



The Council of Parent Attorneys and Advocates, Inc.

A national voice for special education rights and advocacy

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July 9, 2009

The Honorable Edward M. Kennedy

United States Senate

Washington, DC 20510

Re: ***Reinstating Parents' Right to Expert Witness Fees in IDEA cases***

Dear Senator Kennedy,

The Council of Parent Attorneys and Advocates (COPAA) is a national nonprofit organization of parents, attorneys, and advocates who work to protect the civil rights of children with disabilities and ensure that they receive appropriate educational services. We thank you for your strong support for the rights of children with disabilities. We write to urge you to support H.R. 2740, the IDEA Fairness Restoration Act, or a similar Senate bill to enable prevailing parents to recover their expert witness fees in IDEA due process hearings and litigation. Without such protection, the playing field will remain dangerously tilted against parents who exercise their due process rights to ensure that their children receive a free appropriate public education.

Nearly 200 organizations support the bill, including the Arc, COPAA, Easter Seals, Disability Rights Education and Defense Fund, National Disability Rights Network (NDRN), National Center for Learning Disabilities (NCLD), LDA, DREDF, TASH, CHADD, Center for Law and Education, United Cerebral Palsy, Learning Disability Associations of America, National Down Syndrome Society (NDSS), National Down Syndrome Congress (NDSC), Epilepsy Foundation, Autism Society of America, , Our Children Left Behind, Southern Poverty Law Center School-to-Prison Reform Project, Tourette Syndrome Society, and many others. In addition, over 1100 individuals have signed a petition asking Congress to pass the bill. We are attaching both the Organizational sign-ons and the individual petition to this letter. (The individual petition has been open for signatures for only 3 weeks).

Congress' original intent in enacting the Handicapped Children's Protection Act of 1986 was to allow parents to recover expert witness fees. But in 2006, the Supreme Court held in *Arlington Central School District v. Murphy* that parents had no such right. Few parents can afford the thousands of dollars needed to pay qualified medical, educational, and technical experts to testify on their children's behalf. Almost 2/3 of children with disabilities live in families earning under \$50,000 a year. School districts can use therapists, psychologists, and other experts they employ, or hire outside experts with taxpayer dollars. Parents have far fewer resources than school districts but must bear greater expenses. When prevailing parents cannot recover expert costs, the playing field is neither level nor fair, and parents cannot protect their children's rights.

Congress passed the Individuals with Disabilities Education Act 34 years ago so children with disabilities would receive a free appropriate public education--a right they had long been denied, and which many continue to be denied. Hence, the IDEA gives parents the right to seek redress through an impartial due process hearing or judicial proceeding. Of course, hearings have always been rare; in 2003, the GAO reported that there were only 5 hearings per 10,000 special education students in 2000. But because IDEA's enforcement depends on parents to enforce the law, the ability to recover expert witness fees is critical when parents prevail. Of course, parents who do not prevail cannot recover expert fees.

COPAA has received numerous complaints about the inability of parents to recover expert fees. They include these:

- A Pennsylvania mother was forced to go to due process to implement the Independent Educational Evaluation recommendations for her child with severe dyslexia and a written expression disorder. She had to borrow \$1,400 to pay the evaluator to testify, and for two days of cross-examination by the school district. The parent prevailed and the child received the reading instruction he needed. Before the Supreme Court's *Murphy* decision, the mother could recover her expert fees; after *Murphy*, she would not.
- An advocate from a rural community in Northern California, "We do not live in an affluent area, rather a more rural, farming, blue-collar area of California. And the likelihood of not obtaining [expert] reimbursement would make a huge difference to single parents, minority parents and parents just barely making ends meet. They would not be able to meet their burden of proof without experts to testify against the alleged expert District professionals."
- A Florida attorney: "I have been in private practice and at Legal Aid. My private practice clients had limited funds for experts. Often their treating professionals would volunteer to wait until after the case was over and if parents prevailed, to get paid then. It often made all of the difference in winning. This method of funding experts is now unavailable. Many of those clients could not have fronted the expert witness fees. At Legal Aid we operate on a shoestring. Often my ability to be able to use funds to hire an expert hinges on the likelihood of being able to be reimbursed. I will be hiring far fewer experts, if any." This attorney also described how prior to *Murphy*, the school district had reimbursed experts for Legal Aid's low-income clients.
- A family in Texas: "I work as a nurse in a military Pediatric Clinic. I see children with disabilities daily who need help from the school system to maximize their potential. I cannot imagine having an active duty member willing to die for our country who cannot afford to fight for his/her own child because they cannot afford the cost of an expert witness. As the grandmother of a special needs child I know that my daughter and son-in-law would do whatever was necessary and that their family would help them but should they have to mortgage their future and risk their ability to care for our grand-daughter and her sisters to do so."
- A Maryland attorney: "I represent low income individuals in Baltimore City, which has been under a consent decree for almost 20 years, on a pro bono basis and I cannot take their cases to hearing because of the lack of expert availability. In the past, I could advance the costs with expectation of some reimbursement. As a solo, I can no longer afford to do that. Those who need assistance most are denied it."
- A Michigan special education advocate, "Since [Murphy], I have had no fewer than three clients who had to withdraw their request for a hearing, and no fewer than five clients who wanted to request a hearing but did not, due to the fact that they could not afford witness fees and costs. One of the clients who withdrew their request for a hearing because they could not find a free/low cost attorney and cannot afford expert witness fees has essentially been constantly harassed by their district, which knows the parents cannot afford litigation. I currently have a client, a single father, who has two Deaf children who are receiving an wholly inferior education, who simply cannot

afford witness fees, even if he were able to get a free or low cost attorney, who now suffers from depression because he is powerless to improve his children's education.”

- A new attorney in Nevada (where there is a severe shortage of attorneys): “I was willing to take a case pro bono if the parent could pay expenses. She couldn’t afford the expert, and neither could I. We stopped at the resolution session.”
- Georgian parents sought an IEE for their daughter with brain injury-like learning disabilities. She had not been evaluated in over 3 years. The district sought due process, requiring the parents to put on expert testimony. The district had expert witnesses. The parents could not afford the expert neuropsychologist who would have cost more than the evaluation. They had to dismiss/default, as the money spent for the expert was better spent on an evaluation, which the child desperately needed to identify and address her learning problems. This destroyed entirely the family’s right to an IEE. The district has suggested this approach to other districts. Prior to *Murphy*, parents prevailing on the IEE request would have recovered the expert’s fees.
- Independent Educational Evaluations (IEEs) are important when a school district fails to appropriately evaluate a child. Without an appropriate evaluation, children are denied the services they need. Independent evaluations are a critical component of the IDEA, that Congress has protected for over 30 years. But parents are unable to pay experts to challenge district denials of IEEs, and thus unable to obtain the evaluation that they need. Although school districts are supposed to file for due process if they decline to pay for the IEE, they often do not, forcing parents to do so and bear the burden of proof. When parents do obtain an IEE, they may lack the funds to pay the evaluator to testify at due process, which is often critical because the testing is complex. One California attorney reported that a family received an IEE, but could not afford the \$1,000 to pay the expert to testify about it.
- A New Jersey public interest attorney who recently faced a school district that refused to evaluate and provide services to a child with a seizure disorder, wrote, “Since IDEA 2004, I have seen an increase in districts planting their feet and refusing to work with parents, resulting in an increase in the number of due process petitions I have had to file... Our clients cannot afford experts or quality independent evaluators on their own. We used to rely on obtaining reimbursement if we prevailed but the *Murphy* decision foreclosed that option.”

For these reasons, we urge you to support H.R. 2740 or a similar Senate bill to enable parents to recover expert witness fees. COPAA thanks you for your tireless advocacy for the needs of children with disabilities.

Sincerely,

Robert Berlow, Chair, Government Relations Committee
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