



Special Education Law and Settlements.

Lawsuits Happen: A School District Counsel's Point of View

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Some general risks in special education litigation

- Prevailing party attorney's fees.
- Pendency.
- Awards.
- Emotionality.
- Fanning the flames.

Some general risks in special education litigation

- Actually required to give parents instructions on how to sue us.
- Number of special education students and number of hearing/settlement demands.



Assessing a case

1. The Numbers.
2. Documents and Witnesses: a substantive analysis of risk.
3. The Demand: considering the cost of resolution.
4. The Risks and Rewards: the other less tangible considerations.



The Numbers

- Cost of student's in-district education.
- How we value compensatory education.



The Numbers

- No set figure.
- Generally accepted hourly rate.
- The bottom-line total.
- Specific services.
 - OT/PT/SL.
 - Wilson tutoring.
 - ABA: BCBA and one-on-one.



The Numbers

- The hearing cost.
 - Generally four sessions.
 - Preparation time.
 - Staff and instructional time.
 - Average hearing defense costs.



The Numbers

- Insurance.
 - Deductible.
 - Coverage details.
 - Defense costs.
 - Prevailing party fees.



The Numbers

- Attorneys' fees.
 - Average prevailing party fee.
 - Prevailing party status.

The Numbers

- Any “significant” issue. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).
- The lodestar: “*number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.*” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).



The Numbers

- Reasonable hourly rates.
 - Based on rates within the particular District Court boundaries.
 - What's reasonable?



The Numbers

- Degree of success.
- The amount of attorneys' fees can be adjusted by the “degree of success.”
- Not a strict mathematical correlation.



The Numbers

- *“There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.” Hensley v. Eckerhart, 461 U.S. 424, 436-37 (1983).*



The Numbers

- Had-to-do-the-work-anyway.
 - *“the plaintiff’s claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel’s time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.”* *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).



The Numbers

- That means parents might “win” on only half of their claims but a court might reduce the attorney fee by only a quarter.
- Fees-on-fees.

Documents and Witnesses: a substantive analysis of risk

- Review records.
- Input from Supervisors.
- Interview staff (if that far along).
- The documents will not change.

Documents and Witnesses: a substantive analysis of risk

- FAPE: is the IEP “reasonably calculated to provide meaningful educational progress?”
- It is always about the school, not the family.

Documents and Witnesses: a substantive analysis of risk

- Key liability concerns.
 - Failure to react to documentation of poor or no progress.
 - Identified problem, but failed to follow up.
 - Failure to record instructional changes responsive to data.
 - Failure to address needs/recommendations in ER/RR.

Documents and Witnesses: a substantive analysis of risk

- Technology.
- Failing to identify a problem.
- Serial discipline.
- Failure to provide appropriate supports, *e.g.*, behavior plan.
- Data, data analysis, and reaction problems.

Documents and Witnesses: a substantive analysis of risk

- Data.
 - Failure to collect / maintain data.
 - Bad data.

Documents and Witnesses: a substantive analysis of risk

- Data analysis.
 - Lack of progress.
 - Mixed results / mixed data.
 - Good data, bad decisions.

Documents and Witnesses: a substantive analysis of risk

- Reaction.
 - Bad results data / lack of progress.
 - Good results data.
 - Good or bad data results / stick to the program.

Documents and Witnesses: a substantive analysis of risk

- The incompetence conundrum.
 - Procedural errors.
 - Overall impression of inadequate documents.
 - Failure to address the easy things.
 - Failure to explain.
 - The one-dimensional program: failure to see the child wholly, *e.g.*, seeing all behavior through a behaviorist's lens.

Documents and Witnesses: a substantive analysis of risk

- The nature of the disability matters.
 - Autism or reading disability.
 - Emotional disability or social maladjustment.
 - Globally impaired and significantly needy student.
 - Programs are complex and expensive.

Documents and Witnesses: a substantive analysis of risk

- Complexity involves both:
 - program development risk, and
 - program implementation risk.
- A great number of parts increases the likelihood of missing something.
- Expense is self-explanatory . . .
 - but is also reducible to somewhat objective comparison between current educational program and placement cost against requested educational program and placement cost.

Documents and Witnesses: a substantive analysis of risk

- Sympathy.
 - Lies with family not the school.
- A belief about “the best interests of the child.”
- Often courts will simply affirm the HO.

The Demand: considering the cost of resolution

- Tuition and other reimbursement.

The Demand: considering the cost of resolution

- Compensatory education.
 - Type of case matters.

The Demand: considering the cost of resolution

- In-house or third-party fund.
- Average compensatory education fund value: ---.

The Demand: considering the cost of resolution

- Large or small.
 - Larger demand is easier to address.
 - Smaller demand is harder to place against risk.
- Nuisance claim: within deductible.

The Demand: considering the cost of resolution

- A risk-reward case weighs estimated liability risk (including hearing awards and prevailing party fees) against the settlement demand. Analysis of liability (the “risk”) remains fixed, while the “reward” slides: the higher the demand the more a hearing is likely and the lower the demand the more a settlement is likely.

The Risks and Rewards: the other less tangible considerations

- A hearing can be lengthy.
 - 12 days, 31 witnesses. *K.S. v. Strongsville City Sch. Dist.*, Civ. A. 13-0091, 2014 WL 2442193 (N.D. Ohio 2014).
- The student's age.
- The impact on other students and staff.
- Siblings.
- Fueling ardor.
- Living with a hearing officer ordered/parent-directed program.

The Risks and Rewards: the other less tangible considerations

- Pendency.
 - The more you win. . . .
 - Through all appeals of right.
 - Continue to pay even when on appeal.

The Risks and Rewards: the other less tangible considerations

- It could be for a long time.
 - *E.D. ex rel. T.D. v. Colonial Sch. Dist.*, Civ. A. 09-4837, 2017 WL 1207919 (E.D. Pa. Mar. 31, 2017).
 - Motions for Judgment filed August 2010.
 - *Tyler W. ex rel. Daniel W. v. Upper Perkiomen Sch. Dist.*, 963 F. Supp. 2d 427 (E.D. Pa. Aug. 6, 2013).
 - Filed with ODR October 2007.

SPECIFIC SCHOOL DISTRICT CONCERNS

- Location / continuum.
- Culture clash?
- Budget.
 - Are the lights still turned on each Friday night?
- New personnel.



THANK YOU!

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