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BUCKHANNON, SPECIAL EDUCATION DISPUTES, AND
ATTORNEYS' FEES:
TIME FOR A CONGRESSIONAL RESPONSE AGAIN

*Stefan R. Hanson**

I. INTRODUCTION

Federal civil rights statutes, including the Individuals with Disabilities Education Act (hereinafter, IDEA or Act),¹ often have provisions permitting courts to award attorneys' fees to prevailing plaintiffs. Congress intended these fee-shifting provisions to encourage plaintiffs to act as private attorneys general in enforcing these statutes. Implementing that intent, the federal courts, with the exception of those in the Fourth Circuit,² have used a so-called "catalyst theory" to determine whether a plaintiff qualified as a prevailing party for purposes of attorney fee-shifting provisions in civil rights statutes. Under the catalyst theory, if plaintiffs could demonstrate a causal connection between their bringing suit and a corresponding change in defendants' behavior, then plaintiffs qualified as "prevailing parties" for purposes of attorney fee-shifting provisions. The catalyst theory did *not* require a judgment in plaintiffs' favor, a judicially sanctioned consent decree, or even a formal settlement.

In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,³ the Supreme Court of the United States rejected the catalyst theory. *Buckhannon* held that to qualify as a "prevailing party," a party must achieve some form of judicial *imprimatur* of success, such as an enforceable judgment on the merits or a

* Ph.D. (New York University), J.D. (Chapman University, expected May 2003). The author wishes to thank Professor Celestine R. McConville and Dr. Amy E. Hurley for their invaluable assistance in developing this paper.

1. *The Individuals with Disabilities Education Act of 1997*, Pub. L. No. 105-17 (1997), 111 Stat. 37 (codified at 20 U.S.C. § 1400 *et seq.* (2002)).

2. *See S-1 & S-2 v. St. Bd. of Educ. of N. C.*, 21 F.3d 49 (4th Cir. 1994).

3. 532 U.S. 598 (2001).

court-ordered consent decree.⁴ A private settlement would not qualify.⁵

Buckhannon involved the Fair Housing Amendments Act of 1988 (FHAA)⁶ and the Americans with Disabilities Act of 1990 (ADA).⁷ However, lower courts, following the Supreme Court's lead,⁸ have applied *Buckhannon's* holding widely, including to special education litigation brought under the IDEA. In IDEA litigation, parents and guardians pursue their disabled children's rights to a "free and appropriate public education" (FAPE) through various means: state-level administrative mechanisms of compliance complaints, mediation, due process hearings, and lawsuits in federal courts. Congress intended that the fee-shifting provisions of the IDEA would promote its enforcement, ensuring that the approximately 6.1 million disabled American children, or 12.5% of the children currently enrolled in public school,⁹ have equal access to FAPE.

This note examines the impact of *Buckhannon* on IDEA litigation, arguing that *Buckhannon* undermines the role of the IDEA fee-shifting provisions in the enforcement of the IDEA. Under the *Buckhannon* regime, plaintiffs risk incurring attorneys' fees far in excess of the value of their claims; even if they ultimately obtain all of the relief they originally sought. Inevitably, parents will bring fewer claims, however meritorious, and more children will be denied the opportunity for FAPE. In time, fewer disabled children will mature into self-sufficient, independent adults—an individual and societal harm that Congress intended the IDEA to remedy.

4. *Id.* at 604.

5. *Id.* at 604 n. 7.

6. *The Fair Housing Amendments Act of 1988*, Pub. L. No. 100-430 (1988), 102 Stat. 1619 (codified at 42 U.S.C. § 3601 *et seq.* (2002)).

7. *The Americans with Disabilities Act of 1990*, Pub. L. No. 101-336 (1990), 104 Stat. 32 (codified at 42 U.S.C. § 12101 *et seq.* (2002)).

8. Chief Justice Rehnquist's introduction in *Buckhannon* recognizes its holding would be much more widely applied: "Numerous federal statutes allow courts to award attorneys' fees and costs to the 'prevailing party.' The question presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not." 532 U.S. at 600.

9. Natl. Ctr. for Educ. Statistics, Off. of Educ. Research & Improvement, U.S. Dept. of Educ., *Common Core of Data, America's Public Schools, Statistics for Year 2000*, <<http://nces.ed.gov/ccd/bat/index/asp>> (accessed Jan. 14, 2003).

Buckhannon also discourages the early resolution of disputes. So even though parents now may initiate fewer disputes, those that they do initiate are likely to be protracted. As previously stated, to obtain attorneys' fees, plaintiffs must emerge as prevailing parties. Since *Buckhannon* requires a court-ordered judgment or consent decree for prevailing party status, plaintiffs are less likely to seek settlement, instead choosing to persevere to judgment to obtain reimbursement of their attorneys' fees. Defendants are also less likely to seek early resolution of disputes. At any time up until judgment, defendants can provide plaintiffs the relief they seek, thus mooting plaintiffs' cases, and thereby denying plaintiffs prevailing-party status and attorneys' fees. If the defendants do this, plaintiffs will have their relief, but will be responsible for their own attorneys' fees. In many cases, the costs to a disabled child's family will be considerable, unjust, and contrary to the intent of the IDEA. The overall effect will be to protract that IDEA litigation that does occur.

The recent case of J.C., a Connecticut teenager, illustrates the detrimental impact of *Buckhannon* on the IDEA's mandate.¹⁰ In 1995, J.C.'s worried parents asked the school district to evaluate J.C. to determine his possible eligibility for special education services.¹¹ The school district did not comply.¹² In 1997, the parents repeated their request, and, after a meeting, the school district found J.C. ineligible.¹³ In 1998, J.C. vandalized a school bus, and the school district scheduled an expulsion hearing.¹⁴ In response, J.C.'s family hired an attorney who filed for due process hearing under the IDEA to address whether the school district should provide J.C. special education rather than expel him.¹⁵ The school district then met with J.C.'s parents and their attorney and reached a settlement agreement in which J.C.'s parents obtained all the relief they had sought in their due process filing.¹⁶

Subsequently, J.C. and the school district convened the due process hearing solely for the purpose of adopting the

10. *J.C. v. Bd. of Educ.*, 278 F.3d 119 (2d Cir. 2002).

11. *Id.* at 121

12. *Id.*

13. *Id.* at 121-122.

14. *Id.* at 122.

15. *Id.*

16. *Id.*

agreement as an official decision and order.¹⁷ At the hearing, however, the school district refused to cooperate with this process, causing the hearing officer to issue a final written decision dismissing the hearing issues as moot.¹⁸ The school district then proceeded to comply with the terms of the settlement agreement.¹⁹

When the school district refused to pay J.C.'s attorneys' fees, his parents filed suit in federal district court seeking attorneys' fees as a prevailing party under the IDEA.²⁰ Applying the catalyst theory, the District Court awarded J.C.'s parents nearly \$14,000 in attorneys' fees.²¹ Following the District Court's decision, the Supreme Court decided *Buckhannon*. On appeal, the Second Circuit Court of Appeals retroactively applied *Buckhannon* to J.C.'s case and reversed the District Court,²² in effect rendering J.C.'s parents responsible for their own attorneys' fees.

J.C. illustrates how *Buckhannon* has shifted the costs and risks associated with IDEA enforcement onto the families of disabled children. As *J.C.* shows, parents who initiate an IDEA dispute, or accept an early resolution of an IDEA dispute, risk substantial attorneys' fees even when they prevail entirely. This new regime creates incentives inconsistent with the goals of the IDEA and thwarts congressional intent. Since the claims in IDEA litigation are often equitable or relatively small in value, plaintiffs' attorneys' fees may approach or exceed the value of the relief obtained. Congress did not intend for families of disabled children, acting as private attorneys general, to shoulder such a degree of risk in the assertion of their children's right to a FAPE. Instead, Congress intended to encourage the filing of meritorious claims. Overall, *Buckhannon's* effect is to deny more disabled children, an especially vulnerable minority, their constitutional right to a FAPE.

The remainder of this note discusses these ideas in greater detail. Part II reviews the legislative history of the IDEA, and

17. *Id.*

18. *Id.*

19. *Id.* at 122.

20. *Id.*

21. *J.C. v. Regl. Sch. Dist. No. 10*, 115 F. Supp. 2d 297, 302 (D. Conn. 2000), *overruled*, 278 F.3d 119 (2d Cir. 2002).

22. *J.C.*, 278 F.3d at 125.

Part III discusses the history of attorney fee-shifting provisions in the IDEA. Part IV then reviews the *Buckhannon* decision and its impact on IDEA litigation. Finally, Part V discusses judicial solutions to the *Buckhannon* problem and ultimately argues that congressional remedial action is necessary to preserve disabled children's educational rights, and toward this end, it proposes a legislative remedy.

II. THE LEGISLATIVE BACKGROUND OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Federal law currently requires the states to provide the same educational opportunities to children with disabilities as they do to children without disabilities. Protection for children with disabilities essentially began with the Education for All Handicapped Children Act of 1975 (EAHCA).²³ Prior to that time, there was little commitment to the education of handicapped children in the states' public school systems. While Congress has amended the law several times over the years, it has remained committed to the goal of providing equal educational opportunities for disabled children by offering funding to states for the education of disabled children in public schools.²⁴

This legislative commitment to the education of disabled children emerged over time from an interweaving of general civil rights legislation and legislation specifically designed to protect the disabled. Even early civil rights legislation, dating back to the Civil Rights Act of 1871,²⁵ still has relevance for the equal protection claims of disabled children to a FAPE. Historically, however, the EAHCA is more closely associated with the civil rights movements of the 1950s and 1960s. Legislation associated with the EAHCA included the Rehabilitation Act of 1973,²⁶ the first significant civil rights law to address the issue of discrimination against the disabled. Before the Rehabilitation Act, federal efforts to help the

23. *Education for All Handicapped Children Act of 1975*, Pub. L. No. 94-192 (1975), 89 Stat. 773, (also known as the *Education of the Handicapped Act* (EHA)).

24. Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. Davis L. Rev. 349 (1990).

25. *The Civil Rights Act of 1871*, 42 U.S.C. § 1983 (1994).

26. *The Rehabilitation Act of 1973*, Pub. L. No. 93-112 (1973) (codified, as amended, at 29 U.S.C. § 794 (2002)).

disabled had not addressed civil rights *per se*, but instead had focused on vocational rehabilitation. The most important provision of the Rehabilitation Act is Section 504, which provides that “[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²⁷ While the Rehabilitation Act originally sought to end employment discrimination against the handicapped,²⁸ the broad language of Section 504 has had the effect of protecting the handicapped from discrimination in nearly all situations in which a potential discriminator receives federal financial assistance.²⁹ Section 504 prohibits the denial of “benefits of . . . any program or activity receiving Federal financial assistance” and still serves to protect the disabled from discrimination in education as well as employment and other “activities or programs” that receive federal funds.³⁰ In 1978, the Department of Health Education and Welfare issued regulations to implement Section 504 that specifically stated that disabled children were entitled to “free and appropriate” educational opportunities and that “services should be designed to meet the individual educational needs of handicapped persons.”³¹

As with the Rehabilitation Act, the EAHCA reflects congressional intent in the 1970s to guarantee equal rights to persons with disabilities. The Rehabilitation Act focused on expanding and improving the tradition of vocational rehabilitation,³² while the EAHCA focused on guaranteeing equal educational opportunity for handicapped children.³³ The sweep of the Rehabilitation Act, through Section 504, became,

27. Pub. L. No. 93-112, § 504, 87 Stat. 355, 394.

28. Jonathan C. Drimmer, *Cripples, Overcomers, And Civil Rights: Tracing The Evolution of Federal Legislation and Social Policy For People With Disabilities*, 40 UCLA L. Rev. 1341 (1993).

29. *Id.* at 1385.

30. 87 Stat. at 394.

31. 45 C.F.R. § 84.33(a), (b) (1992) (cited in Weber, *supra* n. 24, at 368).

32. Drimmer, *supra* n. 28, at 1382.

33. The Senate Report accompanying the EAHCA noted that “[t]his Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people.” Sen. Rpt. 94-168, at 9 (June 2, 1975) (reprinted in 1975 U.S.C.C.A.N. 1425, 1433).

and has remained, much broader than its vocational roots. Today, both acts provide overlapping and parallel protections to children with disabilities.³⁴

The EAHCA was the first substantial federal commitment specifically to ensure the access of disabled children to a FAPE. Earlier federal efforts had been less comprehensive and lacked sufficient funding to support their intent.³⁵ In 1972, two groundbreaking federal cases recognized that there was widespread systemic denial of disabled children's statutory right to FAPE: *Pennsylvania Association for Retarded Children v. Pennsylvania*³⁶ and *Mills v. Board of Education*.³⁷ These two cases, along with twenty-seven decisions in the several states,

34. For example, The Office for Civil Rights, U.S. Department of Education currently enforces Section 504 and investigates complaints of discrimination by institutions receiving federal funds, such as schools. See <<http://www.ed.gov/offices/OCR>> (accessed Jan. 14, 2003).

35. These federal legislative efforts included establishing the Bureau of the Education for the Handicapped in 1966 by amendment to the Elementary and Secondary Education Act, Pub. L. No. 89-750. Then, in 1971, Congress passed a separate act, the Education of the Handicapped Act, Pub. L. No. 91-230. The Education of the Handicapped Amendments of 1973 extended the Act for three years beginning in July 1, 1973. This legislative history is detailed in Sen. Rpt. 94-168, at 5 (June 2, 1975) (reprinted in 1975 U.S.C.A.N. 1425, 1429).

36. *Pa. Assn. for Retarded Children v. Pa.*, 343 F. Supp. 279 (E.D. Pa. 1972). Based on the equal protection and due process clauses of the Fourteenth Amendment, the court held the proposed consent decree to be fair and reasonable to plaintiff; the Court prefaced its order by stating, "...[A]pproval means that plaintiff retarded children who heretofore had been excluded from a public program of education and training will no longer be so excluded after September 1, 1972. This is a noble and humanitarian end in which the Commonwealth of Pennsylvania has chosen to join. Today, with the following Order, this group of citizens will have new hope in their quest for a life of dignity and self-sufficiency." *Id.* at 302.

37. *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). In *Mills*, the District Court of the District of Columbia established the constitutional equal protection basis for access to education of disabled children. The District Court wrote as follows:

The Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), stated: "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 875 (emphasis added).

repeatedly affirmed the rights of disabled children to equal opportunity to a FAPE.³⁸

Responding to this case law, Congress recognized that “[i]ncreased awareness of the educational needs of handicapped children . . . pointed to the necessity of an expanded Federal fiscal role.”³⁹ Congress also found “that of the more than 8 million children (between birth and twenty-one years of age) with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving a free and appropriate education. 1.75 million . . . receive no educational services at all.”⁴⁰ Earlier statutes did not offer the states sufficient financial help and incentives to ensure disabled children received a FAPE. Under these circumstances, Congress passed the Education of the Handicapped Amendments of 1974.⁴¹ These amendments drew upon the holdings of the federal and state legal cases that affirmed disabled children’s rights to equal education. Specifically, the amendments provided for substantial additional financial assistance to the states to identify, locate, and evaluate all handicapped children. They also provided for the protection of handicapped children’s rights by due process procedures.⁴² These amendments became the basis for the EAHCA enacted in 1975.

Overall, EAHCA emphasized procedure over substance. To receive funding under EAHCA, a state had to demonstrate that it has in effect a policy that assures all handicapped children the right to a free appropriate public education.⁴³ EAHCA contained detailed procedures to which states needed to adhere to demonstrate a compliant policy and to ensure their eligibility for funding.

Also, EAHCA due process procedures involved detailed steps for designing a disabled child’s education plan and the resolution of disagreements between parents and local educational agencies. Congress deliberately relied upon the

38. Sen. Rpt. 94-168, at 6 (June 2, 1975) (reprinted in 1975 U.S.C.C.A.N. 1425, 1430).

39. *Id.* at 5.

40. *Id.* at 8 (as reported by Bureau of Education for the Handicapped).

41. *Education of the Handicapped Amendments of 1974*, Pub. L. No. 93-380, 88 Stat. 576 (1974).

42. Sen. Rpt. 94-168, at 6-7 (June 2, 1975) (reprinted in 1975 U.S.C.C.A.N. 1425, 1430-1431).

43. 20 U.S.C. § 1412(1) (1975).

“procedural safeguards of rights as the means to achieve the broader substantive goal that ‘handicapped’ children would receive an ‘appropriate’ education in integrated settings.”⁴⁴ Also, a contemporaneous congressional staff member commented, “[Y]ou have to go for procedural safeguards rather than substantive things; they’re too hard to deal with in litigation. The judges can deal with procedures.”⁴⁵ This congressional focus on the detailed procedures of delivering FAPE, rather than a focus on the detailed substance of FAPE, became a hallmark of the EAHCA.

The Supreme Court’s decision in *Board of Education v. Rowley*⁴⁶ affirmed the EAHCA emphasis on procedure over substance.⁴⁷ There the Court considered the substantive meaning of a FAPE for a disabled child under the EAHCA.⁴⁸ The parents of Amy Rowley, an eight-year old deaf child, had asked their school district to provide Amy with a sign-language interpreter for her classroom.⁴⁹ The school district declined, asserting that it had provided other personalized instruction and related services.⁵⁰ Amy’s parents maintained that their school district was denying Amy a FAPE by denying her a classroom interpreter.⁵¹ The District Court and the Second Circuit Court of Appeals found for Amy’s parents, but the Supreme Court reversed.⁵²

The Supreme Court found that since Amy was performing above average in school, and since the school district had offered other accommodations, the EAHCA did not require the school district to provide Amy with a sign-language interpreter in order for Amy to receive a FAPE.⁵³ The Court found that a state satisfied the EAHCA’s FAPE requirement when it provided instruction and services to afford a handicapped child

44. David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166, 178 (1991).

45. *Id.* at 178 (citing D. Neal & D. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 22 (Stan. U. Inst. for Research on Educational Finance & Governance Rep. No. 82-A27 1983).

46. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

47. *Id.* at 177.

48. *Id.*

49. *Id.* at 184.

50. *Id.*

51. *Id.* at 185.

52. *Id.* at 177.

53. *Id.* at 185.

“some educational benefit.”⁵⁴ It concluded that the EAHCA intended to confer “some educational benefit” upon a disabled child, rather than to “maximiz[e] the potential” of the disabled child.⁵⁵ So, as a result, since *Rowley*, a FAPE for a disabled child has meant an educational program that confers “some educational benefit” upon the disabled child.⁵⁶

As part of the procedures of the EAHCA, Congress detailed the requirements for a disabled child’s “individualized educational plan” (IEP).⁵⁷ An IEP details the educational approach intended to meet the *unique* needs of the disabled child. The plan would be developed in a meeting attended by representatives of the local educational agency, the child’s teacher(s), the child’s parent(s) or guardian(s), and, where appropriate, the child.⁵⁸ The written IEP document should contain:

(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.⁵⁹

According to the EAHCA, the IEP team must review and potentially revise the IEP at least annually.⁶⁰

In 1990, Congress passed a series of technical amendments to the EAHCA primarily to replace the term “handicap” with “disability” and “handicapped” with “disabled.” Also, Congress

54. *Id.* at 200.

55. *Id.*

56. The substantive standard of “some educational benefit” for a FAPE has remained as the federal standard. Some states have had or have higher substantive standards. In Michigan, the standard is “to develop the maximum potential” of the disabled child. Mich. Comp. Laws Ann. § 380.1751(1) (cited in *Dong v. Bd of Educ.*, 197 F.3d 793, 799–800 (6th Cir. 1999)).

57. 20 U.S.C. § 1401(18) (1975).

58. 20 U.S.C. § 1401(19) (1975).

59. *Id.*

60. 20 U.S.C. §§ 1414(a)(5), 1413(a)(11) (1975).

renamed the EAHCA the "Individuals with Disabilities Education Act" (IDEA).⁶¹ These changes left the content of the Act essentially unchanged.

The due process procedural safeguards of the IDEA (formerly, the EAHCA) include two primary enforcement mechanisms designed to protect disabled children's rights to a FAPE. First, the IDEA specifically provides for impartial due process hearings⁶² with the right of appeal to the district court.⁶³ Other procedural safeguards associated with the administrative due process hearings include the right to counsel, the right to present evidence, and the right to present, confront, and compel the attendance of witnesses.⁶⁴

The second enforcement mechanism is the Complaint Resolution Process (CRP) at the state level.⁶⁵ Under the CRP regulations, a State Education Agency (SEA) must develop written procedures to resolve complaints. Typically, although not always, complaints about the failure of a local educational agency (LEA) to comply with an agreed-upon IEP are addressed through the CRP. Disputes regarding the content of the IEP typically are directed through the administrative due process hearing procedure.⁶⁶ Under the minimum federal complaint procedures, SEAs must act within 60 days after a complaint is filed to 1) carry out an independent on-site investigation; 2) give the complainant the opportunity to submit additional information about the allegations in the complaint; 3) review all relevant information and make an independent determination; 4) issue a written decision with findings of fact and conclusions; 5) include steps for the

61. Pub. L. No. 101-476, § 901, 104 Stat. 1103 (1990).

62. 20 U.S.C. § 1415(f)(1) (1997).

63. 20 U.S.C. § 1415(g), (i) (1997).

64. 20 U.S.C. § 1415(h) (1997).

65. The provisions regarding state level complaint resolution procedures appear in the IDEA implementing regulations. 34 C.F.R. §§ 300.660-300.662 (1999). See also 20 U.S.C. § 1221(e)(3) (2002) (authorizing the Secretary of Education to "... make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by the Department").

66. Section 300.661, a newly developed subsection of the IDEA federal regulations, reflects that some issues may be presented as both complaints and due process hearings and calls for the SEA to set aside those portions of a complaint that are also the subject of a due process hearing until the resolution of the hearing. 34 C.F.R. § 300.661(c) (1999).

effective implementation of the decision; and 6) provide the reasons for the SEAs decision.⁶⁷

In the 1997 reauthorization of the IDEA, Congress introduced mediation into the specific procedural remedies offered under the Act.⁶⁸ The provisions for mediation required that 1) the mediation be voluntary,⁶⁹ 2) the mediation not be used to delay the parent's right to a due process hearing,⁷⁰ 3) the mediation be conducted by a qualified, impartial, and trained mediator,⁷¹ 4) any agreement reached in mediation be in writing,⁷² 5) no content of mediation discussions be used in any subsequent due process hearing,⁷³ and 6) the state bear the cost of the mediation.⁷⁴

Two trends foreshadowed the congressional introduction of mediation into the IDEA procedural safeguards in the 1997 reauthorization. First, many states already had introduced voluntary mediation procedures into their own special education procedural safeguards. Second, many concerned parties had notified Congress that from the perspective of many school district officials, the IDEA promoted costly litigation, especially since attorneys' fees for both parties to any litigation could easily become costs to a school district.⁷⁵ Thus, Congress expressed its intent as follows:

To encourage early resolution of problems whenever possible, section 615 requires States to offer mediation as a voluntary option to parents and LEAs as an initial process for resolving disputes. However, the bill requires that a State's mediation system may not be used to delay or deny a parents right to due process. . . . The committee is aware that, in States where mediation is being used, litigation has been reduced, and parents and schools have resolved their differences amicably, making decisions with the child's best interest in mind.

67. 34 C.F.R. § 300.661 (1999).

68. Steven Marchese, *Putting Square Pegs Into Round Holes: Mediation and the Rights of Children With Disabilities Under the IDEA*, 53 Rutgers L. Rev. 333, 346 (2001).

69. 20 U.S.C. § 1415(e)(2)(A)(i) (1997).

70. 20 U.S.C. § 1415(e)(2)(A)(ii) (1997).

71. 20 U.S.C. § 1415(e)(2)(A)(iii) (1997).

72. 20 U.S.C. § 1415(e)(2)(F) (1997).

73. 20 U.S.C. § 1415(e)(2)(G) (1997).

74. 20 U.S.C. § 1415(e)(2)(D) (1997).

75. 143 Cong. Rec. S4354-02 (1997) (statement of Sen. Gorton).

It is the committee's strong preference that mediation become the norm for resolving disputes under IDEA. The committee believes that the availability of mediation will ensure that far fewer conflicts will proceed to the next procedural steps, formal due process and litigation, outcomes that the committee believes should be avoided when possible.⁷⁶

Also, President Clinton at the time had noted that the introduction of mediation into the procedural safeguards of the IDEA built upon the success story of the Act.⁷⁷

III. THE HISTORY OF ATTORNEYS' FEES REIMBURSEMENT PROVISIONS IN THE IDEA

Originally, the EAHCA had no provision for the reimbursement of attorneys' fees for prevailing plaintiffs. But the Civil Rights Act⁷⁸ and the Rehabilitation Act,⁷⁹ which have relevance and applicability to the disabled child's assertion of his or her right to a FAPE, have attorney fee-shifting provisions. The Civil Rights Attorneys' Fees Awards Act of 1976⁸⁰ provides for attorneys' fees for a prevailing plaintiff in

76. Sen. Rpt. 105-17, at 26-27 (May 9, 1997).

77. 1997 U.S.C.C.A.N. 147 (Statement by President William J. Clinton upon signing H.R. 5).

78. 42 U.S.C. § 1983, as amended, (1996) reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

79. 29 U.S.C. § 794 (1973) reads as follows:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

80. 42 U.S.C. § 1988 (1976). The section of the act regarding attorneys' fees in civil rights action, 42 U.S.C. § 1988 (b) reads as follows:

In any action or proceeding to enforce a provision of sections 1981, 1981a,

an action brought under the Civil Rights Act. Also, section 505 of the Rehabilitation Act of 1973⁸¹ provides for the award of attorneys' fees to a prevailing plaintiff in an action brought under Section 504 of the Rehabilitation Act. Perhaps because of these fee-shifting provisions, in the early years of the EAHCA, claims for FAPE brought under the EAHCA also often included claims brought under both the Civil Rights Act and the Rehabilitation Act.

In its 1984 decision in *Smith v. Robinson*,⁸² however, the Supreme Court held that disabled children asserting their civil rights under the EAHCA could not rely on intertwined or related claims brought under Section 1983 or Section 504 as a way of obtaining reimbursement for attorneys' fees.⁸³ The *Smith* Court held that the comprehensiveness and detail of the EAHCA administrative provisions indicated that Congress did not intend for disabled children to rely upon statutes other than the EAHCA, including the Civil Rights Act or the Rehabilitation Act, as a means to assert their claim to a FAPE.⁸⁴ As a result of *Smith*, disabled children who prevailed

1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb *et seq.*], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorneys' fees, unless such action was clearly in excess of such officer's jurisdiction.

81. 29 U.S.C. § 794a(a)(2) (1973) reads as follows: "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000(d) *et seq.*] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."

29 USC § 794 a(b) states, "In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

82. *Smith v. Robinson*, 468 U.S. 992 (1984).

83. *Id.* at 1020.

84. *Id.* at 1020-1021. In response to the broader *Smith* holding, Congress amended the IDEA to restore disabled children equal access to the broad range of federal constitutional and statutory protections. In its 1999 decision *Witte v. Clark County School District*, 197 F.3d 1271 (1999), the Ninth Circuit cited to the amended section, "IDEA § 1415(l), previously found at 20 U.S.C. § 1415(f), provides: Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies

in a claim for FAPE brought under the EAHCA had no way of obtaining reimbursement of their attorneys' fees.

The dissent in *Smith* argued that the majority misapplied the principles of statutory construction,⁸⁵ and applied an unnecessarily restrictive interpretation of the Civil Rights and Rehabilitation Acts.⁸⁶ As Justice Brennan asserted in his dissent:

Congress will now have to take the time to revisit the matter. And until it does, the handicapped children of this country whose difficulties are compounded by discrimination and by other deprivations of constitutional rights will have to pay the costs. It is at best ironic that the Court has managed to impose this burden on handicapped children in the course of interpreting a statute wholly intended to promote the educational rights of those children.⁸⁷

The dissent proved prescient as Congress, in 1986, passed the Handicapped Children's Protection Act of 1986 (HCPA) providing authority for the reimbursement of attorneys' fees to prevailing plaintiffs in claims brought under the EAHCA.⁸⁸ The HCPA amended the EAHCA and provided that parents or guardians of a handicapped child or youth could at the court's discretion be awarded reasonable attorneys' fees based on the prevailing rate within the community.⁸⁹ These amendments

available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. § 12101 *et seq.*], Title V of the Rehabilitation Act of 1973 [29 U.S.C. § 79[1] *et seq.*], or other Federal laws protecting the rights of children with disabilities" 197 F.3d 1271, 1274-1275 (1999). In an accompanying footnote, the *Witte* court explained the congressional intent, "[t]his section restored the availability of remedies under the federal Constitution and section 504 of the Rehabilitation Act of 1973, as amended in 29 U.S.C. § 794 (1988), for deprivation of disabled students' education rights, after the Supreme Court's restrictive decision in *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984), that such remedies were unavailable. At the same time Congress reaffirmed the necessity of exhausting the IDEA's administrative procedures before seeking judicial relief on these alternate theories." *Witte*, 197 F.3d at 1275 n. 2.

85. *Smith*, 468 U.S. at 1024.

86. *Id.* at 1025.

87. *Id.* at 1031 (Brennan, J., dissenting).

88. *Handicapped Children's Protection Act of 1986*, Pub. L. No. 99-372, 100 Stat. 796 (1986). The preamble reads: "An Act to amend the Education of the Handicapped Act to authorize the award of reasonable attorneys' fees to certain prevailing parties, to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition of discrimination, and for other purposes."

89. 20 U.S.C. § 1415(i)(3)(B), (C) (1986).

prohibited an award if, at least ten days before the due process hearing, the school district had made a settlement offer to the parents that the parents rejected and the court or administrative officer subsequently found that the judgment for the parents was not more favorable than the settlement offer,⁹⁰ provided the parents were not otherwise substantially justified in rejecting the settlement offer.⁹¹ These amendments also offered the court discretion to reduce attorneys' fee awards if plaintiffs unnecessarily protracted a proceeding or the fees sought were unreasonable considering the nature of the action or proceeding.⁹² Finally, the amendments authorized the court to consider whether the defendants had unnecessarily protracted the proceedings or otherwise had not complied with the intent of the fee-shifting provisions when considering plaintiffs' conduct for purposes of awarding fees.⁹³

The terms "prevailing party" and "reasonable," which appeared in the HCPA, came to occupy courts in future litigation regarding attorneys' fees in special education litigation. In the Senate Report prepared in conjunction with the Handicapped Children's Protection Act of 1986,⁹⁴ Congress stated that it intended the terms "prevailing party" and "reasonable" to be construed consistently with the Supreme Court's 1983 decision in *Hensley v. Eckerhart*.⁹⁵ In *Hensley*, the Court defined the terms as follows:

The extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorneys' fees. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorneys' fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the

90. 20 U.S.C. § 1415(i)(3)(D)(i) (1986).

91. 20 U.S.C. § 1415(i)(3)(E) (1986).

92. 20 U.S.C. § 1415(i)(3)(F) (1986).

93. 20 U.S.C. § 1415(i)(3)(G) (1986).

94. Sen. Rpt. 99-112, 1803-04 (July 25, 1985).

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

district court should award only that amount of fees that is reasonable in relation to the results obtained.⁹⁶

Notably, congressional intent regarding the definitions of “prevailing parties” and “reasonable” did not change between this 1985 Senate Report and the 1997 Senate Report accompanying reauthorization of the IDEA in 1997.⁹⁷

Since the enactment of the HCPA, actual recovery of attorneys’ fees by prevailing parents has varied to some extent by enforcement mechanism and jurisdiction. In the federal courts, there has been only one situation, that of attorney-parents representing their own children, in which prevailing plaintiffs have been unable to recover attorneys’ fees for their IDEA claims.⁹⁸ The Fourth Circuit, for example, based its denial of such fees on a “special circumstances” public policy⁹⁹ designed to encourage the “very best representation” for disabled children pursuing IDEA claims and to avoid the potential that an emotionally charged parent will inadequately represent his minor child.¹⁰⁰

Regarding other IDEA enforcement mechanisms, questions have arisen as to whether they are properly considered “actions” or “proceedings” as defined in the IDEA attorneys’ fee-shifting provisions.¹⁰¹ The current judicial consensus is that administrative due process hearings are “proceedings” under the IDEA, and that the attorney fee-shifting provisions of the IDEA apply to disputes resolved at that level without appeal to the district court.¹⁰²

96. *Id.* at 440.

97. The 1997 Senate Report addresses these issues as follows: “Questions have been raised regarding the relationship between the extent of success of the parents and the amount of attorneys’ fees a court may award. In addressing this question, the committee believes the amount of any award of attorneys’ fees to a prevailing party under part B shall be determined in accordance with the law established by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and its progeny. As we stated in the 1986 report accompanying the legislation that added the attorneys’ fees provisions: ‘It is the committee’s intent that the terms “prevailing party” and “reasonable” be construed consistent with the U.S. Supreme Court’s decision in *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983).’” Sen. Rpt. 105-17, at 26 (May 9, 1997); *see also* H.R. Rpt. 105-95 (1997).

98. *Doe v. Bd. of Educ.*, 165 F.3d 260 (4th Cir. 1998), *cert. denied*, 526 U.S. 1159 (1999). *See also*, *Woodside v Bd. of Educ.*, 2000 WL 92096 (E.D. Pa. 2000).

99. *Kay v. Ehrler*, 499 U.S. 432, 437 (1991) (cited in *Doe*, 165 F.3d at 263).

100. *Doe*, 165 F.3d at 263.

101. 20 U.S.C. § 1415(i)(3)(B).

102. *See e.g. Brown v. Griggsville Community Unit Sch. Dist. No. 4*, 12 F.3d 681 (7th Cir. 1993), *Kletzelman v. Capistrano Unified Sch. Dist.*, 91 F.3d 68, 70 (9th Cir.

There is a split in the federal courts as to whether prevailing parents can recover attorneys' fees resulting from CRPs. The Ninth Circuit and the District Court of Vermont have held that these procedures are proceedings as per the IDEA and that attorneys' fees accordingly are recoverable.¹⁰³ The District Court of Vermont found that "[a]s a matter of public policy, disallowing the recovery of attorneys' fees for work done in CRPs would discourage settlement of IDEA claims."¹⁰⁴ In contrast, the federal district court in Minnesota has twice held that CRPs were not an "action or proceeding" for the purposes of IDEA's attorneys' fees provisions. The Minnesota court acknowledged the Ninth Circuit's opposing holding, but disagreed without any accompanying argument.¹⁰⁵ The Eastern District of New York has also reviewed the split among the federal courts and found that CRPs are not actions or proceedings for purposes of the attorney fee-shifting provisions of the IDEA.¹⁰⁶

In some instances, courts have awarded parents attorneys' fees incurred in mediation, without specific contractual agreement in the settlement, and without a preliminary request for a due process hearing, provided the parents obtained some of the relief they were seeking through the mediation process.¹⁰⁷ Courts awarding these fees for mediation

1996); *McSomebodies v. Burlingame Elementary Sch. Dist.*, 897 F.2d 974, 975 (9th Cir. 1989).

103. *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023 (9th Cir. 2000). See also *Upper Valley Assn. for Handicapped Citizens v. Blue Mt. Union Sch. Dist.*, 973 F. Supp. 429 (D. Vt. 1997).

104. *Upper Valley*, 973 F. Supp. at 436.

105. *Johnson v. Fridley*, 2002 WL 334403, 3 (D. Minn. 2002).

106. *Vultaggio v. Bd. of Educ.*, 2002 WL 1889645 (E.D.N.Y. 2002). The *Vultaggio* court bolstered its decision by noting that the text of the relevant statute had changed since the *Upper Valley Association*, 973 F. Supp. 429 (see *supra* n. 103) decision:

When *Upper Valley* was decided, Section 1415(b)(6) stated that the procedures required by the IDEA 'include but shall not be limited to' the procedures enumerated in that section. Today, . . . amended Section 1415(b)(6) states that the procedures required by the IDEA 'shall include' only the procedures referred the [sic] section—the 'but shall not be limited to' language was removed.

Vultaggio, 2002 WL 1889645 at 8 (citing *Megan C.*, 57 F. Supp. 2d 776, 784). The *Vultaggio* court also found that the informality of CRPs provided a policy reason in support of the denial of attorneys' fee recovery. Given the contrary holding of *Upper Valley Association*, the *Vultaggio* decision has created a split within the Second Circuit regarding parents' recovery of attorneys' fees in CRPs.

107. See e.g. *E.M. v. Bd. of Educ.*, 849 F. Supp. 312 (D.N.J. 1994); *Massotti v. Tustin Unified Sch. Dist.*, 806 F. Supp. 221, 223 (C.D. Cal. 1992); *K.A.L. v. Bd. of*

work generally relied upon the catalyst theory, which has been rejected by *Buckhannon*.¹⁰⁸

The so-called catalyst theory developed as part of the private enforcement of civil rights. For purposes of fee-shifting provisions contained in civil rights legislation, the catalyst theory allowed plaintiffs to be considered “prevailing parties” so long as the plaintiffs could demonstrate a causal connection between their bringing suit and the change in the defendant’s behavior.¹⁰⁹ As an example, the Third Circuit permitted recovery as a prevailing party if “(1) the plaintiff obtained relief on a significant claim in the litigation; and (2) there [was] a causal connection between the litigation and the relief obtained from the defendant.”¹¹⁰

In special education litigation, the catalyst theory had become key to the enforcement of the IDEA. Through the catalyst theory, prevailing parents were able to obtain attorneys’ fees and costs as a result of settlement agreements and mediation without the requirement that courts or administrative officers enter case outcomes into the record or create any form of judicial *imprimatur* whatsoever. Before *Buckhannon*, only the Fourth Circuit had expressly rejected the catalyst theory in IDEA litigation.¹¹¹

IV. THE *BUCKHANNON* DECISION

A. *The Decision*

In May 2001, in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*,¹¹² the Supreme Court¹¹³ overruled the common practice of nine federal circuits to award attorneys’ fees to prevailing plaintiffs in civil

Educ., 1994 WL 327160, 4 (D.N.J. 1994) (cited in *Upper Valley*, 973 F. Supp. at 435).

108. See e.g. *E.M.*, 849 F. Supp. at 316.

109. *Buckhannon*, 532 U.S. at 626 (citations omitted).

110. *P.G. v. Bd. of Educ.*, 124 F. Supp. 2d 251, 259 (D. N.J. 2000) (quoting *Metro Pittsburgh Crusade for Voters v. City of Pittsburg*, 964 F.2d 244, 250 (3d Cir. 1992) (quoting *Dunn v. U. S.*, 842 F.2d 1420, 1433 (3d Cir. 1988))).

111. See *S-1 & S-2*, 21 F.3d 49.

112. *Buckhannon*, 532 U.S. 598.

113. Chief Justice Rehnquist delivered the opinion of the Court in which Justices O’Connor, Scalia, Kennedy, and Thomas joined. Justice Scalia also filed a concurring opinion in which Justice Thomas joined. Justice Ginsburg filed a dissenting opinion in which Justices Stevens, Souter, and Breyer joined. *Buckhannon*, 532 U.S. at 599.

rights litigation under the catalyst theory.¹¹⁴ By rejecting the catalyst theory, *Buckhannon* necessarily changed the practice of shifting attorneys' fees in special education litigation.¹¹⁵

A 1992 Supreme Court decision, *Farrar v. Hobby*, foreshadowed the holding in *Buckhannon*.¹¹⁶ In *Farrar*, a civil rights case filed under Section 1983, the Court examined how the term "prevailing party" had come to be defined in civil rights litigation.¹¹⁷ The Court noted that "a plaintiff 'prevails' when actual relief on the merits of [the] claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."¹¹⁸ According to the Court, "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant."¹¹⁹ In *Farrar*, the Court found that the plaintiff was a prevailing party, and therefore should be eligible for attorneys' fees.¹²⁰ However, the Court held that the nominal damages awarded to the plaintiff symbolized the lack of success on the merits, and thus, this particular plaintiff was ineligible to recover attorneys' fees under the Civil Rights Attorneys' Fees Awards Act.¹²¹

Taking its lead from *Farrar*, the Fourth Circuit rejected the catalyst theory for Section 1983 claims. In *S-1 and S-2 v. State Board of Education of North Carolina*,¹²² parents of a disabled child filed suit against the local school district board as well as

114. *Buckhannon*, 532 U.S. at 602 n. 3, cites to these examples: *Stanton v. S. Berkshire Regl. Sch. Dist.*, 197 F.3d 574, 577 n. 2 (1st Cir. 1999); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-550 (3rd Cir. 1994); *Payne v. Bd. of Educ.*, 88 F.3d 392, 397 (6th Cir. 1996); *Zinn v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994); *Little Rock Sch. Dist. v. Pulaski Cty. Sch. Dist., # 1*, 17 F.3d 260, 263 n. 2 (8th Cir. 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard v. Teska*, 31 F.3d 942, 951-952 (10th Cir. 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999). Justice Ginsburg, in her dissent, cites to the identical cases as examples of affirmation of the catalyst theory by a majority of the other Courts of Appeal even after the Fourth Circuit's 1994 rejection of the catalyst theory in *S-1 and S-2*. *Buckhannon*, 532 U.S. at 627 n. 5 (Ginsburg, J., dissenting).

115. See e.g. *J.C.*, 29 F.3d 119.

116. *Farrar v. Hobby*, 506 U.S. 103 (1992).

117. *Id.*

118. *Id.* at 111-112.

119. *Id.* at 113.

120. *Id.* at 103.

121. *Id.*; 42 U.S.C. § 1988 (1976).

122. *S-1 & S-2*, 21 F.3d 49.

the North Carolina State Board of Education and the chairman of the State Board. After the parents and the local board, but not the state board or its chairman, entered into a settlement agreement, the Fourth Circuit judges dismissed the parents' ongoing case against the State Board and its chairman as moot because the settlement agreement provided the reimbursement the parents were seeking.¹²³ The remaining issue was whether the parents were entitled to any attorneys' fees from the state defendants.¹²⁴ The Fourth Circuit, sitting *en banc*, relied on the definitions of prevailing party in *Farrar* to hold that the parents had no claim for attorneys' fees against the state defendants for their Section 1983 claims.¹²⁵ Until *Buckhannon*, however, the Fourth Circuit was alone in interpreting *Farrar* as rejecting the catalyst theory; nine other circuits had affirmed the viability of the catalyst theory after the decision in *Farrar*.¹²⁶

In *Buckhannon*, the Buckhannon Corporation operated the Buckhannon Home, an assisted-living facility in West Virginia.¹²⁷ A State fire marshal sought to enforce West Virginia fire regulations that required residents of the home to be capable of moving themselves from situations of imminent danger such as fire—a so-called “self-preservation” requirement.¹²⁸ In October 1997, the Buckhannon Corporation filed a class action suit against the State of West Virginia, two of its agencies and eighteen individuals seeking declaratory and injunctive relief that the “self-preservation” requirement violated the Fair Housing Amendments Act (FHAA)¹²⁹ and the Americans with Disabilities Act (ADA).¹³⁰ The Buckhannon Corporation filed the suit in response to an order to close the Buckhannon home.¹³¹ In 1998, before the case came to judgment, the West Virginia legislature enacted laws eliminating the “self-preservation” regulations in controversy

123. *Id.* at 50

124. *Id.* at 50–51.

125. *Id.* at 51.

126. *See supra* n. 114.

127. *Buckhannon*, 532 U.S. at 600.

128. *Id.*

129. *Id.*; *The Fair Housing Amendments Act of 1988*, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. § 3601 *et seq.*).

130. *Id.*; *The Americans with Disabilities Act of 1990*, Pub. L. No. 101-336, 104 Stat. 32 (codified at 42 U.S.C. § 12101 *et seq.*).

131. *Id.* at 600–601.

rendering the case moot.¹³² The Buckhannon Corporation moved for an award of attorneys' fees based on the fee-shifting provisions of the FHAA and the ADA according to the catalyst theory.¹³³ Both the FHAA and ADA provide for reimbursement of attorneys' fees for prevailing plaintiffs. Since the Fourth Circuit had rejected the catalyst theory in *S-1 and S-2*, the District Court denied the motion and the Circuit Court affirmed.¹³⁴

In *Buckhannon*, the majority began its reasoning by examining *Black's Law Dictionary* for the definition of "prevailing party."¹³⁵ According to *Black's*, the legal definition of "prevailing party" was "[a] party in whose favor a judgment is rendered. . . ."¹³⁶ The Court reasoned that this dictionary definition indicated the need for a judicial *imprimatur* of some sort before a party could "prevail." After examining the legislative reports accompanying the Civil Rights Attorney's Fees Awards Act, the Court decided that the legislative history surrounding attorney fee-shifting provisions was ambiguous as to congressional support of a catalyst theory.¹³⁷ The Court then reasoned that, in light of the traditional "American Rule," attorneys' fees will not be awarded absent "explicit statutory authority."¹³⁸ This ambiguous legislative history did not support a catalyst theory.¹³⁹ The Court also acknowledged various policy issues surrounding its decision, including whether "mischievous defendants" would or could now unilaterally moot actions to avoid paying attorneys' fees for prevailing plaintiffs.¹⁴⁰ The majority believed that it need not weigh these issues fully, however.¹⁴¹ Instead, the majority relied on *Black's* definition of "prevailing party" to reject the

132. *Id.* at 601

133. *Id.*

134. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health and Human Resources*, 203 F.3d 819 (Table of Unreported Decisions) (4th Cir. 2000).

135. *Buckhannon*, 532 U.S. at 603.

136. *Id.* (citations omitted).

137. *Id.* at 607. Despite the majority's recognition that its holding would be widely applied, *see supra* n. 8, no citation to the legislative history of any statute other than § 1983 appears in the *Buckhannon* decision. So, for example, no reference is made to the legislative history of the fee-shifting provisions of the IDEA, which includes reference to defining "prevailing party" as in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

138. *Id.* at 608

139. *Id.*

140. *Id.* at 608-09.

141. *Id.* at 609.

catalyst theory.¹⁴² As the Court stated, “[g]iven the clear meaning of ‘prevailing party,’ we need not determine which way these various policy arguments cut.”¹⁴³

B. Interpreting *Buckhannon*

The unweighed policy issues alluded to in *Buckhannon* have come to vex many plaintiffs seeking to enforce their right to a FAPE under the IDEA. Courts implementing *Buckhannon* have begun denying plaintiffs reimbursement for their attorneys’ fees even when the plaintiffs have brought meritorious claims and forced the opposing party to change its position. In *J.S. and M.S. v. Ramapo Central School District*,¹⁴⁴ for example, M.S., mother of J.S., a teen with a learning disability, sought reimbursement from the defendant school district for a one-year residential placement of J.S. at a private school.¹⁴⁵ The matter went to hearing and the hearing officer

142. The majority’s decision in *Buckhannon* exemplifies the Court’s trend toward greater use of dictionaries in their decision making. Empirical research on the use of dictionaries in Supreme Court jurisprudence indicates that in the 1992 term, the Supreme Court had a fourteen-fold increase in citations to dictionary definitions compared with the 1981 term. Student Author, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 Harv. L. Rev. 1437, 1440 (1994). Overall, the Court’s use of legal dictionaries as ultimate authorities in decision making reflects the current majority’s preference for textualist methods of statutory interpretation. Some observers have criticized *Buckhannon* and its use of *Black’s Law Dictionary* as reflecting a form of hypertextualism that promotes a myth of precision in judicial decision making. Aviam Soifer, *Courting Anarchy*, 82 B.U. L. Rev. 699, 726 (2002) (citing Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 Ariz. St. L. J. 275 (1998) (citing David Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 UCLA L. Rev. 23 (1983); Richard J. Pierce, Jr. *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 Colum. L. Rev. 749 (1995))). Soifer notes, in reaction to the *Buckhannon* reliance on *Black’s Law Dictionary* for the definitive definition of “prevailing party,” that “Black’s Law Dictionary trumps the Court’s own recent dicta, the view of all the circuit courts except the Fourth Circuit, the statutory civil rights context, and multiple precedents stretching back into the nineteenth century and carefully marshaled in Justice Ginsburg’s dissent.” Soifer, *supra*, at 726. All these secondary sources cite and defer to the remarkably succinct assessment of Judge Learned Hand in warning of the dangers of slavish textualism: “But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.” *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945). For arguments in support of textualism as opposed to a legislative history approach to statutory interpretation, see William W. Buzbee, *The One-Congress Fiction In Statutory Interpretation*, 149 U. Pa. L. Rev. 171 (2000).

143. *Buckhannon*, 532 U.S. at 610.

144. *J.S. & M.S. v. Ramapo C. Sch. Dist.*, 165 F. Supp. 2d 570 (S.D.N.Y. 2001).

145. *Id.* at 572–73.

received some evidence over three days.¹⁴⁶ The school district then agreed to M.S.'s demands and the case was settled.¹⁴⁷ Neither party sought to have the settlement read into the record or affirmed in any way by the hearing officer.¹⁴⁸ Applying *Buckhannon* retroactively, the Southern District of New York denied the plaintiff prevailing party status and, therefore, any prospect of fee or cost reimbursement under the IDEA. The District Court relied on *Buckhannon's* requirement that any resolution of a case involve some form of judicial *imprimatur* before a party may "prevail." Citing *Buckhannon*, the District Court stated that "[p]rivate settlement agreements do not confer prevailing party status."¹⁴⁹

There is no evidence that the school district in *J.S.* mooted the issues for the purpose of avoiding payment of J.S.'s attorney's fees, but the case history provides a blueprint for other defendants to use when it appears that they may not win their case. This approach could be especially effective when the issues involved concern equitable remedies and the state in question is one in which hearing officers may not render settlement agreements as orders or decisions unless both parties consent.¹⁵⁰

The school district in *J.C. v. Board of Education*,¹⁵¹ discussed in the Introduction, followed the *J.S.* blueprint by refusing to cooperate to make the settlement an official order. Together, *J.S.* and *J.C.* illustrate the pitfalls awaiting plaintiffs

146. *Id.* at 576.

147. *Id.* at 573.

148. Chronologically the case was settled before the Supreme Court's decision in *Buckhannon*.

149. *J.S. & M.S.*, 165 F. Supp. 2d at 575 (citing *Buckhannon*, 532 U.S. at 604 n. 7, where the Supreme Court wrote, "Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal.").

150. In Connecticut, it is not clear if under the state's law applicable in *J.C.*, whether a settlement agreement may be recorded as a hearing officer's final decision or order even with the parties' consent. The applicable Connecticut regulation cited by the hearing officer in *J.C.* reads, "A settlement agreement shall not constitute a final decision, prescription or order of the hearing officer. The settlement agreement may be read into the record as an agreement between the parties only." Conn. Agencies Regs. § 10-76h-16(d). Contrast California, where the relevant code reads, "[n]otwithstanding Government Code section 11415.60 of the Administrative Procedure Act, a decision by settlement may be issued on terms the parties determine are appropriate so long as the agreed-upon terms are not contrary to the law." Cal. Code of Regs. Tit. 5, § 3087 (2003).

151. *J.C.*, 278 F.3d 119.

who settle and would be considered prevailing parties under the catalyst theory.

Even when private settlement agreements become part of the official record, parents may be denied prevailing party status under *Buckhannon*. In *Louis R. v. Joliet Township High School District*,¹⁵² “plaintiffs contend[ed that] the mediation agreement read into the record before a hearing officer should be construed as a consent decree for purposes of assessing prevailing party status” under the *Buckhannon* regime.¹⁵³ The plaintiff was seeking to have the agreement entered as an order as a means of ensuring that the agreement would be enforceable.¹⁵⁴ The defendants argued that the agreement was a private settlement not a consent decree because the hearing officer did not make any findings or deliver a ruling.¹⁵⁵ Relying on the definition of consent decree provided by *Barron’s Law Dictionary*,¹⁵⁶ the District Court rejected the plaintiff’s characterization of the mediation agreement,¹⁵⁷ and held that without the Hearing Officer’s explicit approval, entering the agreement into the record did not convert the agreement into a consent decree. Accordingly, plaintiffs were not entitled to “prevailing party” status under *Buckhannon* and could not invoke the attorney fee-shifting provisions of the IDEA.¹⁵⁸

C. The Impact of *Buckhannon*

J.S., *J.C.*, and *Louis R.* all strictly apply *Buckhannon* illustrating how *Buckhannon*’s holding undermines Congress’ intent to promote early resolution of IDEA disputes.¹⁵⁹ The IDEA is designed for school personnel and parents to work

152. *Luis R., v. Joliet Township High Sch. Dist.*, 2002 WL 54544 (N.D. Ill. 2002).

153. *Id.* at 3.

154. *Id.*

155. *Id.*; see also *supra* n. 150.

156. *Id.* (citing Steven H. Gifis, *Barron’s Law Dictionary* 97 (4th ed., Barron’s Educ. Series, Inc. 1996) (emphasis added) (A consent decree is “a contract of the parties entered upon the record with the approval and sanction of a court of competent jurisdiction, which cannot be set aside without the consent of the parties. . .”). See also *supra* n. 142.

157. For sources discussing the role of legal dictionaries in judicial decision-making, see *supra* n. 142.

158. *Luis R.*, 2002 WL 54544 at 3. This District Court also cited to *Buckhannon*, 532 U.S. at 603 n. 7 (“Private settlement agreements do not entail the judicial approval and oversight involved in consent decrees.”).

159. Sen. Rpt. 105–17, at 26–27 (May 9, 1997).

together to determine the appropriate education for a given disabled child.¹⁶⁰ Indeed, this is a purpose of both the IEP requirement and the opportunity for early resolution of disputes through mediation.¹⁶¹ If parents and school personnel cannot agree in the IEP meeting, the parties generally proceed to mediation where a third party neutral controls the process and assists parties in coming to an agreement. Attorneys can represent both parties in mediation.¹⁶² Before *Buckhannon*, in those cases in which the mediation resulted in an agreement as to the appropriate educational plan for the disabled child, the parties entered into a settlement agreement. If the agreement provided the parents substantially all of the relief they were seeking, the parents' attorney could seek reasonable fees from the school district after the mediation. In this situation, parents would be the prevailing party under the catalyst theory, and the school district would be responsible for the parents' reasonable attorneys' fees.¹⁶³ Importantly, and as the IDEA intended, the focus of the mediation was the disabled child's unique needs and the educational plan designed to meet those needs.

As an example, a typical dispute may involve the quantity of a related service such as speech therapy. Hypothetically, the

160. *Id.* at 25 (May 9, 1997); see also Philip T.K. Daniel, *Education for Students with Special Needs: The Judicially Defined Role of the Parents in the Process*, 29 J. L. & Educ. 1 (2000).

161. See 20 U.S.C. § 1415(e).

162. Per federal law, states offer mediation as preliminary to the due process hearing and with adherence to the due process hearing timeline requirements. (For example, a decision must be rendered within 45 days of a party filing for a due process hearing. 34 C.F.R. § 300.511 (1999).) As with due process hearings, parties have a right to attorney representation at these mediations. 34 C.F.R. § 300.509(a)(1) (1999). Federal law neither prohibits nor requires attorney representation during mediation. See Sen. Rpt. 105-17, 26 (May 9, 1997). Some states offer mediation without any requirement that a party file for a hearing. In this type of mediation, some states prohibit attorney representation. For example in California, "[i]t is the intent of the Legislature that parties to special education disputes be encouraged to seek resolution through mediation prior to filing a request for a due process hearing. . .attorneys . . .shall not attend or otherwise participate in the prehearing request mediation conferences." Cal. Code of Educ. § 56500.3(a) (2003). There are no public data on how many parents participate in these prehearing request mediation conferences. However, a proposed bill, Cal. Assembly 164, 2001-2002 Reg. Sess. (Jan. 31, 2001), to compel parents to attend information sessions explaining the advantages of these mediation sessions was recently proposed. Perhaps because there is concern that time devoted to prehearing mediation may delay enforcement of due process rights, the bill has been on inactive status for some time.

163. See e.g. *E.M.*, 849 F. Supp. 312.

school district's speech therapist may believe that twenty minutes of individual speech therapy per week is the appropriate amount of therapy. The parents may obtain an independent evaluation by an outside speech therapist indicating that the child requires two hours per week of speech therapy. If the amount of speech therapy the child should receive cannot be resolved in the IEP meeting, the parents may request a due process hearing to resolve the matter. Before the hearing there may be a voluntary mediation.¹⁶⁴

In the mediation, if the parties hypothetically agreed that forty minutes of individual speech therapy per week and forty-minutes of group speech therapy per week would be reasonably calculated to help the child achieve his IEP goals, then the parties would enter into a settlement agreement. In this example, pre-*Buckhannon*, the mediation need not have considered the issue of the plaintiff's attorneys' fees because in most jurisdictions, these fees would have been available under the catalyst theory.¹⁶⁵ Under *Buckhannon*, if the plaintiff's attorneys' fees are not made part of the formal mediation agreement, it is unlikely that the plaintiff would obtain them under the fee-shifting provisions of the IDEA as now interpreted. There would be a private settlement agreement without judicial *imprimatur*, and as per the case of *J.S.*, the plaintiffs would not be the "prevailing party," even though they had substantially achieved the relief they were seeking.¹⁶⁶

In this hypothetical, the annual monetary value of the incremental increase in speech therapy would be \$2,500.¹⁶⁷ The cost of the independent speech evaluation, the attorney's preparation time, and the attorney's mediation time could easily exceed this amount. Thus, the parents would have incurred substantial financial risk in seeking to ensure that

164. 20 U.S.C. § 1415(e).

165. See *supra* n. 114.

166. *J.S.*, 165 F. Supp. 2d 570.

167. Typical fees for speech therapists in an urban area are about \$90 per hour for individual therapy, \$45 per hour for group therapy. See Am. Speech-Language-Hearing Assn., *2002 Medicare Physician Fee Schedule for Speech-Language Specialists and Audiologists* <<http://professional.asha.org/resources/reimbursement>> (accessed Jan. 14, 2003). In this example, the school district's initial offer of twenty minutes per week individual therapy would have an estimated annual monetary value of $\$30 \times 42$ weeks (per school year) = \$1,260. The hypothetical settlement provided for forty minutes of individual therapy and forty minutes of group therapy per week. The annual monetary value of that therapy would be $(\$60 \times 42) + (\$30 \times 42) = \$3,780$. The incremental increase would then be $\$3,780 - \$1,260 = \$2,520$.

their child received the amount of speech therapy that was appropriate for his needs.

The lesson is clear: after *Buckhannon*, plaintiffs must either make the matter of attorneys' fees a negotiating issue in the settlement discussions or choose to appear *pro se* at the mediation where the school district may be represented by an attorney well-versed in the intricacies of special education law. Under *Buckhannon*, parents and school districts may find that the mediation process is degenerating into a bargaining session where the parties trade pieces of a child's educational program for reimbursement of attorneys' fees. In addition, since attorneys' fees are usually significant relative costs, the change in the dynamics of mediation under the *Buckhannon* regime dramatically shifts the power balance in favor of the defendant. Represented parents whose school districts refuse to include their attorneys' fees in a negotiated settlement have an incentive to proceed to hearing so as to attain prevailing party status. Unfortunately, the risks for such parents are great. They may lose at hearing, but even if they win, the relief they are awarded may be substantially the same relief they were offered in the mediation. If this occurs, there is current statutory language in the IDEA that may deny them attorneys' fees despite their prevailing party status.¹⁶⁸ These changes defeat the intent of the IDEA in two ways: first, they discourage parents from initiating disputes to obtain a FAPE for their child; and second, they encourage parents who do initiate such suits to prolong them to achieve prevailing party status. The intent of the IDEA to have all parties focused on the best interests of the child is easily lost under these new dynamics.

168. 20 U.S.C. § 1415(i)(3)(D)(i) (1997) reads as follows:

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 obtained by the parents is not more favorable to the parents than the offer of settlement.

The IDEA promoted procedure over substance in its effort to guarantee disabled children a FAPE. In *Rowley*, the Supreme Court accepted this ascendance of procedure over substance because the Court recognized that the substance of a unique disabled child's education was not a matter for the federal courts ultimately to decide.¹⁶⁹ The Court also relied on parents acting as private attorney generals in enforcing the IDEA, as Congress intended.¹⁷⁰ Writing for the Court in *Rowley*, Justice Rehnquist noted that "[a]s this very case demonstrates, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act."¹⁷¹ Congress, through its attorney fee-shifting legislation and provisions, sought to buttress this parental ardor. Unfortunately, *Buckhannon* has dramatically limited the ability of parents to privately enforce the IDEA. Now parents may have plenty of ardor, but lack the funds to pursue their child's educational entitlements. Ardor in the face of large attorneys' bills is naturally tempered.

After *Buckhannon*, for parents to assert their disabled child's right to a FAPE, they must risk the possibility of the defense rendering their case moot. Becoming the prevailing party by obtaining judicially sanctioned relief is the only guarantee to parents that they will not be liable for attorneys' fees in excess of the value of the relief they receive. Yet whether parents obtain the necessary judicial *imprimatur* depends, in large part, on the willingness of defendants to contest matters through judgment. Defendants may unilaterally grant relief well into hearings, leaving parents holding the bag for their own attorneys' fees. In *Buckhannon*, Chief Justice Rehnquist wrote, "[a]nd petitioners' fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case."¹⁷² IDEA claims are just the sort of claims for equitable

169. *Rowley*, 458 U.S. at 208.

170. The Senate Report accompanying the 1997 reauthorization of the IDEA, for example, notes: "The procedural safeguards in the IDEA have historically provided the foundation for ensuring access to a free appropriate public education for children with disabilities." Sen. Rpt. 105-17, at 25 (May 9, 1997).

171. *Rowley*, 458 U.S. at 209.

172. *Buckhannon*, 532 U.S. at 608-09.

relief to which he alludes. Compensatory money damages are never available under the IDEA; at most, compensatory education is the remedy available for school district misconduct.¹⁷³ Under IDEA, pursuit of prospective, equitable relief is available, encouraged, and often sought either alone or along with retrospective claims. The procedural safeguards of IDEA supported by state-imposed statutes of limitation encourage speedy resolution of disputes.¹⁷⁴ In addition, there is consensus that early intervention is often a key to success in educating disabled children.¹⁷⁵ These factors lead to claims that are relatively small in total value. Thus, in IDEA claims, the attorneys' fees can easily surpass the value of any relief obtained. With the mooting that *Buckhannon* encourages, parents are at greater financial risk.

Parents, nevertheless, often need attorneys to assert their disabled children's rights to a FAPE. Although parents are allowed to represent their own children *pro se* in administrative hearings and no attorney is necessary to use a state's complaint resolution procedures, many factors discourage parents from acting on their own behalf in these proceedings. Despite being called "administrative hearings" or "complaints," these proceedings require fluency in English, an ability to understand detailed state and federal statutes, and an ability to present a case with evidence, witnesses, legal motions, and briefs before a hearing officer who will adhere to the evidentiary and procedural standards appropriate to litigation in federal courts. Educational and time limitations make it impossible for the vast majority of parents to proceed with these mechanisms without the aid of an advocate or attorney. The situation in federal courts is even more difficult. Federal judges largely have banned non-attorney parents from representing their children in their courts.¹⁷⁶ So, regardless of

173. See e.g. *Witte*, 197 F.3d at 1275 ("Although the IDEA allows courts to grant 'such relief as the court determines is appropriate,' 20 U.S.C. § 1415(i)(2)(B)(iii), ordinarily monetary damages are not available under that statute.")

174. See e.g. Cal. Educ. Code § 56505(j) (2003), which provides that "[a]ny request for a due process hearing . . . shall be filed within three years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request."

175. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir. 2001).

176. *Collinsgru v. Bd. of Educ.*, 161 F.3d 225 (3rd Cir. 1998). See also *Devine v. Indian River County Sch. Bd.*, 121 F.3d 176 (11th Cir. 1997); *Johns v. County of San Diego*, 114 F.3d 874, 876-877 (9th Cir. 1997); *Cheung v. Youth Orchestra Found.*, 906

the size of the claim, parents must have attorneys to pursue their claims in federal courts. Under the *Buckhannon* regime then, parents pursuing IDEA claims in federal court risk defense rendering their cases moot up until the eve of judgment, and since parents are banned from representing their children in federal courts, *Buckhannon* has dramatically increased the financial risks to parents. Parents must now choose between assuming these daunting risks and not asserting their child's rights to a FAPE.

Equal protection for disabled children will suffer as parents do their own cost-benefit analysis. The result will be the cost to society of less-educated, disabled citizens who have diminished chances for self-sufficiency. This was not the intent of Congress. When the earlier Supreme Court decision in *Smith* made attorneys' fees unavailable to parents, Congress passed the Handicapped Children's Protection Act. In the report accompanying that Act, the Senate wrote, "Congress' original intent was that due process procedures, including the right to litigation if that became necessary, be available to all parents."¹⁷⁷ After *Buckhannon*, the greater risk to parents of non-recovery of attorneys' fees makes this egalitarian intent even less realistic.

V. POTENTIAL REMEDIES TO THE BUCKHANNON PROBLEM IN IDEA LITIGATION

A. Court-Based Remedies

The lower federal courts, through their interpretive discretion, offer a potential means of restoring the pre-*Buckhannon* fee-shifting provisions of the IDEA. The incentives of those provisions more closely track the congressional intent of contributing to the active and egalitarian enforcement of the Act. This process seems to be under way, in part, as the lower federal courts have not uniformly applied the broad *Buckhannon* holding. For example, two circuits have relaxed their interpretations of prevailing party status despite *Buckhannon's* judicial *imprimatur* requirement. In *John and Leigh T. v. Iowa*

F.2d 59, 61 (2d Cir. 1990); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986).

177. Sen. Rpt. 99-112, at 2 (July 25, 1985).

Department of Education,¹⁷⁸ the Eighth Circuit held the Iowa Department of Education responsible for attorneys' fees even though the plaintiffs had been adjudicated prevailing parties only in their action against the local school district, not in their action against the state department.¹⁷⁹ On appeal, the plaintiffs had joined the state department of education as defendants.¹⁸⁰ The Eighth Circuit reasoned that, although the plaintiffs prevailed against the local school district, the state department of education should bear responsibility for some of the plaintiffs' attorneys' fees.¹⁸¹ This is because the state department had direct authority over and had assisted the local school district in vigorously defending the case.¹⁸²

In *Barrios v. California Interscholastic Federation*, a panel of the Ninth Circuit held that it was not bound by the "dictum in *Buckhannon* [that] 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...."¹⁸³ This "dictum" was precisely the "authority" that the Southern District of New York and Northern District of Illinois had relied upon in deciding the *J.S.* and *Louis R.* cases.¹⁸⁴

Victor Barrios was a paraplegic high school baseball coach whom the California Interscholastic Federation (CIF) had randomly prohibited from using his athletic wheelchair when doing on-field coaching.¹⁸⁵ He filed suit under the ADA seeking compensatory damages and injunctive relief.¹⁸⁶ He and CIF reached a settlement agreement in which he received \$10,000 in damages and a commitment to allow him to coach his team from his wheelchair during games.¹⁸⁷ The Ninth Circuit found that Barrios qualified as a "prevailing party" under the ADA fee-shifting provisions, even without a judicial *imprimatur* of the settlement, because Barrios received the relief he sought,

178. 258 F.3d 860 (8th Cir. 2001).

179. *Id.* at 862.

180. *Id.*

181. *Id.*

182. *Id.* at 865.

183. *Barrios v. Cal. Interscholastic Fedn.*, 277 F.3d 1128, 1134 n. 5 (9th Cir. 2002), *cert. denied*, *Cal. Interscholastic Fedn. v. Barrios*, 123 S. Ct. 98 (2002) (citing *Buckhannon*, 532 U.S. at 603 n. 7).

184. *J. S.*, 165 F. Supp. 2d 570; *Luis R.*, 2002 WL 54544 (N.D. Ill. 2002).

185. *Barrios*, 277 F.3d at 1130.

186. *Id.* at 1132.

187. *Id.* at 1133.

the relief was memorialized in an enforceable settlement agreement, and that relief was not *de minimus*.¹⁸⁸ The Ninth Circuit reasoned that it was bound not by the dicta in *Buckhannon*, but by its own holding in *Fischer v. SJB-P.D. Inc.*¹⁸⁹ that a plaintiff also “prevails” when he or she enters into a legally enforceable settlement agreement against the defendant.¹⁹⁰

In *Ostby v. Oxnard Union High*,¹⁹¹ the Central District Court of California also chose not to follow the broader interpretation of *Buckhannon*. Instead, the court chose to apply the *Barrios* holding. The plaintiffs in *Ostby* were the parents of Elise Ostby, a teenager with Asperger’s Syndrome (a form of autism) and other related disabilities.¹⁹² They filed for a due process hearing seeking retroactive reimbursement and prospective payment of a residential placement that the parents had unilaterally chosen for Elise after they had gone through a protracted period of frustration securing appropriate services from the defendant high school district.¹⁹³ In mediation, the parties had reached an agreement that gave the parents all of the relief they were seeking, including the defendant’s commitment to pay for Elise’s placement in the future.¹⁹⁴ The mediation agreement “was in writing, was signed by the parties and by the mediation officer assigned to the case and was filed with the [California] Special Education Hearing Office.”¹⁹⁵ The district court held that this agreement, even though it did not have a judicial *imprimatur*, gave the parents “prevailing party” status for purposes of the IDEA attorney fee-shifting provisions.¹⁹⁶ *Ostby* was the first IDEA

188. *Id.*

189. *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115 (9th Cir. 2000).

190. *Fisher*, 214 F.3d at 1118 (quoting *Farrar*, 506 U.S. at 111–112, 113), “[A] plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” The Court explained that “[n]o material alteration of the legal relationship occurs the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.” In these situations, the legal relationship is altered because the plaintiff can force the defendant to do something he otherwise would not have to do.)

191. *Ostby v. Oxnard Union High*, 209 F. Supp. 2d. 1035 (C.D. Cal. 2002).

192. *Id.* at 1036.

193. *Id.*

194. *Id.* at 1037.

195. *Id.*

196. *Id.* at 1042.

case within the Ninth Circuit to apply the *Barrios* holding. The District Court noted that the Ninth Circuit's holding in *Barrios* and the Second Circuit's holding in the *J.C.* case represent conflicting applications of *Buckhannon*.¹⁹⁷ "Thus, in the Ninth Circuit, unlike in the Second Circuit, a plaintiff who obtains a private settlement against a defendant is a 'prevailing party' for purposes of federal fee-shifting statutes."¹⁹⁸

In the Northern District of Illinois, one court has found that the *Buckhannon* holding does not apply to the IDEA. In *TD v. La Grange School District*, Judge Zagel concluded:

... I believe there exist critical distinctions in the text and structure of the IDEA and the ADA and FHAA that persuade me that the Court's ruling in *Buckhannon* was not meant to extend to the IDEA and, accordingly, does not control the interpretation of the term "prevailing party" in the attorneys' fees provision of the IDEA.¹⁹⁹

To reach this conclusion, the *TD* court reasoned from the Seventh Circuit's opinion in *Crabill v. Trans Union L.L.C.*²⁰⁰ in which the court undertook a comparison of the text, structure, and legislative history of the attorney fee-shifting provisions of the Fair Credit Reporting Act (FCRA) with the fee-shifting provisions under consideration in *Buckhannon*. The *Crabill* court concluded: "We cannot find anything in the text, structure, or legislative history of the [Fair Credit Reporting] Act to suggest that its attorneys' fee provision has a different meaning from the provision at issue in *Buckhannon*."²⁰¹ Therefore, in *Crabill*, the Seventh Circuit held that the *Buckhannon* holding applied to the FCRA.

Applying the methodology of the *Crabill* court, the district court in *TD* found material differences between the attorneys' fee provision of the IDEA and the statutes under consideration in *Buckhannon*. Since the IDEA specifically mentioned settlement as a basis for the awarding of attorneys' fees to parents and the IDEA specifically delineated certain instances, not including settlement agreements, when attorneys' fees

197. *Id.* at 1041.

198. *Id.* at 1041 (citing *Barrios*, 277 F.3d at 1134; *Johnson v. D.C.*, 190 F. Supp. 2d 34, 44 (D.D.C. 2002)).

199. *TD v. La Grange Sch. Dist. No. 102*, 222 F. Supp. 2d 1062, 1065 (N.D. Ill. 2002).

200. *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662 (7th Cir. 2001).

201. *Id.* at 667.

would be prohibited, the *TD* court found settlement agreements to be eligible for an award of fees.²⁰² Notably, the *TD* court's ruling is in direct disagreement with its sister court in *Louis R.*

Barrios and *Ostby* indicate that in the Ninth Circuit plaintiffs in certain actions, including IDEA actions, may still obtain prevailing party status through private settlement agreements. *TD* seems to follow this development. This trend may continue as more courts apply *Buckhannon*.

In some jurisdictions, plaintiffs may circumvent the *Buckhannon* problem through a temporary restraining order (TRO). In *Johnny's Icehouse, Inc., v. Amateur Hockey Association of Illinois*, a Title IX action, the plaintiff sought a TRO.²⁰³ Since there were findings of fact by the court in granting the TRO, the court later held that the TRO was sufficient to deem the plaintiff a "prevailing party" under the *Buckhannon* regime, even when the defendant provided relief before the matter was finally adjudicated.²⁰⁴ The court determined that the TRO served as a court-approved finding of fact on the merits of plaintiff's case, namely a form of judicial *imprimatur*. Perhaps the success of this argument in *Johnny's Icehouse* may cause plaintiffs in special education litigation to seek temporary restraining orders and preliminary injunctions. However, the so-called "stay-put" provisions of the IDEA and the education statutes of the several states make injunctions based on findings of fact more difficult to obtain.²⁰⁵

202. Judge Zagel noted that

[u]nlike the ADA or the FHAA, the IDEA specifically addresses settlement as a basis for the award of attorneys' fees. For example, the IDEA specifically provides for a reduction in recoverable fees when parents reject timely, reasonable settlement offers. 20 U.S.C. § 1415(i)(3)(D). Moreover, the IDEA provides that parents may be awarded attorneys' fees when they are the prevailing party 'in any action or proceeding brought under this section,' including, under certain circumstances, 'for a mediation described in subsection (e) of this section that is conducted prior to the filing of a complaint.' 20 U.S.C. § 1415(i)(3)(D)(ii). Finally, because Congress specifically delineated certain instances when attorneys' fees are prohibited under IDEA, 20 U.S.C. § 1415(i)(3)(D)(ii), but did not exclude settlement agreements from being eligible for the award of attorneys' fees, settlement agreements are presumptively eligible for such an award of attorneys' fees.

TD, 122 F. Supp. 2d. at 1063.

203. 2001 WL 893840 (N.D. Ill. Aug. 7, 2001).

204. *Id.* at 3.

205. As part of the procedural safeguards of the IDEA, there is a so-called "stay-put" provision that maintains a student's current educational placement during the pendency of a due process hearing. "During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents

Despite a few divergent opinions, and the long-shot potential of the preliminary injunction, the strong trend appears to be for courts to follow *Buckhannon's* narrow definition of prevailing party.²⁰⁶ To preserve the private cause of action as a means of enforcing the IDEA, Congress must act to restore some form of the catalyst theory in the attorney fee-shifting provisions of the Act.

B. The Need for a Congressional Remedy

As demonstrated above, the *Buckhannon* decision has created a problem for civil rights' plaintiffs. With regard to the IDEA, Congress can solve the problem created by *Buckhannon* quite readily. Congress intervened when, in its 1984 *Smith* decision, the Supreme Court held that civil rights laws and the rehabilitation act did not apply to handicapped children. Congress can intervene again post-*Buckhannon* to protect the rights of disabled children.

In the area of special education, all involved, whether federal courts, state officials, local school personnel, or parents, have an obligation to place the interests of the disabled child above all other interests. As demonstrated above, *Buckhannon* significantly impairs parties' abilities to share this overarching goal. Rules like the one from *Buckhannon* that encourage school districts to save funds by tactically "sticking" parents with attorneys' fees will inevitably distract from the preeminence of the child's interests. Parents, now facing much

otherwise agree, the child shall remain in the then-current educational placement of such child...." 20 U.S.C. § 1415(j). Most states have similar statutory provisions for their due process hearings. See e.g. Cal. Educ. Code § 56505(d). The stay-put provisions are a form of preliminary injunction, and the federal stay-put provision "substitutes an absolute rule in favor of the status quo for the court's discretionary consideration of the factors of irreparable harm and either a likelihood of success on the merits or a fair ground for litigation and a balance of the hardships." *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982) (quoted in *Johnson v. Spec. Educ. Hearing Off., St. of Cal.*, 387 F.3d 1176, 1180 (9th Cir. 2002)); see also *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3d Cir. 1996); *Bd. of Educ. of Community High Sch. Dist. No. 218, Cook County v. Ill. St. Bd. of Educ.* 103 F.3d 545 (7th Cir. 1996). However, the Ninth Circuit, in *Johnson*, held that a plaintiff's request to enjoin a preexisting stay-put order, viz. one issued under State law, would be appropriately handled by a district court using the traditional analysis of "(1) a combination of probable success and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardship tips in [plaintiff's] favor." *Johnson*, 387 F.3d at 1180 (quoting *Prudential Real Estate Affiliates, Inc. v. PPR Realty Inc.*, 204 F.3d 867, 874 (9th Cir. 2000)).

206. Ronald D. Wenkart, *Attorneys Fees Under the IDEA and the Demise of the Catalyst Theory*, 165 Educ. L. Rep. 2 (2002).

greater financial risk if they seek to ensure their disabled child's appropriate education through the IDEA procedural safeguards, naturally will be deterred. The detriment is to the disabled child, and ultimately to the society that must provide for those disabled individuals who are less capable of self-sufficiency in adulthood.²⁰⁷

Certain provisions of the IDEA that are currently in place could forestall some of the unintended negative outcomes *Buckhannon* has engendered. For example, the IDEA allows courts to penalize defendants who would "unilaterally moot an action before judgment in an effort to avoid an award of attorney's fees."²⁰⁸ This is not a good solution, however, because it contravenes another oft-repeated Supreme Court

207. Even before *Buckhannon*, the special education defense bar bemoaned the ascendancy of tactics over merit in resolving disputes concerning appropriate education for disabled children. A typical defense criticism of procedural safeguards of the IDEA has been that "...the threat of losing at a due process hearing and needing to reimburse the parents for attorneys' fees in addition to the cost for services encourages school districts to settle many cases. In fact, even cases with questionable merit are often settled because a cost-benefit analysis does not warrant spending public funds and dedicating the administrative time necessary to litigate." Bridget A. Flanagan & Chad J. Graff, *Federal Mandate to Educate Disabled Students Doesn't Cover Costs*. 47 Fed. Law. 22, 27 (Sept. 2000). Ironically, *Buckhannon* now has made the stakes even higher for school districts, as the incentive has shifted for parents to seek a judicial *imprimatur* in hearings carried through to judgment to ensure their reimbursement of attorneys' fees.

208. *Buckhannon*, 532 U.S. at 608. In the IDEA there is an exception to reduction of [plaintiffs'] attorneys' fee award: "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)(G) (1997).

Subparagraph (F) Reduction in amount of attorneys' fees reads as follows:

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.

20 U.S.C. § 1415(i)(3)(F) (1997).

admonition that fee-shifting provisions should not engender a second major litigation.²⁰⁹

The best solution is congressional revision of the IDEA to provide for some form of catalyst theory or a broader definition of prevailing party for purposes of the fee-shifting provisions.²¹⁰ Both Chief Justice Rehnquist, in his majority opinion, and Justice Scalia, in his concurring opinion in *Buckhannon*, suggest that congressional response may well be appropriate in light of the Court's holding. Chief Justice Rehnquist, writing for the majority, expresses discomfort with the judicial discretion offered by the catalyst theory: "In *Alyeska*. . . , we said that Congress had not 'extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted.'"²¹¹ In his concurring opinion, Justice Scalia acknowledged that Congress *may* wish to act:

The Court today concludes that a party cannot be deemed to have prevailed, for purposes of fee-shifting statutes such as 42 U.S.C. §§ 1988, 3613(c)(2), unless there has been an enforceable "alteration of the legal relationship of the parties." That is the normal meaning of "prevailing party" in litigation, and there is no proper basis for departing from that normal meaning. Congress is free, of course, to revise these provisions—but it is my guess that if it does so it will not create the sort of inequity that the catalyst theory invites, but will require the court to determine that there was at least a substantial likelihood that the party requesting fees would have prevailed.²¹²

209. *Buckhannon*, 532 U.S. at 609 ("We have also stated that '[a] request for attorney's fees should not result in a second major litigation,' *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L. Ed.2d 40 (1983), and have accordingly avoided an interpretation of the fee-shifting statutes that would have 'spawn[ed] a second litigation of significant dimension,' *Garland*, 489 U.S. at 791, 109 S.Ct. 1486.")

210. A congressional overturning of the entire *Buckhannon* decision would also solve the problem. For example, the Vermont Bar Association adopted a resolution in September 2001 calling upon the Vermont congressional delegation to "take all steps necessary to introduce, support, and enact federal legislation that would overturn the *Buckhannon* decision. . ." O. Whitman Smith, *Erosion of Civil Rights Enforcement: Judicial Constriction of the Civil Rights and Disability Bar*, 28 Vt. B. J. & L. Dig. 41, 42 (2002).

211. *Buckhannon*, 532 U.S. at 610 (citing *Alyeska Pipeline Serv. Co. v. Wilderness Socy.*, 421 U.S. 240, 260 (1975)).

212. *Buckhannon*, 532 U.S. at 622.

Both Chief Justice Rehnquist's and Justice Scalia's statements suggest that congressional action is the appropriate remedy for the *Buckhannon* decision.

Given the textualist requirements of the current Court's majority,²¹³ and *Buckhannon's* reliance on *Black's Law Dictionary* for the dispositive definition of "prevailing party," if Congress wishes to reincorporate the advantages of a modified "catalyst theory" into special education litigation, Congress must provide statutory text specifically redefining "prevailing party" for the purposes of the IDEA.²¹⁴

The current attorney fee-shifting sections of the IDEA contain the following provision:

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.²¹⁵

Although there is no mention in this section that the "action or proceeding" result in a judgment or consent decree before a court may award attorneys' fees, to satisfy the requirements of *Buckhannon*, Congress should amend this single provision. Congress should insert language indicating that a court may deem a child with a disability the prevailing party and thus award parents their fees if the parents obtain either a judgment, a legally enforceable consent decree, or an enforceable settlement agreement.²¹⁶ Congress may even go

213. For a discussion of the Supreme Court's textualist approach to statutory interpretation, see *supra* n. 142.

214. Naturally, clarity of text is relative and a matter of perception. Unanticipated ambiguities do arise. When these ambiguities arise, textualist judges rely upon the common law canons of construction. See Bradley C. Karkkainen, "Plain Meaning:" Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 Harv. J. L. & Pub. Policy 401, 472 (1994) (cited in Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, Berkeley J. Empl. & Lab. L. 53, 88 (2000)). See also Buzbee, *supra* n. 142, at 249. Congress must be careful to ensure that its clear language in the amended statute is readily amenable to a plain meaning interpretation.

215. 20 U.S.C. § 1415(i)(3)(B) (1997).

216. Currently in the IDEA there is some discussion of parents rejecting good faith, substantial settlement offers. When parents do reject such offers, the court may deny them attorneys' fee recovery:

20 U.S.C. § 1415(i)(3)(D) (1997)—"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

further and fully revive the catalyst theory in special education litigation. They could do this by incorporating language that provides courts with the authority to deem parents "prevailing parties" when they have substantially achieved the relief they were seeking, regardless of judicial *imprimatur* or other formal outcome, and so long as the parents can demonstrate a causal connection between their proceeding or action and the defendant's action providing relief.²¹⁷ Such a modification of the attorneys' fee provisions will first sustain the congressional intent that attorneys' fee recovery be available to parents in special education litigation, and secondly, the modification would provide the statutory language to satisfy the current textualist Supreme Court majority.

Other qualifications contained in the IDEA attorney fee-shifting provision such as the provisions that prohibit the court from awarding attorneys' fees if parents unjustifiably reject a substantial settlement offer (see *supra*) underscore Congress' intent to encourage the bringing and speedy resolution of meritorious claims regardless of the parents' ability to pay for an attorney.²¹⁸ These fee-shifting provisions are a strong means to further the objectives of the IDEA, namely the provision to each disabled child of a FAPE designed to meet the child's unique needs.

After *Buckhannon*, even if Congress chooses not to amend the general fee-shifting provision,²¹⁹ it should amend that portion of the IDEA attorney fee-shifting provisions that calls for sanctions against school districts or local educational agencies that unnecessarily protract litigation. Currently, the statute reads as follows: "The provisions of subparagraph (F)

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 obtained by the parents is not more favorable to the parents than the offer of settlement.

However, there is no explicit text in the current IDEA statute indicating that a parent or guardian who obtains an enforceable settlement agreement would be a "prevailing party" for purposes of the IDEA's fee-shifting provisions.

217. *Buckhannon*, 532 U.S. at 627–28 (Ginsburg, J., dissenting).

218. Sen. Rpt. 105-17 (May 9, 1997).

219. 20 U.S.C. § 1415(i)(3)(B) (1997).

[prohibiting attorneys' fees to parents] 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."²²⁰ Congress must change the law to overtly alert courts to enforce this existing section. Then, defendants in special education litigation could less easily tactically moot cases to avoid attorneys' fees. Overall, in combination with permitting the use of a revised catalyst theory in the awarding of fees, the amendments to the IDEA's fee-shifting provisions²²¹ should realign the incentives associated with the attorney fee-shifting provisions of the IDEA so that they are once again consistent with the goals of the IDEA.

Congress must act to restore a version of the catalyst theory acceptable to the Court in the attorney fee-shifting provisions of the IDEA. This will reduce the cost of litigation for parents, reduce the number and duration of cases, and more likely preserve IDEA's intent, providing equal protection to disabled children.

VI. CONCLUSION

Buckhannon's rejection of the catalyst theory in attorney fee-shifting provisions of civil rights statutes has impaired parents' ability to enforce their disabled children's right to a FAPE. By limiting prevailing party status to those plaintiffs who obtain judicial *imprimatur*s through judgments or court-ordered consent decrees, *Buckhannon* has effectively reduced the number of disabled children who will receive a FAPE. Under *Buckhannon*, even plaintiffs who "win" can easily "lose." Without a *judicial imprimatur*, "winning" parents who have obtained a FAPE for their disabled child will often be liable for attorneys' fees far in excess of their "winning" claim's value. This outcome denies disabled children their equal protection rights, is contrary to the intent of the IDEA, and ultimately burdens society with more disabled adults who have not achieved self-sufficiency and independence through appropriate education.

220. 20 U.S.C. § 1415(i)(3)(G) (1997).

221. 20 U.S.C. § 1415(i)(3)(B) (1997).

In some jurisdictions, court-based solutions to the *Buckhannon* problem in special education litigation are emerging. However, in light of the Court's reliance on *Black's Law Dictionary* in *Buckhannon* and the Court's preference for textualist statutory interpretation, Congress should carefully revise the text of the IDEA statute. This would be the quickest and most viable remedy available. Congress must redefine "prevailing party" for purposes of the IDEA and perhaps provide the statutory text necessary to delineate the specific boundaries of an acceptable catalyst theory within the attorney fee-shifting provisions of the Act.