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## Implications of *Buckhannon Board & Care Home, Incorporated v. West Virginia Department of Health and Human Resources* for Due Process under the Individuals with Disabilities Education Act

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IMPLICATIONS OF *BUCKHANNON BOARD AND CARE HOME, INCORPORATED V. WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES*<sup>1</sup> FOR DUE PROCESS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT<sup>2</sup>

I. INTRODUCTION

On May 29, 2001, the United States Supreme Court decided *Buckhannon Board and Care Home, Incorporated v. West Virginia Department of Health and Human Resources*. In yet another 5-4 split,<sup>3</sup> the Court determined that for purposes of fee-shifting statutes such as the Fair Housing Amendments Act<sup>4</sup> and the Americans with Disabilities Act,<sup>5</sup> a party must now secure an enforceable judgment or a court-ordered consent decree to recover attorneys' fees as the "prevailing party." A defendant's voluntary change after a suit is filed is no longer enough to recover as it "lacks the necessary imprimatur on the change."<sup>6</sup>

"Numerous federal statutes allow courts to award attorneys' fees and costs to the 'prevailing party.'"<sup>7</sup> And, traditionally, courts have held that simply being the catalyst to change was enough to be deemed a "prevailing party" under the catalyst theory.

Critics of the *Buckhannon* decision argue that the ruling "doesn't offer much assistance to civil rights lawyers."<sup>8</sup> These

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1. 532 U.S. 598, 121 S. Ct. 1835 (2001).

2. 20 U.S.C. § 1400 *et seq.* (West 2001).

3. "In all, one-third of the term's cases (26 of 79) ended in 5-4 rulings. Washington, D.C., lawyer Thomas Goldstein, who tracks the statistics, says this is the highest percentage of 5-4 rulings in more than a decade." David G. Savage, *United They Sit*, ABA Journal 34, 34 (Sept. 2001).

4. 42 U.S.C. § 3601 *et seq.* (West 2001).

5. 42 U.S.C. § 12101 *et seq.* (West 2001).

6. *Buckhannon*, 121 S. Ct. at 1840.

7. *Id.* at 1838.

8. Margaret Sanner & Carl Tobias, *Shifting Winds: Court Whittles Away at*

critics believe that the decision "will frustrate plaintiffs' efforts to recover attorney fees in litigation seeking to vindicate important societal values, such as the prevention of discrimination."<sup>9</sup>

While no federal due process cases show definite implications of *Buckhannon* under the Individuals with Disabilities Education Act (IDEA), a federal fee-shifting statute, there are inevitable consequences for school districts in suits filed against them under IDEA. Glimpses of such consequences can be seen in the two *Buckhannon* citing IDEA cases: *J.S. & M.S. v. Ramapo Central School District*<sup>10</sup> and *Jose v. Joliet Township High School District 204*.<sup>11</sup>

This paper examines the *Buckhannon* decision, the history of attorneys' fees legislation pursuant to IDEA, and the application of *Buckhannon* to IDEA. It concludes that the Court's decision in *Buckhannon* will result in fewer out of court settlements and increased litigation for American school districts under IDEA.

## II. BUCKHANNON BOARD AND CARE HOME, INCORPORATED V. WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

### A. Background Facts

Buckhannon Board and Care Home, Inc. (Buckhannon), operator of assisted living homes, failed an inspection with the West Virginia Office of the State Fire Marshal for violating West Virginia Code, sections 16-5H-1 and 16-5H-2.<sup>12</sup> These statutes required "that all residents of residential board and care homes be capable of 'self-preservation,' or capable of moving themselves 'from situations involving imminent danger, such as fire.'"<sup>13</sup> On October 28, 1997, after receiving a cease and desist order that required closure of Buckhannon's board and care facilities within 30 days, Buckhannon filed suit in the Northern District of West Virginia against the state of West

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*Plaintiffs' Recovery for Attorneys' Fees*, 87 ABA J. 39, 39 (Sept. 2001).

9. *Id.*

10. 165 F. Supp. 2d 570 (2001).

11. 2001 WL 1000734 (2001).

12. (1998).

13. *Buckhannon*, 121 S. Ct. at 1838 (quoting W. Va. Code §§ 16-5H-1, 16-5H-2).

Virginia, two of its agencies, and eighteen individuals on behalf of itself and other similar board and care facilities. Buckhannon sought declaratory and injunctive relief claiming that the "self-preservation" requirement of West Virginia law violated the Fair Housing Amendments Act of 1988 (FHAA)<sup>14</sup> and the Americans with Disabilities Act of 1990 (ADA).<sup>15</sup>

The District Court granted the Respondents' motion to dismiss the case as moot after the West Virginia Legislature successfully passed two bills eliminating the "self-preservation requirement." The court found "that the 1998 legislation had eliminated the allegedly offensive provisions and that there was no indication that the West Virginia Legislature would repeal the amendments."<sup>16</sup>

Buckhannon requested attorneys' fees as the "prevailing party" in the suit and asserted that it was entitled to such fees under the "catalyst theory." The "catalyst theory" rests on the idea that a plaintiff is a "prevailing party" where it is able to achieve its desired result through a lawsuit which brings about a voluntary change in the defendant's conduct.<sup>17</sup> Given the Fourth Circuit Court of Appeals had rejected the "catalyst theory" in *S-1 and S-2 v. State Board of Education of North Carolina*,<sup>18</sup> the District Court denied the motion for attorneys' fees, and the Court of Appeals affirmed. The United States Supreme Court granted certiorari.<sup>19</sup>

### B. Issue and Holding

By granting certiorari in *Buckhannon*, the Supreme Court set out to resolve the disagreement between the Courts of Appeals<sup>20</sup> on accepting the "catalyst theory," and whether the

14. 42 U.S.C. § 3601 *et seq.*

15. 42 U.S.C. § 12101 *et seq.*

16. *Buckhannon*, 121 S. Ct. at 1838.

17. *Id.* at 1838, 1839.

18. 21 F.3d 49 (1994).

19. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources*, 530 U.S. 1304 (2000).

20. At that time, the Courts of Appeals were split with the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits recognizing and upholding the "catalyst theory." See, e.g. *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 Hous. Auth.*, 21 F.3d 541, 546-550 (3d Cir. 1996); *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 City Sch. Dist.*, #1, 17 F.3d 260, 263 n. 2 (8th Cir.1994);

term “prevailing party” “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.”<sup>21</sup>

The Supreme Court affirmed the Fourth Circuit Court of Appeals, rejecting the “catalyst theory,” and held that in order to award attorneys’ fees under a fee-shifting statute like the FHAA or ADA, a “prevailing party” must be “a party in whose favor a judgment is rendered, regardless of the amount of damages awarded. . . also termed successful party.”<sup>22</sup> Therefore, a “prevailing party” must obtain a judgment on the merits or a consent decree. The Court noted that “a consent decree does not always include an admission of liability by the defendant,” nor does the plaintiff have to recover damages.<sup>23</sup> The key is that both a consent decree and a judgment on the merits are a “court-ordered ‘change in the legal relationship between the plaintiff and the defendant.’”<sup>24</sup> On the other hand, 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.”<sup>25</sup>

The Court reasoned that to allow recovery under the “catalyst theory” would allow an award of attorneys’ fees “where there is not judicially sanctioned change in the legal relationship of the parties. . . . A defendant’s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprima-*

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*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).

21. *Buckhannon*, 121 S. Ct. at 1838.

22. *Buckhannon*, 121 S. Ct. at 1839 (quoting Black’s Law Dictionary 1145 (7th ed. 1999)). It is interesting to note that Justices Scalia and Thomas, who both concurred with the majority in *Buckhannon*, rely heavily on dictionaries to define terms in the opinions they write. However, there is no “official” dictionary of the Supreme Court and many different ones are used. Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Remains a Fortress: An Update* 5 Green Bag 51, 52 & 54 (Autumn 2001).

23. *Buckhannon*, 121 S. Ct. at 1840.

24. *Id.* (quoting *Tex. St. Teachers Assoc. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)).

25. *Id.* at 1840, n. 7; see also *Kokkonen v. Guardian Life Ins. Co.*, 511 US 375 (1994).

*tur* on the change.”<sup>26</sup>

The Court felt that it was premature to say that without the “catalyst theory”, defendants would work to unilaterally moot an action before judgment to avoid attorneys’ fees. On the contrary, the Court insisted that the “catalyst theory” creates a disincentive for defendants to change their behavior which may, in fact, be illegal.<sup>27</sup>

### C. *The Dissent*

Justice Ginsburg’s dissent repeatedly referred to the precedent set by Federal Circuit Courts upholding and applying the “catalyst theory” to fee-shifting statutes.<sup>28</sup> She noted that “the ‘catalyst rule’ . . . is a key component of the fee-shifting statutes Congress adopted to advance enforcement of civil rights. Nothing in history, precedent, or plain English warrants the anemic construction of the term ‘prevailing party’ as imposed by the Court.”<sup>29</sup> In fact, prior to 1994, every Federal Court of Appeals (except the Federal Circuit, which had not yet addressed the issue) had held that a plaintiff in a situation like Buckhannon’s and his patients could obtain attorneys’ fees if their suit was the “catalyst” for the change they sought, regardless of whether they obtained a judgment or consent decree. In 1994, the Fourth Circuit strayed from the pack and decided in an *en banc* ruling that a party had to have an enforceable decree or agreement to prevail in a fee-shifting suit.<sup>30</sup>

Ginsburg claimed that the Court’s decision will allow a defendant “to escape a statutory obligation to pay a plaintiff’s counsel fees, even though the suit’s merit led the defendant to abandon the fray, to switch rather than fight on, to accord the plaintiff sooner rather than later the principle redress sought in the complaint.”<sup>31</sup>

Justice Ginsburg also took exception to the court substituting *Black’s Law Dictionary’s* definition of “prevailing party” for that of long-standing judicial precedent.<sup>32</sup> “In prior cases, we

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26. *Buckhannon*, 121 S. Ct. at 1840.

27. *Id.* at 1842-43.

28. *Id.* at 1850.

29. *Id.*

30. *Id.* at 1851-52 (referring to *S-1 and S-2*, 21 F.3d at 51).

31. *Id.* at 1850.

32. Lawrence A. Frolik & Melissa C. Brown, *Adv. Elderly and Disabled Client* ch. 7, ¶ 7.09 (2001); see also Thumma, *supra* n. 22.

have not treated Black's Law Dictionary as preclusively definitive; instead, we have accorded statutory terms, including legal 'terms of art,' a contextual reading."<sup>33</sup>

Justice Ginsburg does acknowledge that certain fee-shifting statutes do require court-ordered relief. However, many statutes like the FHAA and ADA do not.<sup>34</sup> In fact, in rejecting the history of the "catalyst theory" pursuant to statutes like the FHAA and ADA,

[t]he Court also rejected legislative history from the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988, as support for the catalyst theory. However, the Senate Report accompanying § 1988 could not have been clearer. "Parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." The majority did not even mention an even clearer provision from the House Report: "[A]fter a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as injunction, is needed."<sup>35</sup>

Justice Ginsburg added that barring the "catalyst rule" may lead to nuisance suits in an effort to recover attorneys' fees. She stated, "[t]he catalyst rule provided no berth for nuisance suits."<sup>36</sup> Most plaintiffs will now be reluctant to settle out of court. Ginsburg closed her dissent with the opinion that "[f]idelity to the purpose [of civil rights] calls for court-awarded fees when a private party's lawsuit, whether or not its settlement is registered in court, vindicates rights Congress sought to secure."<sup>37</sup>

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33. *Buckhannon*, 121 S. Ct. at 1853.

34. Those that require a court order, however, specifically state so. *Id.* (citing *The Prison Litigation Reform Act of 1995*, 42 U.S.C. § 1997e(d)(1)(B)(i) (1994 ed., Supp. IV)).

35. *The Courts Address Golf Carts, Attorneys' Fees and Medicaid Causes of Action*, 6 Advocate (newsletter of the Natl. Assistive Tech. Advoc. Project) 1, 5 (Summer 2001) (available at <<http://www.nls.org/av/summer01.htm>>) (quoting *Buckhannon*, 121 S. Ct. at 1857-58).

36. *Buckhannon*, 121 S. Ct. at 1859.

37. *Id.* at 1861.

### III. THE DEVELOPMENT OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AS A FEE-SHIFTING STATUTE

#### A. How did we get to IDEA?

##### 1. Public Law 94-142: The Education for All Handicapped Children Act

The Individuals with Disabilities Education Act<sup>38</sup> has a significant legislative history, beginning in 1958 with Congress' passage of the Expansion of Teaching in the Education of Mentally Retarded Children Act.<sup>39</sup> This Act provided federal funds for training teachers of the mentally retarded.<sup>40</sup> Then, in 1965, Congress passed the Elementary and Secondary Education Act (ESEA),<sup>41</sup> which was designed to improve the quality of American public schools and to increase and strengthen educational opportunities.<sup>42</sup> The ESEA was amended eight months later to include the first federal grants intended to assist state programs in educating children with disabilities in state-operated or state-supported schools and institutions.<sup>43</sup> Further amendments in 1966 provided grants to local schools rather than state-operated schools and institutions.<sup>44</sup> These amendments also created the Bureau of Education for the Handicapped (BEH) to administer all Office of Education programs for disabled children and the National Advisory Council, currently known as the National Council on Disability.<sup>45</sup>

Federal support for education of disabled children continued as the ESEA was amended again in 1967 to expand and improve special education services through funding regional resource centers, centers and services for deaf and blind chil-

38. 20 U.S.C. § 1400 *et seq.*

39. Pub. L. No. 85-926, 72 Stat. 1777 (1958).

40. Daniel H. Melvin II, Student Author, *The Desegregation of Children with Disabilities*, 44 DePaul L. Rev. 599, 605 (1995).

41. Pub. L. No. 89-10, 79 Stat. 27 (1965).

42. Richard L. Horne, *The Education of Children and Youth with Special Needs: What do the Laws Say?*, #ND15 NICHCY News Dig. (news digest of the Natl. Info. Ctr. for Children and Youth with Disabilities) 3 (Oct. 1996)  
<[www.nichcy.org/pubs/newsdigest/nd15txt.htm](http://www.nichcy.org/pubs/newsdigest/nd15txt.htm)>.

43. Pub. L. No. 89-313, 79 Stat. 1162 (1965).

44. Pub. L. No. 89-750, 80 Stat. 1191 (1966).

45. Horne, *supra* n. 42, at 3.

dren, expanded media programs, research, and a center to recruit teachers and disseminate information about education for disabled children.<sup>46</sup> However, the programs and services were discretionary, and many public schools did not take advantage of them.<sup>47</sup> Congress attempted to help improve the effectiveness of these programs in 1970 with another amendment to the ESEA.<sup>48</sup> This amendment consolidated the grant programs created under the ESEA, and the ESEA became known as the Education of the Handicapped Act (EHA).<sup>49</sup>

Congress attempted to assure safeguards against discrimination in the identification, evaluation, and placement of disabled students when it passed the Education Amendments of 1974.<sup>50</sup> This law required states to set up a timetable for granting disabled students a full right to education. It also mandated integration of special education students into the general education classroom. However, this law had little effect on education for the disabled because the bill lacked a program for funding and a real method of enforcement.<sup>51</sup>

Public Law 94-142, the Education for All Handicapped Children Act (EAHCA), passed on November 29, 1975,<sup>52</sup> was the first real federal guarantee to a free and appropriate public education (FAPE) for disabled children ages 3 to 21.<sup>53</sup> Under the EAHCA, special education gained its own life and finally had its own source of funding and its own specially trained teachers.<sup>54</sup> The EAHCA corrected many of the problems found in enforcing and funding the ESEA and its amendments. States that received federal funds under the EAHCA had to submit a plan that included the state's policies and procedures for educating disabled students. It further required an explanation of how those policies and procedures complied with the Act. The plan then had to be approved by the BEH. Approval obligated the states, and therefore local school districts that received

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46. Pub. L. No. 90-247, 81 Stat. 783 (1967).

47. Horne, *supra* n. 42, at 3.

48. Pub. L. No. 91-230, 84 Stat. 175 (1970).

49. Charles J. Russo, Timothy E. Morse & Marian C. Glancy, *Special Education: A Legal History and Overview*, 64 Sch. Bus. Affairs 8, 8 (Aug. 1998).

50. Pub. L. No. 93-380, 88 Stat. 484 (1974).

51. Horne, *supra* n. 42, at 4.

52. Pub. L. No. 94-142, 89 Stat. 73 (1975).

53. Horne, *supra* n. 42, at 4.

54. Sabrina Holcomb, Ed Amundson & Patti Ralabate, *The New IDEA Survival Guide*, 10 (Natl. Educ. Assn. of the U.S. 2000).

state funds, to follow the provisions of the EAHCA. All states but New Mexico submitted a plan so they could receive federal funding. New Mexico soon learned, however, that under Section 504 (discussed below), it would be required to provide a free, appropriate education to its disabled students regardless of the EAHCA.<sup>55</sup> So New Mexico submitted a plan and received federal funds for programs it was required to provide anyway.<sup>56</sup>

Rights guaranteed by the EAHCA included "fairness, appropriateness, and due process in decision making about providing special education and related services to children and youth with disabilities."<sup>57</sup> The EAHCA provided safeguards in placement and special education program decisions. School districts could no longer refuse service to disabled students or force parents to place their children in special education programs of which they did not approve.<sup>58</sup> In fact, parents could now sue school districts through an administrative hearing process for denial of their child's right to education and educational services.

The EAHCA included specific eligibility criteria for special education services, which included non-discriminatory testing and evaluation<sup>59</sup> and individualized education plans (IEPs).<sup>60</sup> It required a free and appropriate education be provided in the least restrictive environment (LRE) possible.<sup>61</sup> The LRE was

55. *N. M. Assn. for Retarded v. N.M.*, 678 F.2d 847 (10th Cir. 1982).

56. Mitchell L. Yell, David Rogers & Elisabeth Lodge Rogers, *The Legal History of Special Education: What a Long, Strange Trip It's Been!*, 19 Remedial and Spec. Educ. 219, 225 (July/Aug. 1998).

57. Richard A. Culatta & James R. Tompkins, *Fundamentals of Special Education: What Every Teacher Needs to Know* 15 (Prentice-Hall, Inc. 1999).

58. Harvey B. Polansky, *The Meaning of Inclusion: Is it an Option or a Mandate?*, 60 Sch. Bus. Affairs 27, 27 (July 1994).

59. Yell, *supra* n. 56, at 225.

60. Culatta, *supra* n. 57, at 14. "An IEP is developed at a meeting among qualified school officials, the child's teacher, the child's parents or guardians, and, when appropriate, the child. It must include, among other things, statements of the child's present level of educational performance, annual goals for the child, the specific educational services to be provided the child, and the extent to which the child will be able to participate in [general] education programs. School officials must convene a meeting at least annually to review and, when appropriate, revise the IEP. As this court has recognized, 'the IEP is more than a mere exercise in public relations. It forms the basis for a handicapped child's entitlement to an individualized and appropriate education.' Thus the importance of the development of the IEP to meet the individualized needs of the handicapped child cannot be underestimated." *Greer v. Rome City Sch. Dist.*, 967 F.2d 470 (11th Cir. 1992) *aff'ing* 950 F.2d 688, 695 (11th Cir. 1991) (quoting *Doe v. Ala. St. Dept. of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990)).

61. Culatta, *supra* n. 57, at 14; Yell, *supra* n. 56, at 225.

defined as "appropriate placement along a continuum. . . . This continuum [could] run from a self-contained, highly structured environment, to inclusion in a [general education] classroom. This placement [had to] allow the student to be educated as much as possible with students who [were] not disabled."<sup>62</sup> The law also guaranteed related services such as transportation to and from school, speech pathology, and physical therapy.<sup>63</sup>

## 2. *The Rehabilitation Act of 1973, Section 504*

The Rehabilitation Act of 1973, Section 504<sup>64</sup> offered broader and more general legal coverage as opposed to the narrow, specific coverage of educational rights for the handicapped found in the EAHCA.<sup>65</sup> Section 504 prevented discrimination against disabled people<sup>66</sup> in federally funded programs.<sup>67</sup> This included public education programs that were federally funded.<sup>68</sup>

Given the apparent overlap of [S]ection 504 and the EAHCA, [legal] actions were brought to vindicate educational rights under both acts. Several advantages were readily apparent in bringing an action under [S]ection 504 for protections that were also available under the EAHCA. One of the significant differences was that attorneys' fees were available under [S]ection 504 but not under the EAHCA. . . .<sup>69</sup>

62. Polansky, *supra* n. 58, at 28.

63. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 187 n. 10 (1982).

64. Pub. L. No. 93-112, 87 Stat. 355 (1973).

65. Thomas F. Guernsey, *The Education for All Handicapped Children Act, 42 U.S.C. §1983, and Section 504 of the Rehabilitation Act of 1973: Statutory Interaction Following the Handicapped Children's Protection Act of 1986*, 68 Neb. L. Rev. 564 (1989).

66. Section 504 defined a disabled person as "[a]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such impairment." Horne, *supra* n. 42, at 4.

67. Holcomb, *supra* n. 54, at 9. "[N]o otherwise qualified handicapped individual in the United States. . . shall, solely by reason of his handicap, be excluded from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." Kathleen S. Monzie, Student Author, *The Right to a Special Education*, 57 Mont. L. Rev. 151, 161 (1996) (quoting Pub. L. No. 93-112, 87 Stat 355 (codified as amended at 29 U.S.C. § 701 (1988 & Supp. V 1993)).

68. Culatta, *supra* n. 57, at 14.

69. Guernsey, *supra* n. 65, at 567.

Many of these suits were brought concurrently under 42 U.S.C. §1983<sup>70</sup> alleging deprivation of a federal right. Section 1983 also offered the remedy of attorneys' fees.<sup>71</sup>

As a result, most suits alleging a violation of the EAHCA additionally alleged violations of Sections 504 and 1983 so that if the parents prevailed, they could obtain attorneys' fees.<sup>72</sup> However, lower courts were split on whether the EAHCA was an "exclusive remedy or whether actions covered by the EAHCA could also be brought concurrently under Sections 1983 and 504."<sup>73</sup> The United States Supreme Court directly addressed this issue in *Smith v. Robinson*<sup>74</sup> and held that "Congress intended the [EAHCA] to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education."<sup>75</sup> Therefore, the EAHCA could not be circumvented by claims under other statutes, which allowed the recovery of attorneys' fees.<sup>76</sup>

### 3. *The Handicapped Children's Protection Act of 1986*

In 1986, Congress passed an amendment to the EAHCA: The Handicapped Children's Protection Act of 1986,<sup>77</sup> in reaction to the Supreme Court's decision in *Smith*. This amendment allowed courts to award reasonable attorneys' fees and costs to parents who were prevailing parties in lawsuits against school districts who violate the EAHCA.<sup>78</sup> This amendment also provided a real force behind the law as school districts would be responsible not only for compliance with the law but for all costs associated with their non-compliance so that "the efficacy of seeing relief [no longer] hinged upon the ability of . . . parents . . . to incur litigation expenses . . ."<sup>79</sup>

This provision caused a steep rise in special education litigation. Both parents and school districts were now more fre-

70. 42 U.S.C. § 1983 (1983).

71. Guernsey, *supra* n. 65, at 567.

72. *Id.*

73. *Id.* at 567-68.

74. 468 U.S. 992 (1984).

75. *Smith*, 468 U.S. at 1009.

76. Guernsey, *supra* n. 65, at 568.

77. Pub. L. No. 99-372, 100 Stat. 796 (1986).

78. Yell, *supra* n. 56, at 226; Guernsey, *supra* n. 65, at 568.

79. A. Seymour, III, *Creating Substantive Rights for Children with Disabilities* 3 Georgetown J. on Fighting Poverty 183, 187 (1996).

quently represented by attorneys in their interactions with each other, and the threat of losing at a due process hearing caused many school districts to enter into out-of-court settlements. In fact, school districts still often settle cases that lack merit based on a cost-benefit analysis that “does not warrant spending public funds and dedicating administrative time necessary to litigate.”<sup>80</sup>

### *B. The Individuals with Disabilities Education Act*

Congress again amended the EAHCA in 1990<sup>81</sup> and changed the name to the Individuals with Disabilities Education Act (IDEA).<sup>82</sup> There were few substantive changes to the law,<sup>83</sup> but the name change was significant because it “symbolized a rejection of the patronizing attitude associated with the term ‘handicapped’ and demonstrated a renewed interest in the education of the nation’s disabled citizens.”<sup>84</sup>

The small legislative changes that did occur in IDEA included the addition of autism and traumatic brain injury as

80. Bridget A. Flanagan & Chad J. Graff, *Federal Mandate to Education Disabled Students Doesn't Cover Costs*, 48 *The Fed. Law.* 22, 26-27 (Sept. 2000).

81. Pub. L. No. 101-476, 104 Stat. 1103 (1990).

82. Monzie, *supra* n. 67, at 161; Horne, *supra* n. 42, at 5.

83. IDEA encompassed all previous legislation and amendments meaning that it guaranteed the right to a free, appropriate education (FAPE) to all disabled students ages three to twenty-one at public expense. A free and appropriate education was to be given regardless of the severity of a student's disability. This education was to be based on a complete and individual assessment of each disabled child's needs and performance levels. An IEP was to then be written based on the outcomes of the assessment and was to include specific services to which the child was entitled and would receive in an attempt to meet the goals of the child's IEP. To the maximum extent possible, each disabled child was to be educated in the general education classrooms of his/her own neighborhood school. Disabled students had the right to receive supplemental services like transportation to and from school and developmental, corrective, and other supportive services including speech therapy, speech pathology and audiology, psychological services, counseling (including rehabilitative), physical therapy, occupational therapy, therapeutic recreation, school health services, social work services in the school, parent counseling and training, and medical diagnosis or evaluation.

Under IDEA, as had been guaranteed by previous legislation, parents of disabled students had the right to be involved in the decisions surrounding their child's assessment, placement, and IEP. Parents had to give consent before initial assessment could even take place. Parents were to be notified of any changes in their child's program(s) and be included in any meetings involving the writing of, or changes in, the IEP. A parent's signature was required on the IEP before it could be implemented. Parents also had the right to challenge or appeal in a due process procedure any decision made by the school in regard to their child's assessment, placement, IEP, or the provision of a free, appropriate education. Horne, *supra* n. 42, at 5.

84. Monzie, *supra* n. 67, at 162.

classifications of students covered by the Act. Further changes included a transition plan<sup>85</sup> with goals to prepare the disabled student to transition into higher education, employment, and/or the community after graduation. This plan was required by age sixteen as an addition to the IEP.<sup>86</sup>

By 1996, however, many students were still not being educated in the general education classroom. The United States Department of Education reported that only forty percent of all general education classrooms contained special education students. Some states encouraged inclusion more than others.<sup>87</sup> While this statistic did reflect a difference from statistics reported to Congress prior to the passage of the EAHCA in 1975, it showed that the United States was a long way from granting all disabled children the right to a free, appropriate public education with the maximum amount of time possible in a general education classroom. So, in 1997, Congress issued significant amendments to the IDEA. The result became known as IDEA '97.<sup>88</sup>

The main idea of IDEA '97 mirrored research and court decisions that suggested that disabled students performed better in the general education classroom (with supplemental aids and services, if necessary).<sup>89</sup> The largest changes made by IDEA '97 involved the IEP process and team.<sup>90</sup> Discipline was also a significant topic added to IDEA '97.<sup>91</sup> Significantly, IDEA '97 attempted to alleviate the overly adversarial system of special education litigation by requiring states to offer mediation between parents and schools as a method for resolving disputes about IEPs and other issues related to special education assessment, placement, or programming.<sup>92</sup> Mediation could settle claims without having to go through a due process hearing. Even more telling was that the award of attorneys' fees was re-

85. A transition plan is often called an Individualized Transition Plan or ITP.

86. Horne, *supra* n. 42, at 5; Lilliam Rangel-Diaz, *Ensuring Access to the Legal System for Children and Youth With Disabilities in Special Education Disputes*, 27 *Human Rights* 17, 18 (Winter 2000); Yell, *supra* n. 56, at 226.

87. Kristen Girard Golomb & Peggy Hammeken, *Grappling with Inclusion Confusion?*, *Learning* 49, 49 (Jan./Feb. 1996).

88. Pub. L. No. 105-17, 111 Stat. 37 (1997).

89. Holcomb, *supra* n. 54, at 10.

90. Dixie Snow Huefner, *The Risks and Opportunities of the IEP Requirements Under IDEA '97*, 33 *The J. of Spec. Educ.* 195, 196 (2000).

91. Yell, *supra* n. 56, at 226.

92. *Id.*

tained in IDEA '97.<sup>93</sup>

#### IV. THE IMPLICATIONS OF *BUCKHANNON* ON DUE PROCESS HEARINGS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT.

Since the Supreme Court's decision in *Buckhannon* on May 29, 2001, numerous District Court and Court of Appeals decisions since *Buckhannon* have applied the Court's decision to some of the over 200 fee-shifting statutes.<sup>94</sup> However, only two of those cases have dealt with the IDEA.

##### A. Federal IDEA Law

"As a result of the Court's opinion in *Buckhannon*, it is safe to conclude that the "catalyst theory" may no longer be applied in other cases involving disability legislation that use the 'prevailing party' language, such as . . . Individuals with Disabilities Education Act."<sup>95</sup> Under the "catalyst theory," parents were able to file suit, mediate a settlement with a school district, and still obtain attorneys' fees. But, *Buckhannon* seems to encourage parents to skip the mediation process unless they

93. "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." 20 U.S.C. 1415(i)(3)(B) (West 2001).

94. See Sanner, *supra* n. 8, at 39. For a list of fee-shifting statutes such as the *Rehabilitation Act of 1973*, *Title III of the Civil Rights Act of 1964*, *Title VII of the Civil Rights Act of 1964*; *Privacy Protection Act of 1980*, *National Housing Act*, *Securities Exchange Act of 1978*, *Age Discrimination in Employment Act of 1967*, etc., see *Marek v. Chesney*, 473 U.S. 1, 44-50 (1985) (as cited in *Buckhannon*, 121 S. Ct. at 1839). The cases involving fee-shifting statutes which have been decided since *Buckhannon* include *Burt v. County of Contra Costa*, 2001 WL 1135433 (N.D. Cal.) (based on claims under *Title VII of the Civil Rights Act of 1964*, 42 U.S.C. §§ 1981 & 1983); *Silekis v. Perryman*, 2001 WL 965503 (N.D. Ill.) (based on claims pursuant to the *Equal Access to Justice Act*); *Hispanics United v. Village of Addison*, 157 F. Supp. 962 (N.D. Ill. 2001) (based on claims for violating the *Fair Housing Act*, 42 U.S.C. §§ 1981-83, and the *Equal Protection Clause*); *Aynes v. Space Guard Prods., Inc.*, 201 F.R.D. 445 (S.D. Indiana 2001) (based on violations of *Title VII* and the *Americans with Disabilities Act*); *Bruce v. Wkly. World News*, 2001 WL 1256131 (D. Mass.) (based on claims under the *Copyright Act*); *Sys. Mgt., Inc. v. Loiselle*, 154 F. Supp. 2d 195 (D. Mass. 2001) (awarding attorneys fees under the fee-shifting provision of the *Racketeer Influenced and Corrupt Organizations Act*); *Fish v. St. Cloud State U.*, 2001 WL 667778 (D. Minn.) (granting attorneys' fees based on petition as prevailing party under *Title VII*); *Heavy Construction Lumber, Inc. v. Intl. Bhd. of Teamsters*, 2001 U.S. Dist. LEXIS 12178 (E.D.N.Y.) (claims for attorneys' fees under the *Labor Relations Management Act*).

95. John W. Parry, *Supreme Court Rules in Martin, Penry, and Buckhannon Cases*, 25 Mental & Physical Disability L. Rptr. 517, 518 (2001).

can get the agreement ordered by consent decree. Instead, parents will favor going to due process hearing so that they may recover attorneys' fees as the "prevailing party."

The real consequence of *Buckhannon* is unclear, however. *Jose v. Joliet Township High School District 204*<sup>96</sup> demonstrates this lack of clarity. *Jose* was filed with the District Court for the Northern District of Illinois, as a demand for attorneys' fees based on "prevailing party" status under the Individuals with Disabilities Education Act.<sup>97</sup> Defendant moved for a judgment on the pleadings.<sup>98</sup>

On November 1, 2000, Plaintiffs had filed for a due process hearing for denial of specialized instruction. Shortly thereafter, the parties participated in mediation and reached an agreement that was read into the record before a hearing officer. As a result, *Jose* received the educational services demanded. Soon thereafter, Plaintiffs filed this suit.<sup>99</sup>

The court held that despite the fact that no due process hearing being held, no evidence being presented, and no finding or order by a hearing officer, the reading of the mediation agreement into the record before the hearing officer leaves open the possibility of the plaintiff being the "prevailing party" under the definition in *Buckhannon*. Therefore, Defendant's motion for judgment on the pleadings was denied.<sup>100</sup>

The United States District Court for the Southern District of New York made it clear in *J.S. & M.S. v. Ramapo Central School District* that the difference between *Jose* and a case that is settled purely based on mediation or settlement negotiations is that the agreement in *Jose* was read into the hearing officer's record.<sup>101</sup>

In *J.S.*, the District participated in three days of an administrative hearing where some evidence was presented, but the District agreed to the parents' demands and settled the case before the end of the hearing. The settlement agreement was never read into the record of the hearing officer nor was the hearing officer asked to render an opinion on the case. Thus the

96. 2001 WL 1000734.

97. 20 U.S.C. § 1400 *et seq.*; 20 U.S.C. § 1415(i)(3)(B) (West 2001) (Fee-shifting statute).

98. *Jose*, 2001 WL 100734 at 1.

99. *Id.*

100. *Id.* at 2.

101. *J.S. & M.S.*, 165 F. Supp. 2d at 576.

parents had nothing within the definition of *Buckhannon* that would allow them to be deemed a "prevailing party." The District Court held they were not entitled to recover attorneys' fees.<sup>102</sup>

IDEA encourages school districts to engage in mediation as a part of the process of resolving school or parent concerns regarding special education services for a child. In fact, in their capacities as educational agencies, states, counties, and districts must make mediation available.<sup>103</sup>

Jeffrey White, associate general counsel for the American Trial Lawyers Association, says "[i]ronically, [*Buckhannon*] may force some claimants into litigation rather than allow an informal settlement,"<sup>104</sup> thwarting the effectiveness and purpose of IDEA '97.

Prominent parent/special education advocates and websites encourage parents who settle with the school district to get the district to admit in writing that there has been a change in their relationship and to agree to paying attorneys' fees. If the district will not agree to this, then the parent is encouraged to go to court to obtain relief.<sup>105</sup> Thus, *Buckhannon* places school districts in a difficult position. They must either agree to admit there has been a change in legal relationship and pay attorneys' fees or accrue the costs of going to a due process hearing even if they are willing to settle out of court.

Some organizations urge parents to add a claim for damages in hopes that even if a school district changes their current practice, there will still be a retroactive claim.<sup>106</sup> They warn that "[t]he potential impact of *Buckhannon* can be devastating. Defendants may now have the ability to string a plaintiff along during the course of litigation only to unilaterally provide all the relief a plaintiff seeks on the eve of trial. Such tactics would eliminate the right to fees for all the time spent

102. *Id.*

103. 20 U.S.C. § 1415(e)(1) (West 2001).

104. Thomas Scarlett, *Supreme Court Limits Reimbursement of Attorney Fees Under Federal Statutes*, Trial 16, 16 (Aug. 1, 2001).

105. See e.g. Reed Martin, *Could You 'Prevail' in Your Lawsuit but 'Lose' Your Attorney's Fees and Costs? You Need to Understand How to Deal with a New U.S. Supreme Court Case, Buckhannon v. West Virginia IHR*

<<http://www.reedmartin.com/buckhannonvwestvirginiahhr.html>> (accessed Sept. 17, 2001).

106. Natl. Assistive Tech. Advoc. Project, *supra* n. 35, at 6.

on the case."<sup>107</sup>

The Practising Law Institute (P.L.I.), in its Handbook Series on Litigation and Administrative Law, urges attorneys who are working with a strong case to move forward on the merits. Therefore the court will not be able to prove mootness if a change in the relationship or defendant's conduct occurs during the course of litigation. Otherwise, the attorney should try to settle with an agreement which includes attorneys' fees.<sup>108</sup> It also appears, as in *Jose* and *J.S. & M.S.*, that if a settlement agreement is enforced by a consent decree, it too will be the basis for awarding attorneys' fees.<sup>109</sup>

Clearly, parents who feel their child's rights have been violated under IDEA will be more eager to go to a hearing or have a settlement agreement enforced by a consent decree in order to obtain attorneys' fees. School districts will likely volunteer to include attorneys' fees in the settlement agreement in exchange for not having the settlement agreement enforced by consent decree and thus avoid paying full attorneys' fees and the cost of litigating that matter in court.<sup>110</sup>

### B. State IDEA Law

There is some speculation as to how *Buckhannon* will apply to state special education suits.<sup>111</sup> However, "state statutes and regulations must meet the federal requirements as outlined in [IDEA '97]."<sup>112</sup> And state courts must comply with the decisions of the United States Supreme Court. Therefore, it is unlikely that state fee-shifting statutes will be treated any differently than the federal statutes upon which *Buckhannon* is based. However, state laws have yet to be amended based on *Buckhannon*, nor are there any published state hearing office decisions that reflect how it will affect state fee-shifting statutes.

107. *Id.*

108. Richard A. Rothschild, *Litigating Section 1988 Attorneys' Fees*, 666 P.L.I. Litig. & Admin. Prac. Course Handbook Series 7, 12 (Oct.-Nov. 2001).

109. Scarlett, *supra* n. 104, at 16.

110. Richard Talbot Seymour, *Recent Decisions on Monetary Relief*, SG016 ALI-ABA CLE, ALI-ABA Course of Study 1081, 1140 (July 26-28, 2001)

111. Draft Firm Letter from Miller, Brown & Dannis to Governing Board Members, Superintendents, Student Services Directors, Special Education Directors and Selpa Directors Re: The United States Supreme Court Rejects the "Catalyst Theory" as the Basis for Seeking Attorneys' Fees Under the ADA and FHAA (dated June 22, 2001; on file with author).

112. Yell, *supra* n. 56, at 227.

There are some commentators and practitioners, like Richard A. Rothschild of the Western Center on Law and Poverty, who believe that fees will still be available in state court.<sup>113</sup> He refers to the California Code of Civil Procedure, section 1021.5, which allows recovery of attorneys' fees by a successful party "in any action which has resulted in the enforcement of an important right affecting the public interest."<sup>114</sup>

## V. CONCLUSION

The full effect of *Buckhannon* has yet to be seen, particularly for IDEA. Practitioners and advocates recommend abandoning private settlements in special education due process hearings in order to preserve the right to be awarded attorneys' fees. Therefore, it is likely that *Buckhannon* will result in fewer out-of-court settlements and increased litigation for American school districts under IDEA. Parents will not be willing to mediate or settle without having the agreement endorsed by a hearing officer or court of law. Additionally, school districts will press for private settlements to avoid the necessity of paying attorneys' fees. However, in an effort to avoid the costly hearing process, school districts will likely add attorneys' fees to their settlement agreements in hopes of settling at an amount closer to nuisance value rather than risk a hearing that might result in liability for all attorneys' fees. Surely, these viewpoints in direct opposition to each other will inevitably result in increased involvement by attorneys on both sides.

*Jennifer R. Rowe*

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113. Rothschild, *supra* n. 108, at 11.

114. Cal. Civ. P. Code § 1021.5 (West 2001).