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## FOR YOUR INFORMATION

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News For School Clients

### Parents Denied Attorneys' Fees in Special Education Case

Under the Individuals with Disabilities Education Improvement Act (commonly referred to as the IDEA), parents who prevail against a school district at an administrative hearing for violations of the rights of a child with a disability may seek an award of attorneys' fees. In special education litigation, the attorneys' fees award for the work of the child's attorney is a substantial part of the cost of the litigation. A recent decision issued by the Seventh Circuit Court of Appeals, the federal appeals court that governs federal cases arising out of Wisconsin, has narrowed the type of issues for which a parent may receive attorneys' fees when they fail to prevail on all of their issues.

In *Linda T. v. Rice Lake School District*, the parents of William, a sixth grade student with autism, filed a complaint against the School District when they disagreed with the individualized education program (IEP) it offered their son. The IEP offered William a placement for half-days at Red Cedar Hall, a facility with classrooms serving only students with disabilities who required a functional-based, prevocational curriculum, and half-days at the Middle School. The IEP stated that William would participate with non-disabled peers "*whenever appropriate.*" It also stated that "on-going autism training will be offered for the staff that work with William," with the amount and frequency to be determined "*as opportunities arise and are deemed appropriate.*" Unhappy with the IEP,

the parents filed a request for a due process hearing.

Specifically, the parents challenged the IEP on three grounds. First, they argued that William's placement half-days at Red Cedar Hall denied him the right to receive an appropriate education in the least restrictive environment. William's parents sought an order placing him at the Middle School full-time. Second, the parents contended that William's IEP did not contain sufficient detail about the training to be provided to the staff. That is, they wanted a specific amount and frequency of training activities to be designated in the IEP. Third, the parents requested that the District be required to retain an independent consultant to train the staff on how to implement William's IEP.

After a three-day hearing, the Administrative Law Judge (ALJ) issued a decision on the merits of the case. The ALJ ruled that William would not receive a satisfactory education in the regular education classroom at the Middle School because the regular education class curriculum was too-complex and fast-paced for William, whose goals were not part of the sixth-grade curriculum. The ALJ concluded that placing William half-days at Red Cedar Hall was acceptable. However, the ALJ also concluded that William's IEP had insufficiently identified the available and appropriate opportunities for William to interact with nondisabled peers during his

time at the Middle School. The ALJ ordered the IEP team to reconvene to determine with greater specificity the mainstreaming opportunities that would be appropriate for William and to revise the IEP accordingly.

With respect to the staff training issue, the ALJ also found the language in the IEP to be too vague and directed the IEP team to revise the IEP to clearly state the amount and frequency of autism training that would be provided to the staff. The ALJ did not dictate the amount and frequency of training, rather the ALJ deferred to the expertise of the IEP team members to make this determination. Finally, the ALJ rejected the parents' request that the District hire an independent consultant to train William's teachers.

With this "mixed" result, the parents filed a claim in federal district court seeking attorneys' fees, asserting that they were the prevailing party at the administrative hearing, entitling them to such fees. The issue before the court was whether William's parents "prevailed" in the legal sense and, if so, what amount, if any, would constitute a reasonable fee award. The court held that although the parents did not prevail on the issues of William's placement and the retention of an independent consultant, they were entitled to "prevailing party" status to the extent the ALJ ordered the IEP team to reconvene and revise the IEP. Importantly, however, the court also held that this level of success was *de minimis* because the issue of greater specificity in the IEP was merely a "secondary concern," and there was no requirement to provide William with any new or additional services. The

court, therefore, denied the parents an award of attorneys' fees because a plaintiff who formally but only nominally prevails may be denied recovery of attorneys' fees. William's parents appealed the decision.

The Court of Appeals upheld the decision of the district court and denied the parents an award of attorneys' fees because their success on the merits was *de minimis*. That is, the Court reasoned that when a parent's success is related to simply technical changes to the IEP, but they lose on their primary dispute regarding a placement issue, they are not entitled to attorneys' fees. Here, the ALJ simply required the IEP team to reconvene to fix, if you will, two areas of the IEP that provided a particular service, but failed to state with sufficient specificity the amount and frequency to be provided.

This case provides support for the conclusion that disputes between parents and school districts over simply "technical" IEP issues, such as the amount and frequency of staff training and a student's mainstreaming opportunities, are not likely to result in an award of attorneys' fees for parents' attorneys. This should result in more frequent resolution of such disputes without reliance on an extended and expensive hearing before an administrative law judge. School districts are cautioned, however, to determine the amount and frequency of a service that is to be provided and state it with specificity in the student's IEP.

*If you have any questions regarding this topic, please call Joanne Harmon Curry of Lathrop & Clark LLP at 608-286-7248. Attorney Curry provides counsel in the areas of general school law, student discipline, special education law, disability and discrimination law, employment, federal Indian and tribal law, and litigation.*

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