No. 02-3928

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

T.D.,

Plaintiff-Appellee

v.

La Grange School District No. 2,

Defendant-Appellant

On Appeal from the United States District Court
for the Northern District of Illinois, No. 98-CV-2071
The Honorable James B. Zagel

BRIEF AMICUS CURIAE OF SENATORS EDWARD M. KENNEDY, TOM HARKIN, JAMES M. JEFFORDS AND PAUL SIMON (RET.), AND REPRESENTATIVES DALE E. KILDEE, GEORGE MILLER AND MAJOR R. OWENS SUPPORTING APPELLEES AND URGING AFFIRMANCE

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INTEREST OF AMICI

Amici are six sitting members and one former member of Congress with a long and continuous history of involvement in the evolution and oversight of the Individuals with Disabilities Education Act, including the attorneys' fee provision added in 1986 by the Handicapped Children's Protection Act. They are original co-sponsors of Public Law 94-142, IDEA's 1975 precursor (Senator Kennedy, then Representative, now Senator, Jeffords, and former Senator Simon); original co-sponsors of the HCPA (Senators Kennedy, Jeffords and Simon, Representatives Kildee and Owens); former chairmen of the subcommittees with jurisdiction over IDEA (Senators Harkin and Simon, Representative Owens); the former chairman of the Senate committee with jurisdiction (Senator Kennedy); and the current ranking minority members of the Senate and House committees (Senator Kennedy, Representative Miller). Senator Kennedy served on the subcommittee that drafted Public Law 94-142, and was a conferee on the Conference Committee that developed the final version of the HCPA. Senators Simon, Kennedy and Jeffords, and Representatives Kildee, Miller and Owens were members of the committees with jurisdiction over IDEA at the time that the HCPA was drafted, debated and enacted, and, with the exception of former Senator Simon, are members of those committees today. Senators Simon, Kennedy, Harkin and Jeffords and Representative Owens participated as *amici curiae* in the U.S. Court of Appeals for the District of Columbia Circuit's 1990 *en banc* consideration of *Moore v. District of Columbia*, which recognized

Congress' authorization in the HCPA of awards of attorneys' fees for parents who prevail in administrative proceedings under IDEA, and with which this Court explicitly agreed in *Brown v. Griggsville Community Unit School District.*

By virtue of their long histories and continuing roles in drafting, debating, negotiating and overseeing IDEA and the HCPA, *amici* have unique perspective and guidance to offer in this matter.[*]

SUMMARY OF ARGUMENT

The decision of the district court in this matter was correct: Congress in the Individuals with Disabilities Education Act authorized the award of attorneys' fees to prevailing parents when disputes are resolved by settlement agreements, and the Supreme Court's decision in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), does not change this. 20 U.S.C. §1415(i)(3)(D)(i), added to the law by the Handicapped Children's Protection Act of 1986 ("HCPA"), authorizes fees when parents prevail in administrative proceedings via private settlement agreements as part of a larger scheme to promote dispute resolution, and was an essential part of the carefully-crafted and hard-won bipartisan compromise

[*]This brief *amicus curiae* addresses only the issue of the availability of an award of attorney fees for parents who prevail in IDEA cases via private settlement agreement; at the time that it was drafted, *amici* were unaware of any other questions before the court in this matter.

that paved the way for enactment of the HCPA. Nothing in *Buckhannon* changes the manner in which IDEA and the HCPA must be construed, or even applies to the task of construing those statutes. Interpreting *Buckhannon* to preclude fee awards when IDEA disputes settle would require this court to ignore §1415(i)(3)(D)(i), and so to erase this Congressional enactment. The Supreme Court could not have intended and, indeed, *Buckhannon* does not require, that courts do so.

ARGUMENT

I. IN CRAFTING THE HANDICAPPED CHILDREN'S PROTECTION ACT, CONGRESS DELIBERATELY AUTHORIZED COURTS TO AWARD ATTORNEYS' FEES TO PARENTS WHO PREVAIL VIA PRIVATE SETTLEMENT AGREEMENT IN ADMINISTRATIVE PROCEEDINGS

A. The Fee-shifting Provisions of the Handicapped Children's Protection Act Were a Carefully-crafted and Hard-won Bipartisan Compromise

The fee shifting provisions of the Individuals with Disabilities Education Act ("IDEA"), called the Education of the Handicapped Act ("EHA") until renamed in 1990,[1] were first added to the law by Section 2 of the Handicapped Children's Protection Act of 1986 ("HCPA"),[2] Congress' response to *Smith v. Robinson*, 468 U.S. 992 (1984). In *Smith*, the Supreme Court held that the EHA was the exclusive vehicle for raising legal claims about the provision of a free appropriate public education to children with

[1] Originally enacted in 1975 as Pub. L. No. 94-142, 89 Stat. 773, IDEA was renamed by the EHA Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103.

[2] Pub. L. No. 99-372, 100 Stat. 796.

disabilities, thereby foreclosing Section 504 of the Rehabilitation Act of 1973[3] and 42 U.S.C. §1983 as avenues for bringing such claims. One major consequence of this interpretation was to preclude prevailing parents from receiving an award of attorney fees, as Congress had never explicitly provided for fee awards under the EHA (as it had for the latter two statutes).[4]

Almost immediately following this decision, identical bills countering *Smith* were introduced in the two Houses of the 98th Congress,[5] due to a general recognition that the decision was contrary to Congress' original intent, and would greatly limit the ability of parents with limited income to obtain legal representation in order to secure their children's rights. The 98th Congress adjourned without passing this legislation, and divergent bills explicitly authorizing attorney fees for prevailing parents were introduced in both houses once again in the 99th Congress, early in 1985.[6] A contentious process ensued, with, *inter alia*, committee members in the House divided as to whether fee awards should be permitted for administrative proceedings,[7] Senate committee members

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[3] 29 U.S.C. §794.

[4] Prior to *Smith*, when parents prevailed on an EHA claim, courts would regularly award attorneys' fees because of related Section 504 or constitutional claims.

[5] H.R.6014 and S.3859.

[6] H.R.1523 and S.415. These bills also contained provisions, ultimately enacted, countering the *Smith* holding that the EHA was the exclusive remedy for asserting the right of children with disabilities to a free appropriate public education.

[7] *See* H.R. Rep. 99-296, at 15-17 (1985) (hereinafter "House Report").

at odds over an attempted cap on the fees that could be awarded to publicly-funded attorneys,[8] the U.S. Department of Education seeking changes in S.415 after it was reported out of committee,[9] and the House and Senate passing significantly divergent bills.[10] As demonstrated by the discussion *infra* at 10 - 17, there was vigorous disagreement among members about the extent to which proposed provisions and amendments would result in excessive costs for school systems, empower or disadvantage parents, and encourage or discourage expeditious settlement of education disputes.

The final version of the HCPA passed the Democratic-controlled House and the Republican-controlled Senate in July of 1986, after House and Senate conferees forged a compromise on its fee-shifting provisions. Members speaking in support of the conference agreement repeatedly stressed that the final bill was a delicate and hard-won compromise. In urging his colleagues to support final passage of the bill, Senator Hatch, a co-sponsor, conferee and Chairman of the Senate Labor and Human Resources Committee, stated:

> ...As cosponsor of S.415 and as a conferee, I am pleased that the conference agreement we are now voting on reflects the culmination of several years of deliberation and refinement.

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[8] *See* S. Rep. No. 99-112 at 17-18 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1806-07 (hereinafter "Senate Report").

[9] *See* Senate Report at 12.

[10] *See* H.R. Conf. Rep. No. 99-687 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1807 (hereinafter "Conference Report").

> The agreement we are now considering is a compromise which I feel accomplishes two major objectives. First, it provides for the award of a reasonable attorneys' fees to prevailing parents in an Education of the Handicapped Act action or proceeding.
>
> Second, it includes...provisions...to protect against excessive reimbursement.
>
> Let me again emphasize that the conference agreement developed is a compromise. Without the passage of this carefully crafted document, handicapped children and their parents cannot be fully protected...I would like to commend Senator Weicker and Congressman Williams for their diligence in finally reaching consensus.

132 Cong. Rec. 16825 (July 17, 1986). Representative Biaggi, a co-sponsor and one of the House managers of the bill, observed,

> This compromise represents hundreds of hours spent by both Houses of this body...Although we have arrived at this point, it was not without great difficulty...I wish to acknowledge the contributions and efforts of all of the conferees...in reaching this carefully crafted compromise.

132 Cong. Rec. 17609 (July 24, 1986). Representative Bartlett, a sponsor of the House bill and the ranking minority member of the Subcommittee on Select Education of the Committee on Education and Labor, emphasized the extraordinary difficulty of the process that culminated in the Conference agreement on the HCPA:

> This has been a difficult piece of legislation. It concerns a particularly volatile issue – namely, attorneys' fees...In this legislation, we have wrestled with the issue of attorneys' fees in a sensitive area – the education of handicapped children. It has taken 2 years to write a three-page bill. The process has been trying, and there are many of us who have been involved in that process who are not entirely satisfied with this legislation, but who feel that its benefits outweigh its potential limitations.

Id.

B. The Amendments to IDEA Made by the HCPA On Their Face Authorize Fee Awards When Cases Settle

The fee-shifting provisions effectuated by section 2 of the HCPA provide in pertinent part,

> [i]n 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), and

> [a]ttorneys' 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 settlement offer 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.

20 U.S.C. §1415(i)(3)(D)(i). Section 1415(i)(3)(E) further provides,

> [n]otwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.[11]

As the district court in the instant case held, these provisions on their face establish that parents who prevail by settling their claims at the administrative level are

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[11] When enacted in 1986, the provisions now codified at 20 U.S.C. §§1415(i)(3)(B), (D)(i), (E) were codified at 20 U.S.C. §§1415(e)(4)(B), (D), (E). They were recodified as part of the IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37.

eligible for a fee award. *TD v. LaGrange School District No. 102*, 222 F. Supp. 2d 1062, 1065 (N.D. Ill. 2002) *See also Shelly C. v. Venus Independent School District*, 878 F.2d 862 (5th Cir. 1989), *cert. denied*, 493 U.S. 729 (1990); *Rossi v. Gosling*, 696 F. Supp. 1079 (E.D. Va. 1988).[12] Together they (1) authorize courts to award attorneys' fees to a parent who prevails in an administrative proceeding, but (2) require courts to deny a portion of the fees that otherwise would be included in such an award when a parent, under certain circumstances, refused a settlement offer before going on to prevail before the administrative hearing officer. This prohibition on fee awards for work done *after* an ultimately rejected settlement offer has been made has meaning only if – and is necessary to effectuate the Congressional concerns underlying it[13] only if – the statute makes fees available for work done *prior* to the rejected offer.

C. The HCPA Encouraged Settlement

Section 1415(i)(3)(D)(i) simultaneously authorizes fee awards for parents who settle their IDEA cases and penalizes them when, under certain circumstances, they do not . In choosing this approach, Congress chose to encourage parents to advocate vigorously on behalf of their children, but to accept reasonable settlement offers. This

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[12] The Third Circuit's recent decision to the contrary in *John T. v. Delaware County Intermediate Unit*, ___ F.3d ___, 2003 WL 194874 (3rd Cir., 1/30/03), is erroneous and unpersuasive, as it simply and without analysis dismisses §1415(i)(3)(D) - (G) as irrelevant to the question of who is a prevailing parent eligible for a fee award under IDEA. *John T.* offers no alternative interpretation of the plain text of §1415(i)(3)(D) - (G), and no alternative interpretation of the structure of §1415(i)(3).

[13] See discussion beginning *infra* at 11.

choice re-affirmed and strengthened two pillars of the statutory scheme. By authorizing fees, Congress gave parents an important tool for vindicating the rights of their children, reinvigorating its longstanding "emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process." *Bd. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 205 (1982). And by providing a strong incentive to accept reasonable settlement offers, Congress saw to it that, as has been the case since the statute's inception, "[t]he general policy under the IDEA is to resolve educational disputes as quickly as possible." *Powers v. Indiana Department of Education*, 61 F.3d 552, 556 n.3.[14]

D. Section 1415(i)(3)(D)(i) Was an Essential Aspect of the Carefully-crafted Bipartisan Compromise That Enabled Passage of the HCPA

Both the House and Senate bills, as introduced and passed, were silent on the topic of fees-for-settlement. Section 1415(i)(3)(D)(i) was added at the eleventh hour, by the House and Senate conferees charged with reconciling the two bodies' conflicting versions of the Act. *See* Conference Report at 6. This was a departure from the usual legislative

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[14] *Powers* held that a 30-day statute of limitations for filing a claim for attorneys fees is consistent with the federal policy to promote prompt dispute resolution underlying IDEA. The opinion quotes from the legislative history of the EHA to illustrate this point, and includes the following passage:

"As the oft-quoted Senator Williams explained during Senate debate on the original IDEA, 'delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development.... Thus...it is expected that *all hearings and reviews* conducted pursuant to these provisions will be *commenced and disposed of as quickly as practicable* consistent with a fair consideration of the issues involved.'" *Powers*, 61 F.3d at 556 n.3 (emphasis in original) (citations omitted).

process, and contrary to a House "scope rule" prohibiting conferees from including in their report issues that had not been committed to the conference by either body of Congress. *See* 132 Cong. Rec. 17599-600 (July 24, 1986) (remarks of Rep. Beilenson). The inclusion of §1415(i)(3)(D)(i) necessitated adoption of a resolution on the House floor waiving the scope rule before that body could consider the Conference report and the final version of the HCPA contained therein. *Id.*

Clearly, then, the conferees considered §1415(i)(3)(D)(i) essential to their final compromise. By authorizing fee awards for parents who settle their IDEA disputes but limiting fees in certain instances when they do not, this provision – along with its companion provision, §1415(i)(3)(F) - (G), also added by the conferees[15] – enabled the

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[15] Sections 1415(i)(3)(F) - (G), like §1415(i)(3)(D)(i), address circumstances under which the fees awarded to a prevailing parent may be reduced. As added by section 2 of the HCPA, these provisions, at the time to be codified as new subsections of 20 U.S.C. §1415(e)(4) provided:

> (F) Whenever the court finds that –
>
> (i) the parent, during the course of the action or proceedings unreasonably protracted the final resolution of the controversy;
>
> (ii) the amount of 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, experience, and reputation; or
>
> (iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding,
>
> the court shall reduce, accordingly, the amount of attorneys' fees awarded under this subsection.
>
> (G) 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 section 615 of the Act.

conferees to accommodate the three primary and, perceived by some at times as competing, legislative goals that emerged as members of Congress worked to fashion a legislative response to *Smith* that would once again allow prevailing parents to be awarded attorneys' fees: (1) providing meaningful access to IDEA's dispute resolution procedures for all parents, regardless of economic status; (2) encouraging prompt resolution of disputes, and refraining from creating disincentives to settlement; and (3) avoiding excessive fee awards and controlling the costs to public school systems.

As demonstrated below, the legislative history is replete with evidence of the prominent role these goals played as H.R. 1523, the House bill, and S. 415, the Senate bill were shaped, debated and re-shaped. As the following examples make apparent, the principal controversy revolved around the two bills' authorization of fee awards for administrative, as opposed to only judicial, proceedings,[16] and the possible consequences thereof.

Sec. 2, Pub. L. No. 99-372, 100 Stat. 796, 797.

[16] As introduced and originally considered by the Subcommittee on Select Education, H.R. 1523 allowed fee awards for judicial actions only. *See Handicapped Children's Protection Act: Hearing Before the Subcommittee on Select Education of the Committee on Education and Labor on H.R. 1523*, 99th Cong. 1st Sess., 1-2, 9 (1985) (hereinafter "House Hearing"). The version reported out of the Committee on Education and Labor and passed on the floor authorized fees for administrative proceedings as well, as did S. 415 from the outset. *See* House Report at 1; 131 Cong. Rec. 31369 (November 12, 1985); S. 415, 99th Cong., 1st Sess., 131 Cong. Rec. 1980 (February 6, 1985); Senate Report at 12.

1. Legislative goals.

a. Meaningful access for all parents.

The imperative that *Smith* be countered so that all parents, regardless of economic status, might have meaningful access to IDEA's dispute resolution procedures was prominent throughout development, consideration and passage of the HCPA – beginning with statements made at the hearings on H. 1523 and S. 415 held, respectively, by the Subcommittee on Select Education of the House Committee on Education and Labor and the Subcommittee on the Handicapped of the Senate Committee on Labor and Human Resources, and continuing through the committee reports on the bills, debate on the floor of both houses and, finally, the Conference agreement.

Statements at the subcommittee hearings focused on vindicating Congress' original intent in crafting IDEA's scheme of procedural rights. At the Senate hearing, Senator Kerry, a cosponsor of the HCPA and one of the conferees, offered the following:

> ....[N]either Senator Stafford nor the other authors of Public Law 94-142 intended to limit handicapped children and their parents from access to due process. Nor did they intend the right to litigation be made available only to those who can afford it.

Handicapped Children's Protection Act: Hearing Before the Subcommittee on the Handicapped of the Committee on Labor and Human Resources of the U.S. Senate on S. 415, 99th Cong. 1st Sess. 2-3 (1985) (hereinafter "Senate Hearing"). Senator Simon, a cosponsor of both Pub. L. 94-142 and the HCPA, agreed:

> I think that one of the things that was clear in the minds of all of us when

> we created Public Law 94-142 was that the economic status of the parents should have nothing to do with whether or not a child received an opportunity for an appropriate public education.

Senate Hearing at 4. At the House hearing, Representative Biaggi stated,

> We cannot allow low-income parents to be denied full – and complete – access to justice under P.L. 94-142...It is critical that we continue to assure parents the right to be reimbursed for the costs of protecting their children's rights under the law.

House Hearing at 55.

The committee reports on H.R. 1523 and S. 415 also highlighted meaningful access for all parents as an important goal of the legislation. The report on H.R. 1523 explained, "[b]y adopting the 'action or proceeding' language, the Committee is also increasing the possibility that poor parents will have access to the procedural rights in EHA, thereby making the law's protections available to all." House Report at 5. The report on S. 415 reminded members that "Congress' original intent was that due process procedures, including the right to litigation if that became necessary, be available to all parents." Senate Report at 2.

Floor statements made during passage of both the Senate and House bills were quite forceful in articulating the importance of empowering parents to use the law's due process system. Senator Kennedy, a co-sponsor of the HCPA and one of the managers for the Senate, voiced his support as follows:

> I rise in strong support of this important bill...The Handicapped Children's Protection Act clarifies the intent of Congress that handicapped children and their parents or legal guardians have available to them the fill range of remedies to

protect and defend their rights to a free, appropriate education.

> The basic purpose of this legislation and its primary intent states that handicapped children and their parents or legal guardians should be able to participate in the due process system and have access to the full range of remedies to protect their educational rights on an equal par with the school districts and I strongly support this purpose.

131 Cong. Rec. 21391 (July 30, 1985). Senator Simon, too, spoke of fair and equal access to the remedies Congress had created:

> For minority group parents, for low-income a well as moderate income parents, the right to obtain reimbursement for assistance they may need at the administrative level is critically important to assure fair and equal access to the formal procedures mandated by Congress....

131 Cong. Rec. 21392 (July 30, 1985). Representative Miller spoke in a similar vein on the floor of the House:

> The law requires parental involvement at all stages of the process, from requesting an evaluation to yearly review of the individualized education plan (IEP). In those instances where parents feel compelled to pursue a formal hearing or court action to attain free appropriate education for their child, providing reimbursement for needed legal assistance is critical to assure fair and equal access to this right.

131 Cong. Rec. 31376 (November 12, 1985).

Finally, with the legislative process drawing to a close with a vote on the floor of the Senate on the Conference agreement, Senator Hatch reminded his colleagues that "[w]ithout the passage of this carefully crafted document, handicapped children and their parents cannot be fully protected since they have no recourse under current law if their rights are violated." 132 Cong. Rec. 16825 (July 17, 1986).

b. Prompt dispute resolution and settlement.

The view that authorizing fees for administrative proceedings would undermine the goal of encouraging prompt resolution of disputes, and create disincentives to settlement, was manifest in the proceedings in the House. In a statement on the floor during consideration of H.R. 1523, then-Representative Jeffords, a co-sponsor of the bill and a member of the Subcommittee on Select Education, explained,

> By providing for attorneys' fees at the administrative level, I am concerned that we will be...interfering with a procedure that is working. Instead of informality and cooperation, the process will become formal and adversarial.
>
> ...Our action in this bill may draw in the use of an attorney at an earlier stage in the proceedings than has been the norm to date. In this way...[w]e may be providing a disincentive to resolve disputes informally, as soon in the process as possible. We may instead be providing incentive to take the dispute to court.

131 Cong. Rec. 31376 (November 12, 1985). Representative Bartlett made a similar point:

> H.R. 1523, by allowing for the recovery of fees at the administrative level, removes the incentive to resolve disputes informally because schools will be as liable for attorneys' fees under the administrative system as they are in court.
>
> By allowing for the recovery of attorneys' fees...at the administrative level, H.R. 1523 will increase the participation of attorneys and decrease the likelihood that parents and educators will resolve their disputes informally and inexpensively.

131 Cong. Rec. 31372 (November 12, 1985).

c. Cost Containment

As noted above, H.R. 1523 as introduced did not provide for administrative fees.

Representative Bartlett's opening remarks in the subcommittee hearing on this early version of the bill explained the import of this limitation, as he saw it:

> It requires that fees and expenses be awarded only for court-related actions, not actions associated with administrative hearings. This tends to delitigize the process and controls, to some extent, costs associated with disputes and limits diversion of scarce resources from the primary business of the schools, which is education children.

House Hearing at 9. As reported out of committee, however, the House bill did provide for fees for work associated with administrative hearings. This prompted ten committee members to file "Supplemental Views" to the Committee Report. They stated:

> Unwisely, H.R. 1523 extends, without limitation, the right to recover attorneys' fees to the administrative procedures available under P.L. 94-142 for the first time. This provision could radically alter the delicate balance that currently exists in P.L. 94-142's due process system, resulting in severe financial burden for state educational agencies and local school systems.

House Report at 15.

2. Provisions of House and Senate bills

As passed by the respective bodies, the House and Senate versions of the HCPA took different approaches to reconciling the legislative goals discussed above. The House version contained a "sunset provision," pursuant to which the authority to award fees to parents who prevail in administrative proceedings would terminate four years after the date of enactment of the HCPA.[17] The Senate version placed a cap on the fees that could be awarded to publicly-funded legal services organizations, limiting such fees to the

[17] *See* H.R. 1523, 131 Cong. Rec. 31369 (November 12, 1985).

actual cost to the organization of performing the work in question.[18]

3. Conference Agreement

The Conference Committee took a completely different approach. It rejected both the House's sunset provision and the Senate's fee cap. Conference Report at 5, 7. In their place the conferees added brand new provisions: those now codified at 20 U.S.C. §§1415(i)(3)(D)(i) and (E) - (G), and a prohibition on the use of bonuses or multipliers to calculate fees awarded solely under IDEA.[19] With this resolution, the final version of the HCPA accommodated the three preeminent legislative goals that had proven so contentious: (1) *meaningful access to the due process system for all parents* was promoted by allowing fee awards for parents who prevail in administrative proceedings, including fees at prevailing rates for those represented by publicly-funded legal services organizations, with no sunset provision; (2) *prompt dispute resolution and settlement* were encouraged by the authorization now in §1415(i)(3)(D)(i) of fee awards for parents who prevail by settlement, and the limitation on awards when such parents decline to settle under certain circumstances, as well as by what is now §1415(i)(3)(F)(i) (requiring courts to reduce awards to prevailing parents who unreasonably protracted the proceedings); and (3) *cost containment* was advanced by the combined effect of §1415(i)(3)(D)(i) and the balance of §1415(i)(3)(F), which provided additional grounds

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[18] *See* Senate Report at 12, 17-18; Conference Report at 5.

[19] Conference Report at 5-7.

for reducing fee awards, along with the ban on the use of bonuses or multipliers. This was the carefully-crafted compromise that carried the day.

E. The Congressional Authorization of Fees for Cases Settled by the Parties Encompasses Purely Private Settlement Agreements as Well as Those Entered into in States That Allow Parties to Obtain the Imprimatur of the Administrative Hearing Officer

Notably, but not surprisingly, in authorizing fees to parents who prevail in administrative proceedings by way of settlement, Congress made no distinction between cases that end in a legally enforceable private settlement agreement and those that in some fashion bear the imprimatur of the administrative hearing officer. Consistent with the "'cooperative federalism' which is the hallmark of the implementation of...the Individuals with Disabilities Education Act," *Bernardsville Bd. of Education v. J.H.*, 42 F.3d 149, 150 (3rd Cir. 1994),[20] Congress has never dictated the procedural details of the due process hearing systems that, among other procedural safeguards, 20 U.S.C. §1415(a) requires states to "establish and maintain...in accordance with" the balance of section 1415. Rather, Congress from the start delineated minimum requirements that state-designed hearing systems must meet, leaving all other related matters to the discretion of the states.

These minimum requirements are more striking for what they omit in the way of

[20] For additional cases recognizing IDEA as an exercise in cooperative federalism, see, e.g., *Little Rock School District v. Mauney*, 183 F.3d 816, 830 (8th Cir. 1999); *Town of Burlington v. Department of Education*, 736 F.2d 773, 783-84 (1st Cir. 1984).

procedural detail than for what they contain. Included are affording parents an opportunity for an "impartial" due process hearing; provisions regarding disclosure of expert evaluations and recommendations prior to any hearing; administrative appeal rights under certain circumstances; affording parties the rights (1) to be accompanied and advised by counsel and by individuals with special knowledge or training regarding the problems of children with disabilities, (2) to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) to a written, or at the option of parents, electronic verbatim record of the hearing, and (4) to written, or, at the option of the parents, electronic findings of fact and decisions; and treating as final all hearing decisions unless the decision is appealed to a court or there is a right to an administrative review of the decision under state law. *See* 20 U.S.C. §1415(f) - (i). Congressional silence and state discretion extend to such matters as, *inter alia*, the applicable rules of evidence and procedure; the availability, if any, of discovery; the qualifications of hearing officers, including whether or not they must have law degrees; enforcement of orders and decisions; and, key for the case at bar, the question of whether due process hearing systems must include a mechanism by which administrative hearing officers may approve, read into the record, adopt as orders or otherwise place their imprimatur upon settlement agreements.[21] Never having required that states authorize their hearing officers to place

[21] Exercising this discretion, some states prohibit administrative hearing officers from placing their imprimatur on settlement agreements, and some appear to permit the practice, at lease at times. *See, e.g.,* Conn. Agencies Regs. § 10-76h-16(d) (2000) ("A

their imprimatur on settlement agreements, Congress of course did not make the presence or absence of such an imprimatur a relevant factor when it authorized attorneys' fees for parents who prevail by settlement.

II. BECAUSE CONGRESS IN THE HCPA AUTHORIZED FEE AWARDS WHEN PARENTS PREVAIL IN ADMINISTRATIVE PROCEEDINGS VIA PRIVATE SETTLEMENT, *BUCKHANNON* IS IRRELEVANT TO THE FEE CLAIMS OF THE SETTLING PLAINTIFFS IN THIS MATTER

That IDEA on its face provides for an award of attorneys' fees for parents who prevail through settlement should dispose of this appeal in plaintiffs' favor. Nothing in the Supreme Court's decision in *Buckhannon* changes the manner in which IDEA and the HCPA must be construed, or even applies to the task of construing those statutes. Furthermore, while the defendant might contend that the legislative history of the HCPA indicates that Congress intended for the term "prevailing party" to be construed consistent with subsequent precedent developed under other fee-shifting statutes, the relevant documents demonstrate that Congress' intent was far narrower, and encompassed only certain enumerated, existent Supreme Court holdings.

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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."); *In RE: Rockport Public Schools*, 8 MSER 2, 4-5, Massachusetts Bureau of Special Education Appeals #01-4954 (Jan. 24, 2002) (post-*Buckhannon*, hearing officers will continue "to decline to endorse or otherwise affirm private parties' settlement agreements") (copy attached); *Eddins v. Excelsior Independent School District*, 88 F. Supp. 2d 695, 698 (E.D. Tex. 2000) (terms of settlement reached prior to the start of a due process hearing were entered as judgments by administrtive hearing officer).

A. ***Buckhannon*** **Did Not Hold That All Congressional Enactments Allowing Fee Awards to a "Prevailing Party" Are to Be Interpreted Identically, Regardless of Whatever Other Language Congress May Have Included**

In *Buckhannon*, the Supreme Court interpreted two Congressional enactments: (1) 42 U.S.C. §3613(c)(2), which provides that under the Fair Housing Amendments Act of 1988 ("FHA"), "the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee and costs," and (2) 42 U.S.C. §12205, which provides that under the Americans with Disabilities Act ("ADA"), "the court...in its discretion, may allow the prevailing party...a reasonable attorney's fee...." As to each, the court held that the term "prevailing party" does not encompass a party claiming success under a "catalyst theory," in that "[a] defendant's voluntary change in conduct...lacks the necessary judicial *imprimatur* on the change." *Id.*, 532 U.S. at 605 (emphasis in original). The Court further held that under these laws, "prevailing party" means one who secures a "material alteration of the legal relationship of the parties," *id.* at 604 (citations omitted) and that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of fees." *Id.* (citations omitted).[22]

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[22] The Court also suggested in a footnote that private settlement agreements might not suffice to confer prevailing party status. *See Buckhannon*, 532 U.S. at 604 n.7. The Ninth Circuit has characterized this comment as *dictum*. *See Barrios v. California Interscholastic Federation*, 277 F.3d 1128, 1134 n.5 (9th Cir. 2002) (awarding fees to settling plaintiff under the Americans with Disabilities Act). *But see also Oil, Chemical and Atomic Workers International Union v. Department of Energy*, 288 F.3d 452 (D.C.

At the start of its analysis, the Court observed that "Congress...has authorized the award of attorney's fees to the 'prevailing party' in numerous statutes in addition to those at issue here...." *Id.* at 602-03.[23] The Court next noted that "[w]e have interpreted these fee-shifting provisions consistently...and so approach the nearly *identical* provisions at issue here," *id.* at 603 n.4 (internal citation omitted) (emphasis added), thereby extending the reach of its holding beyond claims brought under the FHA and ADA. It did not, however, extend it as far as IDEA. For while the fee-shifting provisions of the FHA and ADA may be "nearly identical" to numerous other statutes authorizing an award to a prevailing party, they are not nearly identical to the fee-shifting provisions found in IDEA. Neither of the statutes at issue in *Buckhannon* have provisions comparable to 20 U.S.C. §1415(i)(3)(D)(i), nor do any of the three other fee-shifting provisions explicitly cited in *Buckhannon* as examples of statutes "nearly identical" to those before it, and previously interpreted consistently.[24] IDEA and the HCPA thus simply are not within the universe of statutes to which *Buckhannon's* construction of the term "prevailing party" extends.

Cir. 2002) (giving language greater affect); *John T., supra*, 2003 WL 194874 (declining to follow *Barrios*).

[23] The examples cited immediately thereafter include neither IDEA nor the HCPA. *See* 532 U.S. at 602-03.

[24] These three fee-shifting provisions are 42 U.S.C. §2000e-5(k) (Civil Rights Act of 1964); 42 U.S.C. §1973*l*(e) (Voting Rights Act Amendments of 1975) and 42 U.S.C. §1988 (Civil Rights Attorney's Fees Awards Act of 1976). *See Buckhannon*, 532 U.S. at 602-03.

This Court has already recognized that *Buckhannon* does *not* stand for the proposition that the term "prevailing party" must be construed as having the same meaning in each and every fee-shifting statute in which it may appear. To the contrary, in *Crabill v. Trans Union*, 259 F.3d 662, 667 (7th Cir. 2001), this court found that plaintiffs who had not obtained formal judicial relief were not eligible for a fee award under the Fair Credit Reporting Credit Act only after explaining, "[w]e cannot find anything in the text, structure, or legislative history of the Act to suggest that its attorneys' fee provision has a different meaning from the provision at issue in *Buckhannon*." As demonstrated above, the "text, structure and legislative history" of IDEA clearly establish that its attorneys' fee provision does have a different meaning.[25]

The fee-shifting provision of IDEA appears in 20 U.S.C. §1415(i)(3)(B) *through* (G). Section 1415(i)(3)(B), where the statement that fees may be awarded "to the parents of a child with a disability who is the *prevailing party*" (emphasis added) appears, must be construed in light of the *entire* fee-shifting provision of which it is but one subsection. *Moore v. District of Columbia*, 907 F.2d 165, 167 (D.C. Cir. 1990). To instead ignore

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[25] *See also Adams v. Bowater*, 313 F.3d 611 (1st Cir. 2002) ("Whether the plaintiffs can recover attorney's fees does not necessarily depend on whether a formal judgment has been entered. The Supreme Court did require a judgment under one statute, but the ERISA statute is differently phrased and conceivably the result could be different.") (citing *Buckhannon*); *Oil, Chemical and Atomic Workers, supra,* 288 F.3d at 455 ("eligibility for an award of attorney's fees in a FOIA [Freedom of Information Act] case should be treated the same as eligibility determinations made under other fee-shifting statutes unless there is some good reason for doing otherwise") (applying *Buckhannon*).

§1415(i)(3)(D)(i) would be to erase what Congress has enacted. It is ludicrous to suggest that the Supreme Court intends or *Buckhannon* requires that courts do so.

B. Congress Specified the Particular Precedents Set Under Other Fee-shifting Statutes Consistent with Which the HCPA Is to Be Construed

Nowhere in the legislative history of the HCPA did Congress evince an intent that the new law be construed consistent with whatever precedent might develop in the future under other fee-shifting statutes. To the contrary, Congress in the relevant committee reports specified not only which particular decisions are to guide interpretation, but the particular holdings of each that are to apply. In all, the House committee report on H.R.1523, the Senate committee report on S.415 and the Conference report identified four cases: *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980) (for its holding allowing fee awards for mandatory administrative proceedings);[26] *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (regarding the relevance of a party's degree of success in calculating an award and the rates upon which awards must be based);[27] *Blum v. Stenson*, 465 U.S. 886 (1984) (regarding the prevailing community rate awards are to be based upon);[28] and *Marek v. Chesney*, 473 U.S. 1 (1985) (same).[29] This careful delineation of relevant, existing precedent could not be further from a mandate to apply whatever case law might

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[26] House Report at 5; Senate Report at 14.

[27] House report at 5, 6 ; Senate Report at 13; Conference Report at 5-6.

[28] House Report at 6; Conference Report at 5-6.

[29] Conference Report at 5-6.

develop in the future under other statutes.

CONCLUSION

For the foregoing reasons *amici* urge that the decision of the district court be affirmed.

Respectfully submitted,

_____
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Dated: February 25, 2003

Certificate of Compliance with Rule 32(a)

I hereby certify that:

I. this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,678 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and

II. this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 9 in 13-point Times New Roman type.

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Eileen L. Ordover
Counsel for *Amici* Edward M. Kennedy, *et al.*

Dated: February 25, 2003

ADDENDUM

Circuit Rule 31(e)(1) Certification

I hereby certify that the enclosed computer disk contains the full contents of the foregoing Brief Amicus Curiae of Senator Edward M. Kennedy *et al.*, with the exception of the contents of the "Addendum," and that the disk is virus-free and properly labelled. I further certify that the material included in the Addendum is not available electronically.

_____
Eileen L. Ordover

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2003, (i) two copies of the foregoing Brief Amicus Curiae of Senator Edward M. Kennedy, et al., Supporting Appellants and Urging Reversal and (ii) and a computer disk containing the same were served by Federal Express Second Business Day Delivery, upon the following counsel:

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