



Support H.R. 1208 and S. 613

Ask Congress to Restore the Level Playing Field for Children with Disabilities

RESTORE PARENTS' RIGHT TO RECOVER EXPERT WITNESS FEES WHEN THEY PREVAIL IN DUE PROCESS HEARINGS

BACKGROUND

WHAT WILL THIS LEGISLATION DO AND NOT DO?

H.R. 1208 and S. 613 will restore the right of parents to recover expert witness fees when they win special education hearings or court actions under the Individuals with Disabilities Education Act.

- This right was provided to parents of children with disabilities when bipartisan majorities in both houses of Congress passed and President Ronald Reagan signed into law the Handicapped Children's Protection Act of 1986, P.L. 99-372 (HCPA).
- The right was taken away by the U.S. Supreme Court's decision in *Arlington Central School District v. Murphy*, 548 U.S. 291, 126 S.Ct 2455 (2006).

PARENTS WILL NOT BE ABLE TO RECOVER EXPERT WITNESS FEES IF THEY LOSE. IF THEY WIN THEY ARE ONLY ABLE TO RECOVER EXPERT FEES IF AND TO THE EXTENT A JUDGE APPROVES A REQUEST.

WHERE DOES IT SAY THAT CONGRESS INTENDED FOR PARENTS TO BE ABLE TO RECOVER FEES OF THEIR EXPERT WITNESSES?

- During the two year debate over the Handicapped Children's Protection Act there was never any question that if parents won a judge could award expert witness fees.

- To make clear their intent that expert fees could be awarded the unanimous Joint Explanatory Statement of the House/Senate Committee of Conference stated:

The conferees intend that the term ‘attorneys’ fees as part of the costs’ include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian’s case in the action or proceeding, as well as traditional costs incurred in the course of litigating a case.” H.Rpt. 99-687 (99th Congress 2d Sess. 1986), 5.

WHY IS THIS LEGISLATION NEEDED?

TO RESTORE CONGRESS’ ORIGINAL INTENT AND TO HELP ENSURE THAT ANY PARENT WHO WISHES TO EXERCISE HER RIGHT TO HAVE AN IMPARTIAL HEARING OFFICER RESOLVE DISPUTES BETWEEN HERSELF AND HER CHILD’S SCHOOL MAY DO SO REGARDLESS OF HER INCOME AND/OR ABILITY TO AFFORD TO PAY EXPERTS

- Congress passed the IDEA to ensure that children with disabilities receive a free appropriate public education (FAPE)
- In passing the IDEA Congress recognized that sometimes parents and school districts differ as to what constitutes FAPE
- Congress put a provision in IDEA giving parents the right to a hearing before an impartial hearing officer to resolve such disputes.
- In the absence of strong federal and state enforcements parents have become the primary enforcers of children’s IDEA rights.¹
- Parents requesting hearings have the burden of proving that FAPE was not provided or offered to their child by the school. *Schaffer*
- For a parent to have a chance to prove to a hearing Officer that FAPE was not provided she needs experts such as psychologists, therapists, and teachers to prove that the education proposed for her child by experts in her child’s school would not or did not provide FAPE.
- Expert witness fees of several thousand dollars may accrue in the course of a special education hearing.
- Approximately 36% of children with disabilities live in families earning less than \$25,000 a year; over 2/3 earn less than \$50,000 a year.²
- These parents cannot afford to pay the experts if they cannot recover fees when they win.
- Attorneys who are otherwise willing to represent parents with meritorious cases cannot take the cases if parents cannot pay for expert fees. As a result many parents’ right to legal representation exists only on paper.
- At times it is the school district that sues the parents, in which case parents must also have expert witnesses to adequately defend themselves.
- As Senator Harkin said when he introduced S. 613: ‘By including “reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian’s case’ and reestablishing the right of judges to award such fees to parents who prevail in IDEA cases, as Congress intended, this legislation will level the playing field and restore the ability of low- and middle-income parents to be effective advocates for their children’s educational needs.”

¹ National Council on Disability, “Back to School on Civil Rights”, Finding II.1.B (January 2000)

² See M. Wagner, C. Marder, J. Blackorby, & D. Cardoso, *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* (Sept. 2002), 23 -24, 28-29 available at http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf (as visited November 29, 2005).

MYTHS AND REALITIES

MYTH: PARENTS ARE LITIGIOUS

REALITIES:

- Very few parents go to hearing – In SY 2007-2008:
 - 6,598,853 students with disabilities were receiving IDEA services³
 - 3,218 hearings were fully adjudicated, that is, hearings were fully adjudicated for .0487% of IDEA students, or one of every 2,051 IDEA recipients nationwide.⁴
 - 2,702 of these hearings were in DC, PR, and NY
 - Only 9 states had 20 or more hearings
 - 11,398 hearing requests were resolved without a hearing.⁵

MYTH: ENACTING THIS LEGISLATION WILL BE COSTLY TO SCHOOL DISTRICTS

REALITIES:

- Parents do not recover fees if the school provided FAPE and parents lose
- Schools can avoid liability for fees by providing FAPE in the first instance
- Schools can reduce the possibility of liability for expert fees or the amount by settling cases early, using resolution sessions for the purpose intended by the 2004 amendments, or using mediation.
- Only 0.3% of total spending on special education in 2000 was for mediation, due process hearings, and court cases.⁶
- Amendments to the law in 2004 pertaining to attorneys' fees ensure that parents will not file frivolous or otherwise unmeritorious suits.

³ U.S. Department of Education, Office of Special education Programs, Data Analysis System Table 1-1(excludes Vermont), https://www.ideadata.org/TABLES32ND/AR_1-1.htm

⁴ U.S. Department of Education, Office of Special education Programs, Data Analysis System, https://www.ideadata.org/TABLES32ND/AR_7-3.htm; See GAO Report 03-897 "Numbers of Formal Disputes are Generally Low and States are Using Mediation and Other Strategies to Resolve Conflicts" (2003). Indeed, a 2003 Department of Education study found that 94% of districts had no disputes go to a hearing.

⁵ *Id.*, OSEP Table 7-3

⁶ 150 CONGRESSIONAL RECORD S.5351 (May 12, 2004) (statement of Senator Kennedy).

EXAMPLES OF PROBLEMS FACED BY SOME PARENTS AND ADVOCATES

"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."

—Northern California Advocate

"The District filed on us to reduce services (in CA, if we disagree with an IEP (the reduction in services) we can refuse to sign off on it, and the District's remedy is due process) we know that if we do not have solid evaluations we will lose. So our District is engaging in filing so that we have to do evaluations (or accept their IEP) and forcing us to spend our retirement. If we could recover witness fees after being filed on (and prevailing), it might make Districts bit reluctant to do this. So I think that we ought to mention that this bill would protect parents from aggressive Districts that wish to force inappropriate IEPs on the kids."

"The entire IDEA is worthless if parents do not have an economically feasible means to enforce it."

—Kansas Attorney

"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."

—Nevada Attorney

"A Pennsylvania 8th grader with dyslexia and a written expression disorder had struggled intensely with reading and writing all of his life. His single mother sought due process to implement the Independent Educational Evaluation recommendations. She had to borrow \$1,400 to pay the evaluator to testify. She also had to pay for the expert's time during two days of school district cross-examination. Before the Supreme Court's Murphy decision, she was able to recover these fees after prevailing and getting the scientifically-based reading instruction to which her son was entitled. After Murphy, she would not. "

- Philadelphia Public Interest Lawyer

COPAA website statement on Murphy - <http://www.copaa.org/public-policy/copaas-major-legislative-priorities/reinstate-parents-right-to-expert-witness-fees/>