last visited Jan. 21, 2004).

²⁰⁴ See Mark Weber, *Special Education Attorneys' Fees after Buckhannon Board & Care Home, Incorporated v. West Virginia Department of Health and Human Resources*, 2002 B.Y.U. EDUC. & L.J. 273, 287 (2002).

request for a due process hearing is filed, the student remains in her last uncontested placement until the dispute is resolved.²⁰⁵ If the dispute is not resolved until a hearing officer issues a decision, the student could be in the stay put placement for months. If there are appeals to court, the stay put period could last years. The stay put provision thus amounts to a powerful incentive for parents to file for a hearing when the school proposes a change in the IEP with which the parents disagree, or the school plans to suspend or expel their child. In the event of an expulsion, for example, parents can trigger stay put by filing for a hearing and block implementation of the expulsion while the IDEA hearing process and appeals are pending. Of course, even after *Buckhannon*, parents can request a hearing, in part or in whole to trigger stay put, and represent themselves.

Parent attorneys may have their clients sign a representation agreement indicating that the client agrees not to accept a settlement offer that does not include fees. However, there is an ethical duty to convey all settlement offers to client, including offers that do not provide for attorney's fees. There is thus the real and significant possibility that a client will accept a settlement offer that conflicts with the representation agreement. This in fact appeared to happen in one recent case, where the school offered the parent far more than she asked for, conditioned on her agreement to waive fees, and the parent accepted the offer in her child's interests.²⁰⁶ For the attorney to insist that a client reject a settlement offer that provides the parent with everything she sought is arguably unethical. At the very least, it makes parent representation in special education disputes a less attractive proposition.

Another option for parent attorneys is to seek to make settlements a hearing officer-sanctioned consent decree, or at least to write into the settlement agreement that it has the force and effect of a consent decree, to be reviewed, approved, and

²⁰⁵ 20 U.S.C. § 1415 (2000). There are exceptions for serious misconduct such as bringing a gun to school.

²⁰⁶ *Johnson*, 190 F. Supp. 2d at 36-37.

enforced by a hearing officer, or to write into the settlement that the parties agree that the parents have prevailing status.²⁰⁷

Parents may make more complaints under section 504 to the Office of Civil Rights. Since such complaints are investigated and decided by OCR, the level of parent attorney (or *pro se* parent) involvement need not be high. The OCR complaint process may end the dispute to the parents' satisfaction. If not, an IDEA due process hearing can be held, and eventually a lawsuit may be filed. Section 504 violations may give rise to money damages in some situations if litigation results.

Parent attorneys may take a harder line in their demands and approach to disputes, in order both to preserve prevailing status and hence eligibility for fees, and to prevent schools from unilaterally mooting disputes as described above. Parent attorneys may elect to skip mediation, since success in it likely does not confer prevailing status.²⁰⁸ Parent attorneys may make demands schools are unlikely to agree to, so as to preclude the schools from making an acceptable offer and mooting the case. In particular, parent attorneys may more frequently include claims for damages. A nationally prominent IDEA parent attorney's website specifically recommends making damages claims for this purpose.²⁰⁹ Since damages are available under the IDEA in narrow circumstances, and hearing officers lack authority to award them, schools are unlikely to voluntarily pay them, preserving the case for a court decision. As one commentator has noted, IDEA damages claims increase the adversary nature of an IDEA dispute, as allegations of serious personal misconduct are often involved, and thus the financial and emotional costs for the parties are elevated.²¹⁰ Parent attorneys may also attempt to avoid mootness by asserting that the behavior complained of is part of a pattern or is otherwise likely to

²⁰⁷ See Hampden, *supra* note 195 (PLI presentation by Legal Services attorney including suggested language for settlement agreements).

²⁰⁸ See Weber, *supra* note 169, at 283.

²⁰⁹ See Martin, *supra* note 203.

²¹⁰ See Weber, *supra* note 169, 285-86, 289 (discussing this issue more extensively).

recur.²¹¹ Finally, parents and their attorneys may look to more favorable fee-shifting language in their state's special education laws.

4. Consequences for Special Education Services

Buckhannon may thus ultimately change the nature and quality of special education. From the school perspective, pre-hearing private settlement of IDEA disputes becomes a much more attractive option, as settlement not only ends the accrual of fees by their own attorney but avoids liability for fees for the parent's attorney. This may mean that schools become more willing to agree to changes requested by the parent. In cases where the parent seeks beneficial changes, this is of course good for the student. In cases, however, where the school in good faith believes that its proposal is better, the school may end up agreeing to changes which do not help the student. Schools spending less money on their own and parents' attorneys' fees will in theory have more money to spend on actual education services.

From the parent perspective, it may be harder to disagree with the school's proposal without the assistance of an attorney, but easier to get the school to agree to changes if the parent does ask for them. Unless the parent is wealthy, it almost certainly will be harder to find an attorney to take the case if the school will not agree.

VI. Possible Caps on Fees Under House IDEA Reauthorization Bill

A. Changes to the IDEA Fee Provisions in the House and Senate Reauthorization Bills

The IDEA reauthorization bill passed by the House on April 30, 2003, HR. 1350, would effectively cap the hourly

²¹¹ Two recent articles suggest this approach. Paolo Annino, *supra* note 167 (also criticizing *Buckhannon* decision generally); Weber, *supra* note 169, at 284.

attorney fee rates eligible for reimbursement.²¹² Specifically, HR. 1350 provides that the Governor of each state (or his designee, perhaps the state superintendent of public instruction) shall set hourly rates for reimbursement. These maximum hourly rates would apparently be set annually and made public. The committee report to the bill notes “concern[] about excessive litigation under the Act and the burden that local educational agencies face in paying fees to attorneys” and expresses confidence “that the addition of this provision will help restore balance to the proceedings under this Act and continue to provide early opportunities for schools and parents to foster more cooperative partnerships and resolve problems.”²¹³

²¹² HR.1350 provides in pertinent part:

(i) ADMINISTRATIVE PROCEDURES- Section 615 of the Individuals with Disabilities Education Act (20 U.S.C. § 1415) is amended-- (1) by redesignating subsection (i) as subsection (h); and... (C) in paragraph (3), by amending subparagraph (C) to read as follows: '(C) DETERMINATION OF AMOUNT OF ATTORNEYS' FEES- '(i) IN GENERAL- Fees awarded under this paragraph shall be based on rates determined by the Governor of the State (or other appropriate State official) in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection. '(ii) NOTICE- The Governor of the State (or other appropriate State official) shall make available to the public on an annual basis the rates described in clause (i). H.R. 1350, 108th Cong. § 205(i) (2003).

²¹³ The complete description of HR. 1350's attorney's fees provision is as follows:

Attorney's fees

The Committee remains concerned about excessive litigation under the Act and the burden that local educational agencies face in paying fees to attorneys. The bill includes language that requires each Governor (or their designee) to set the rate of attorney's fees that may be awarded for actions under this Act that arise in their State. The fees set by a Governor may take into account the geographic differences of a state, such as rural versus urban areas, and may be a range of fees that take those geographic differences into account. The determined rates must be made available to the public each year. The Committee encourages the States to make the established rates public prior to the beginning of the school year. The Committee believes that the addition of this provision will help restore balance to the proceedings under this Act and continue to provide early opportunities for schools and parents to foster more

The committee report explains that fees may vary within a state: “fees set by a Governor may take into account the geographic differences of a state, such as rural versus urban areas, and may be a range of fees that take those geographic differences into account.”²¹⁴ For example, in theory Washington’s governor could set one fee rate for western Washington and another for the eastern part of the state, in view of intrastate differences in the cost of living and community rates for attorneys.

The IDEA reauthorization bill pending in the Senate does not contain these fee restrictions.²¹⁵ It would, however, expand the scenarios in which fees are unavailable, in effect narrowing the scope of “prevailing.” The Senate bill would bar fees for mediations whether or not a hearing was pending, unless state law authorized fees for mediation.²¹⁶ Moreover, both the pending Senate bill and the House-approved bill would also require schools to set up an informal pre-hearing meeting with parents who have requested a due process hearing. At such a meeting, the school could not bring an

cooperative partnerships and resolve problems. H.R. REP. NO. 108-77 at 116 (2003).

²¹⁴ *Id.*

²¹⁵ S. 1248, pending in the Senate, provides in pertinent part:

'SEC. 615. PROCEDURAL SAFEGUARDS. '(3) JURISDICTION OF DISTRICT COURTS; ATTORNEYS' FEES- [(A)..(C) unchanged] '(D) PROHIBITION OF ATTORNEYS' FEES AND RELATED COSTS FOR CERTAIN SERVICES- [(i) unchanged] '(ii) IEP TEAM MEETINGS- Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e). '(iii) OPPORTUNITY TO RESOLVE COMPLAINTS- A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered-- '(I) a meeting convened as a result of an administrative hearing or judicial action; or '(II) an administrative hearing or judicial action for purposes of this paragraph. [(E) unchanged] '(F) REDUCTION IN AMOUNT OF ATTORNEYS' FEES- Except as provided in subparagraph (G), whenever the court finds that-- '(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy; [(ii) - (iv) substantively unchanged] [(G) unchanged] S. 1248, 108th Cong. § 615(i)(3)

²¹⁶ 2003 S. 1248, 108th Cong. (2003).

attorney unless the parents brought one also. If the dispute was resolved at that meeting, the Senate bill would not provide for fee reimbursement.²¹⁷

B. The Earlier IDEA Fee Cap in the District of Columbia

If HR. 1350, or something like it, becomes the law, it will not be the first time Congress has capped IDEA attorney's fees. For fiscal years 1999-2001, Congress limited reimbursement of parent attorneys' fees for IDEA disputes with the District of Columbia's public school system to \$50 per hour with a \$1300 maximum, and later raised rates to \$125 per hour with a \$2500 maximum (except for "extended or complex litigation").²¹⁸ By a vote of 2-1, a federal appeals court upheld this cap in the face of constitutional and statutory challenges.²¹⁹ The majority's description of Congress's thinking in adopting the D.C. fee cap, and its analysis of its legality, is instructive in thinking through the fee changes that may soon become part of the IDEA.

At the time of the case, the D.C. school system had longstanding and significant failures to comply with the IDEA.²²⁰ These failures had resulted in a compliance agreement and continuing oversight by the Department of Education, as well as a huge number of due process hearing requests by parents.²²¹ The majority took notice of the huge fee payments (\$10 million in fiscal year 1998) made by the

²¹⁷ *Id.* (meeting not required if parents waive it or parties have agreed to mediation). The House bill has similar language. H.R. 1350, 108th Cong. (2003).

²¹⁸ Pub. L. No. 105-277, § 130, 112 Stat. 2681, 2681-3138 (1998) (fiscal year 1999); Pub. L. No. 106-113 § 129, 113 Stat. 1501, 1517 (1999) (fiscal year 2000); Pub. L. No. 106-522, § 122, 114 Stat. 2440, 2464 (2000) (fiscal year 2001).

²¹⁹ *Calloway v. District of Columbia*, 216 F.3d 1, 25 (D.C. Cir. 2000) (upholding IDEA fee reimbursement cap of \$50 per hour with \$1300 maximum, same as for representation of indigent persons in District charged with misdemeanors, with exception for "extended or complex litigation").

²²⁰ *Id.* at 3-4.

²²¹ *Id.* at 2-4 (noting that D.C. schools served one in 200,000 of the nation's disabled students, but were responsible for almost unimaginable 45 percent of due process hearing requests).

D.C. school district to parent attorneys.²²² The majority seemingly found those payments to be a windfall to parent attorneys.²²³ Citing a newspaper article and the Congressional findings that underlie the D.C. fee cap, the majority seemed to agree that the fee payments took desperately needed money from the school system.²²⁴ The plaintiffs in the case reported that the fee cap limited their access to legal representation, citing refusals by several attorneys who no longer did special education work because of the fee cap.²²⁵ Data from the NASDSE study described above in Part IV suggests the fee cap also reduced IDEA hearings in the District. In 1998, there were 1,950 hearing requests and 498 hearings in the district. In 1999, hearing requests declined by more than 35 percent to 1,250 and actual hearings declined by 28 percent to 357.²²⁶

The District of Columbia Public Schools' total payments of IDEA fees to parents' attorneys during the era of the fee cap continued to be high, albeit much less than the payments would have been without the cap. The GAO reports \$12.7 million in IDEA fees paid to parent attorneys during the fee cap era.²²⁷ This breaks down into \$10 million for administrative hearings and \$2.7 million for litigation. These payments were made in connection with 5,804 matters for an average payment of \$1,715.²²⁸ Without the fee cap, administrative fee payments would be an estimated \$27.7 million for this period.²²⁹ Court-ordered attorney's fees in

²²² *Id.* (payments of \$10 million in fiscal year 1998).

²²³ *Id.* (citing Washington Post story explaining that in District parent special education representation had moved from "an obscure niche" to a "booming, lucrative industry").

²²⁴ *Id.* at 4.

²²⁵ *Id.* at 5.

²²⁶ *Ahearn, supra* note 139, at 5-6. In 2000, the number of hearing requests bounced back somewhat to 1,499, as did the number of hearings to 419, but these levels still fall far short of 1998 when the fee cap was imposed.

²²⁷ *DCPS: Limitation of Attorneys' Fees for Fiscal Years 1999 through 2001*, GAO-03-224R (2002), available at www.gao.gov (last visited Oct. 5, 2003).

²²⁸ *Id.* (noting that fee cap did not cap other reimbursable expenses, for example, paralegal fees).

²²⁹ *Id.*

connection with litigation were estimated to be relatively unchanged by the fee cap.²³⁰

The court unanimously and soundly rejected the constitutional equal protection challenge to the fee cap, holding that as D.C. residents were not a suspect class nor was educational quality a fundamental right, rational basis analysis governed the claim.²³¹ The court found a rational basis for the cap since “[i]t is at least conceivable . . . that capping fees will produce additional resources for direct educational services, and that, despite limiting parents’ ability to use litigation as a means of enforcing IDEA, [the fee cap] will yield a net benefit for disabled children.”²³² The majority also noted that the fee cap’s actual limitation was on the D.C. schools’ payment of fees, rather than the courts’ fee awards.²³³ The dissenting judge in the case disagreed on this issue, finding that the fee cap effectively modified the IDEA’s substantive fee provisions and was therefore a local law preempted by the federal IDEA.²³⁴ In a more recent case, a court found the “extended and complex” representation necessary to override the D.C. fee cap.²³⁵

C. The Efficacy of an IDEA Fee Cap From Parent and School Perspectives

Those opposed to HR. 1350's fee restrictions note that the capping of fees for reimbursement of parent attorneys without capping fees for school attorneys will result in an imbalance of power, with schools but not parents having access to the most highly qualified (or at least the most expensive) lawyers. Opponents also raise the hypothetical possibility of governors setting extremely low hourly rates (on

²³⁰ *DCPS*, *supra* note 227, at 2 (noting that fee cap limited DCPS’s payments, rather than courts’ authority to award fees; and did not limit fees under other statutes such as Section 1983).

²³¹ *Id.* at 6-7.

²³² *Calloway v. District of Columbia*, 216 F.3d 1, 4 (D.C. Cir. 2000).

²³³ *Id.* at 9-10.

²³⁴ *Id.* at 14-15 (Ginsburg, J., dissenting).

²³⁵ *Hammond v. District of Columbia*, No. Civ. A. 99-1723(GK) slip op. (D.D.C. 2001) (referring to 2001 D.C. appropriations cap of \$2500 per case).

one parent advocacy website, a state hypothetically sets a \$1 hourly reimbursement rate).²³⁶

These concerns find some support in the research discussed above in Part IV. The fact that parents at least partially succeed in almost half of all hearings nationally, as well as the specific case of the D.C. schools' longstanding and widespread IDEA compliance problems, described in Part VIB, suggest that schools have not yet fully achieved compliance with the IDEA. The great increase in IDEA hearings and litigation, noted in Part IV, which has not resulted in a drop in parent success rates, corroborates that there continue to be problems with noncompliance and suggest that the increase in hearings and litigation is not the result of a spate of frivolous claims. That parents, at least in the 1980s, succeeded significantly more often when they had an attorney suggests that access to legal representation is important to parent success when schools have violated the IDEA. If the school costs of \$8,000 to \$12,000 for a mediation or hearing and \$96,000 for a year of litigation are any indicator of parent costs, they are far beyond the means of most parents. While these costs are indisputably a burden on schools, at \$24 per IDEA student nationally, and about one-third of 1 percent of special education costs, they do not represent a huge portion of special education budgets. Since most disputes are in large or wealthy districts, they are able to be absorbed into school budgets that either involve large numbers of students or significant resources. Finally, with the current fee-shifting language of the IDEA, disputes are more likely in wealthier schools. A cap on fees would likely further contain disputes to wealthy families. The former D.C. fee cap serves as a possible scenario if the House bill becomes law. At \$50 per hour with a \$2,500 maximum, few attorneys could afford to do IDEA work, as the cessation of IDEA work by several parent attorneys in the D.C. case showed.

²³⁶ Why the Senate Needs to Write a Better IDEA for Children with Disabilities and Prevent Harm to their Education, *at* www.geocities.com/protectidea/detailed.html (last visited Nov. 23, 2003).

Those who support the House fee cap language also can find support in both the IDEA research described in Part IV and the D.C. fee cap described in Part VIB. IDEA hearings and litigation have greatly increased. Parents do not even partially succeed more than half of the time, suggesting that more often than not the school is incurring legal costs although it has not violated the IDEA. Those costs are substantial, as much as \$96,000 for a single year of litigating a single IDEA case. Moreover, they cannot really be budgeted. A school does not know in advance that an IDEA parent will file for a hearing. Schools not only get meager federal funding under the IDEA (approximately seven cents of the special education dollar)²³⁷, they are not allowed to use their federal IDEA funds to pay parent attorney fees. While IDEA dispute resolution costs may be only a small fraction of special education costs nationally, they tend to be concentrated in certain districts (including urban school districts which are the most strapped financially) and are an indisputably significant burden to those schools that incur them. As the court upholding the D.C. fee cap pointed out, a fee cap is thus likely to reallocate resources from the few involved in hearings or litigation to the larger group of students who need them. Arguably, leaving fee cap decisions to governors or similar state officials who have primary responsibility for education and its funding is fairer than a federal (spending clause) statute's unfunded requirement of fee payments to parents by schools.

Congress's ultimate decision on the IDEA fee cap will not be an easy one. Congress can soothe itself by noting that it is leaving the decision on fee caps to state officials, rather than imposing one itself. However, if the House fee cap provision becomes law, it seems inevitable that IDEA parent access to effective dispute resolution will be compromised. On the other hand, under the current arrangement under which

²³⁷ TWENTY-FOURTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AT I-32, *available at* <http://www.ed.gov/about/reports/annual/osep/2002/index.html> (last visited Nov. 23, 2003) (1999-2000 federal IDEA funds are 7.5 percent of total special education expenditures).

fees are not capped, schools involved in IDEA disputes face enormous costs which likely limit their ability to serve all students well.

D. Congress's Decision on the IDEA Fee Cap as a Signpost on the IDEA's Future Direction

Congress's ultimate decision on the fee cap will signal a direction on the larger issue of whether the IDEA is in essence a spending clause education regulation law with limited enforcement mechanisms, or is instead a civil rights law with normal civil rights enforcement including uncapped fee shifting. As discussed above, the IDEA has never fallen squarely under either of these two statutory approaches. Like other education-specific laws, it is modestly funded Spending Clause legislation purporting to provide positive education-related rights to students. However, it goes beyond these statutes in terms both of the right-based language it uses and the elaborateness of the enforcement mechanisms it establishes, including an attorney's fees remedy. Parents and their advocates will now argue that the IDEA is a true civil rights statute which must be interpreted consistently with others. Specifically, they will argue there is no rationale for capping IDEA fees when other civil rights laws provide for uncapped reimbursement of reasonable fees. Schools will now argue the IDEA is something other than a typical civil rights law, and thus it is appropriate to cap fees. They will likely point to the unique provisions in the IDEA's fee language – its specifics concerning mediations and IEP team meetings, and its ban on bonuses or multipliers, as evidence that Congress has long recognized it to be appropriate to limit fees under the IDEA more so than under civil rights laws. Thus, in a different sense than whether *Buckhannon* is interpreted to apply to the IDEA consistently with other civil rights statutes, and with parents and schools switching positions on the essence of the IDEA, the outcome of the IDEA fee cap issue will likely serve as an important guidepost on the future civil rights (or other) path of the IDEA.

Conclusion

The *Buckhannon* Court limited the scope of “prevailing” status and hence eligibility for attorney’s fees under other civil rights statutes. Courts have begun to address whether and how the decision applies to the IDEA, in which case fee eligibility for parents will become more limited. Thus far, most but not all courts have agreed with school arguments that the IDEA’s fee provisions should be interpreted parallel to those in other civil rights laws, and have therefore narrowed IDEA fee eligibility for parents. On the other hand, and in another branch of government, if the House bill’s fee cap is finally adopted by Congress, the IDEA fee-shifting provisions will work differently than those under other civil rights statutes, but again in a way that limits fees for parents. Two different branches of government are thus being asked to decide whether to treat the IDEA consistently with other civil rights statutes. The two “sides” to IDEA disputes, schools and parents, each want the IDEA treated like other civil rights statutes in one but not the other situation. Schools (and parents) thus face arguing to courts that the IDEA is just like (different from) other civil rights laws while they lobby Congress that the IDEA is different from (just like) other civil rights laws. Moreover, there is every possibility that one branch of government will treat the IDEA like other civil rights laws while the other branch will consider it to be different from those other civil rights statutes. Pending these outcomes, the future of IDEA dispute resolution could not be less clear.