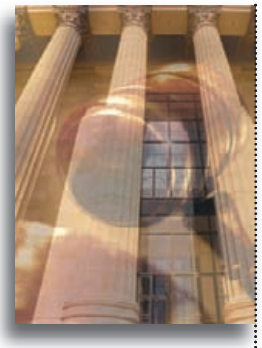

Attorney Fees, School Boards, and Special Education

By Allan G. Osborne Jr., Ed.D., and Charles J. Russo, J.D., Ed.D.

A major expense associated with litigating disputes under the Individuals with Disabilities Education Act (IDEA) is the right of parents who succeed in suits against their school boards to recover attorney fees. Yet until recently, boards were generally unable to recover attorney fees from parents even when they succeeded in demonstrating that they met IDEA mandates.

In one of the more significant changes affecting the cost of delivering special education, the IDEA now allows school boards to recover attorney fees if they can convince courts that parental suits were unreasonable.

In light of the significance of statutory language allowing school boards to recover fees, this column reviews the IDEA's key features and accompanying case law addressing attorney fees. It then briefly reflects on the meaning of the attorney fees provisions for school business officials and other education leaders who are responsible for overseeing school board finances.

IDEA Attorney Fee Provisions

The IDEA includes a comprehensive dispute resolution system culminating in judicial review. However, in *Smith v. Robinson* (1984), the Supreme Court upheld language in an early version of the IDEA that forbade parents from recovering attorney fees if they prevailed in suits against their school boards to secure the rights of their children.

Dissatisfied with this outcome as inconsistent with the intent of the IDEA, Congress amended the statute to allow courts to award attorney fees to parents who prevail in litigation against their school boards (20 U.S.C.A. § 1415[I][3][B][C]).

Parents are treated as prevailing parties if they obtain all or most of the relief they seek or succeed on the most significant of their issues so that the legal relationship between the parties changes. If parents are only partially successful, courts may reduce awards to reflect their limited success. When parental success is minimal, courts do not usually award fees.

Awards of attorney fees are based on such factors as the prevailing rates in the areas where cases were litigated (20 U.S.C.A. § 1415[I][3][B]) and are subject to appellate review to ensure that trial courts did not abuse their discretion (*A.R. ex rel. R.V. v. New York City Department of Education* 2005).

In a noneducation case, *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Services* (2001), the Supreme Court ruled that to recover attorney fees, plaintiffs must obtain enforceable judgments on the merits of their claims or court-ordered consent decrees. Most courts agree that this holding applies to the recovery of attorney fees under the IDEA and that prevailing parents may be reimbursed for their legal expenses if settlement agreements are approved by hearing officers or the judiciary and are entered into judicial records.

Courts can deny requests for attorney fees if parents reject settlement offers and fail to obtain more favorable judicial relief (20 U.S.C.A. § 1415[I][3][D][I]; *Dell v. Board of Education* 1995); if they reach settlements without resorting to due process hearings (*P.O. ex rel. L.T. v. Greenwich Board of Education* 2002); if they reach settlements pursuant to the IDEA's complaint resolution procedures (*Vultaggio ex rel. Vultaggio v. Board of Education, Smithtown Central School District* 2002); and if attorney fees (*Holmes v. Millcreek Township School*

District 2000) or the time billed for legal services (*Cavanaugh ex rel. Cavanaugh v. Cardinal Local School District* 2005) is excessive or vague (*C.C. ex rel. Mrs. D. v. Granby Board of Education* 2006).

As noted, the IDEA had not allowed school boards to seek reimbursement for their legal expenses even if they prevailed in litigation. Still, using their general equity powers under Rule 38 of the Federal Rules of Appellate Procedure (2008), courts occasionally awarded attorney fees to school boards if they deemed parental claims to be frivolous or to prolong litigation unnecessarily.

In an early example, the First Circuit awarded fees to a school board in New Hampshire in affirming that a parental claim lacked merit and caused unnecessary delays in reaching a resolution to a dispute over services for the daughter who was dyslexic (*Caroline T. v. Hudson School District* 1990). The court decided that since the parents unjustly engaged in tactics that led to undue delays and failed to cooperate in settlement negotiations, they were responsible for the school board's legal fees.

2004 IDEA Amendments

In 2004, Congress amended the IDEA to allow school boards to seek reimbursements for their legal expenses when parents file suits that are later found to be frivolous, unreasonable, or without foundation or when litigation continued after it clearly became frivolous, unreasonable, or without foundation (20 U.S.C.A.§ 1415[I][3][B][I][II]).

In a case from Wisconsin, the Seventh Circuit awarded fees to a school board in pointing out that the parents and their lawyer filed suit seeking attorney fees when they had no reasonable basis for doing so because they clearly were not the prevailing party (*Bingham v. New Berlin School District* 2008).

The IDEA also allows boards to recoup expenses when parental actions are brought for improper purposes, cause unnecessary delays, or needlessly increase the cost of litigation (20 U.S.C.A § 1415[I][3]-[B][I][III]). Interestingly, under this provision, awards are levied against the parents' attorneys, not the parents themselves, since the law expects lawyers to be more aware of the IDEA's requirements.

In such a case from California, a federal trial court upheld an administrative law judge's imposition of unnamed sanctions against the attorney who represented parents in their unsuccessful challenge to their daughter's individualize education program (*K.S. ex rel. P.S. v. Fremont Unified School District* 2008). In justifying the sanction, the court explained that the lawyer filed a motion for clarification over the date of a hearing in subjective bad faith, without merit, and for the sole purpose of harassing the board.

Like parents, school boards must clearly be the prevailing party in legal actions in order to obtain fee awards. For example, the Ninth Circuit refused to grant fees to the Alaska Department of Education and Early Development because it was not the prevailing party (*Oscar v. Alaska Department of Education and Early Development* 2008). Further, a federal trial court in California interpreted the IDEA as requiring a school board to show that a parental complaint was frivolous, unreasonable, or without foundation before it was willing to grant a request for fees. In rejecting the claim, the court observed that the mere fact that the school board may have prevailed in the litigation was insufficient (*Hawkins v. Berkeley Unified School District* 2008).

On the other hand, school boards are subject to the same types of sanctions as parents. For example, a federal trial court in California penalized a board and its attorney for raising frivolous objections, making misstatements, and mischaracterizing facts in violation of the principle that officials cannot continue suits that are clearly frivolous, unreasonable, or without foundation or engage in tactics that unnecessarily prolong litigation or otherwise abuse the process (*Moser v. Bret Harte Union High School District* 2005).

Reflections

Since litigation can be expensive, disputes about special-education placements can and often do consume a significant portion of the annual budgets of school boards, particularly when they must reimburse prevailing parents for their legal expenses. Unfortunately, with tight budgets, every dollar spent on legal costs is one taken away from providing a quality education for all students. School business officials and other education leaders thus have a responsibility to students and taxpayers to make reasonable efforts to reduce their legal expenses.

Perhaps the most significant step education officials can take in seeking to limit their legal expenses is to try to recoup attorney fees when they prevail in parental actions that were clearly unreasonable.

In addition to recouping their legal expenses, school boards that attempt to recover attorney fees from parents and their lawyers may have the added bonus of discouraging frivolous suits in the future. To this end, school business officials and other education leaders should work with their special-education administrators, their building-level educators, and their attorneys to identify cases in which they have a reasonable likelihood of success in asserting their own rights under the IDEA's attorney fee provisions.

Even so, school board officials should be cautious because if they seek to recover attorney fees from parents, they may be responsible for the parents' costs in defending that

litigation in the event that they are unsuccessful.

Conclusion

By paying careful attention to when their school boards can recover legal fees in disputes with parents of students with disabilities or can take steps to avoid litigation, school business officials will be true to their duty of accounting for the use of district funds.

To the extent that education leaders can recover fees that their school boards had to spend in defending against frivolous litigation or use the threat of doing so to unnecessary litigation, then they will be better able to have the financial wherewithal to provide a high-quality education to all children in their districts.

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