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SPECIAL EDUCATION ATTORNEYS' FEES AFTER  
*BUCKHANNON BOARD & CARE HOME,*  
*INCORPORATED V. WEST VIRGINIA DEPARTMENT OF*  
*HEALTH AND HUMAN RESOURCES*

*Mark C. Weber\**

On May 29, 2001, the United States Supreme Court decided *Buckhannon Board & Care Home, Incorporated v. West Virginia Department of Health and Human Resources*.<sup>1</sup> The Court ruled that in order to be a “prevailing” party entitled to attorneys’ fees under civil rights fees provisions, the claimant must prevail before the court in a judgment on the merits or a consent decree.<sup>2</sup> The Court rejected the “catalyst theory,” previously adopted by all but one of the regional circuit courts of appeals,<sup>3</sup> which permitted the claimant to obtain fees if the lawsuit was the catalyst for a voluntary change in the defendant’s conduct. Accordingly, it denied attorneys’ fees in Buckhannon’s case on the ground that the case ended in a dismissal for mootness after the state repealed the rule the plaintiffs had challenged as a violation of two civil rights laws.<sup>4</sup>

Ever since the Handicapped Children’s Protection Act of 1986<sup>5</sup> overturned the Supreme Court’s decision in *Smith v. Robinson*,<sup>6</sup> federal law has permitted parents to obtain attor-

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1. 532 U.S. 598, 121 S. Ct. 1835 (2001).
2. *Id.* at 1840.
3. *See id.* at 1839 n.3, 1852, nn. 4-5 (Ginsburg, J., dissenting).
4. *Id.* at 1838.
5. Pub. L. No. 99-372, 100 Stat. 796 (1986) (codified as amended at 20 U.S.C. § 1415(i)(3)(B)-(G) (West 2001)).
6. 468 U.S. 992 (1984) (barring attorneys’ fees in special education case).

neys' fees for prevailing in administrative and judicial proceedings in special education cases. Because courts usually construe all civil rights attorneys' fees provisions in a similar manner, the *Buckhannon* case will have important implications for special education litigation. Many special education cases are resolved without any formal decision from a judge or hearing officer. Frequently, the parent files a due process complaint, and the school district, under the pressure of a scheduled hearing, reviews the child's situation and provides the program or services that the parent sought for the child or drops its plans to change the child's program or placement. The parent then withdraws the request or the hearing officer dismisses the case as moot. In other instances, the school district makes a due process hearing request to initiate a student evaluation or special education services without the parent's consent but withdraws the request after the parent makes clear that she will put up a defense at hearing. Under the law prior to *Buckhannon*, the parent is entitled to attorney's fees in those instances and can file suit to obtain an award even without requesting any other relief.<sup>7</sup> But if *Buckhannon* bars fees in special education cases resolved without an adjudication on the merits or a consent order, the school district will no longer have to pay that parent's counsel fees.

This change in the law would work a significant reallocation of litigation resources from parents challenging school districts to the districts.<sup>8</sup> Moreover, parents wishing to obtain fees and districts wishing to avoid fees are likely to alter their behavior to maximize their respective advantages. Both the potential shift of power in special education disputes and the strategic maneuvering likely to accompany it need further study. Although there has been significant scholarship on special education attorneys' fees,<sup>9</sup> the catalyst theory,<sup>10</sup> and civil

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7. See e.g. *McSomebodies v. San Mateo City Sch. Dist.*, 897 F.2d 974 (1989) (establishing that action may be brought solely to obtain fees).

8. As students of law and economics have noted, attorneys' fees are simply another item of relief, and if the plaintiffs' right to obtain them is limited, settlements will be biased downward. See Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. Leg. Stud. 93 (1986).

9. The most comprehensive discussion in the law review literature is Thomas F. Guernsey, *The School Pays the Piper, But How Much?: Attorneys' Fees in Special Education Cases After the Handicapped Children's Protection Act of 1986*, 23 Wake Forest L. Rev. 237 (1988); see also Mark C. Weber, *Special Education Law and Litigation Treatise* ch. 22 (LRP Publications 1992 & supp. VIII 2000) (chapter discussing attor-

rights attorneys' fees in general,<sup>11</sup> the *Buckhannon* case has altered the legal terrain sufficiently to justify a new look.

This paper will describe the catalyst theory in Part One, discuss *Buckhannon's* abolition of that theory in Part Two, consider the applicability of *Buckhannon* to special education litigation in Part Three, list some strategic implications of the application of the case to special education disputes in Part Four, and map out a number of policy implications of applying the case to special education litigation in Part Five.

## I. THE CATALYST THEORY

For a generation, courts have held that civil rights claimants may recover attorneys' fees when they prevail in the sense of achieving what they want from the litigation, even if the case itself ends in a dismissal for mootness, a voluntary dismissal, or some other disposition that does not constitute a courtroom victory. The claimants prevail when the litigation has been the "catalyst" for a change that provides the relief the

neys' fees in special education cases); Peter C. Hughes, *Attorneys' Fees for Administrative Proceedings Under the HCPA and Contingency Enhancements*, 58 Geo. Wash. L. Rev. 909 (1990); Sheila K. Hyatt, *The Remedies Gap: Compensation and Implementation Under the Education for All Handicapped Children Act*, 17 N.Y.U. Rev. L. & Soc. Change 689, 728-31 (1990); Myron Schreck, *Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act: Of Carey, Crest Street and Congressional Intent*, 60 Temp. L.Q. 599, 639-50 (1987).

10. See Joel H. Trotter, *The Catalyst Theory of Civil Rights Fee Shifting After Farrar v. Hobby*, 80 Va. L. Rev. 1429 (1994); Martin Patrick Averill, Comment, "Specters" and "Litigious Fog": *The Fourth Circuit Abandons Catalyst Theory in S-1 & S-2 by and Through P-1 & P-2 v. State Board of Education of North Carolina*, 73 N.C. L. Rev. 2245 (1995). Commentary specifically on *Buckhannon's* overturning of the catalyst theory includes: Adam Babich, *Fee Shifting After Buckhannon*, 32 Envtl. L. Rep. 10137 (2002); David Arkush, Note, *Preserving "Catalyst" Attorneys' Fees Under the Freedom of Information Act in the Wake of Buckhannon Board and Care Home v. West Virginia Department of Health and Human Services*, 37 Harv. C.R.-C.L. L. Rev. 131 (2002); Caroline L. Curry, *Recent Developments*, 54 Ark. L. Rev. 727 (2001); Note, *Leading Cases*, 115 Harv. L. Rev. 457 (2001); see also Mary D. Fan, Case Note, 111 Yale L.J. 1251-52 (2002) (describing *Buckhannon* as "a recent example of the Supreme Court's mounting disregard for legislative history . . .").

11. See e.g. Peter H. Huang, *A New Options Theory for Risk Multipliers of Attorney's Fees in Federal Civil Rights Litigation*, 73 N.Y.U. L. Rev. 1943 (1998); Keith Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 Vand. L. Rev. 1069 (1993); Bernard P. Codd, Comment, *Grossly Excessive Attorney's Fee Requests under the Civil Rights Attorney's Fee Awards Act: Should the Entire Fee Request Be Denied?*, 24 U. Balt. L. Rev. 149 (1994); David Shub, Note, *Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney's Fees Awards for Civil Rights Plaintiffs*, 42 Duke L.J. 706 (1992).

claimants sought, even though there is no adjudication. Relying on language in the legislative history of the 1976 Civil Rights Attorney's Fees Awards Act,<sup>12</sup> courts concluded almost immediately after the passage of that law that civil rights plaintiffs could obtain fees in the absence of a judgment from a court if they prevailed in obtaining what they sought from the litigation.<sup>13</sup>

The catalyst theory gained strength from comments in various Supreme Court cases saying it was settled law that fees were available if the litigation vindicated the claimant's civil rights, even in the absence of a formal judgment in the claimant's favor.<sup>14</sup> In 1994, however, the Fourth Circuit Court of Appeals determined in *S-1 v. Board of Education*<sup>15</sup> that the catalyst rule was inconsistent with the Supreme Court's decision in *Farrar v. Hobby*.<sup>16</sup> For its part, *Farrar* entailed only the proposition that a minor victory on one of twenty claims did not make the plaintiff a prevailing party; accordingly, nine other courts of appeals considered *Farrar* irrelevant to the issue and reaffirmed the catalyst theory despite *S-1*.<sup>17</sup> At the time of the

12. H.R. Rpt. 94-1558, at 7 (Sept. 15, 1976) ("[A]fter a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity that no formal relief, such as an injunction, is needed."); see Sen. Rpt. 94-1011, at 5 (June 29, 1976), ("For purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.").

13. See e.g. *Nadeau v. Helgemoe*, 581 F.2d 275, 279-81 (1st Cir. 1978). Justice Ginsburg's dissent cites eleven other court of appeals decisions predating the Supreme Court's *Hewitt v. Helms* decision, 482 U.S. 755, 760 (1987), which unsurprisingly described the "catalyst theory" as "settled law." *Buckhannon*, 121 S. Ct. at 1852 n. 4 (Ginsburg, J., dissenting). The only circuit not to adopt the catalyst theory was the Federal Circuit, which did not have the opportunity to consider the issue. See *id.* at 1851.

14. *Hewitt*, 482 U.S. at 760 (describing entitlement to fees as "settled law" in situation where "voluntary action by the defendant . . . affords the plaintiff all or some of the relief sought," and reserving question when catalyst theory justifies fee award); see *Farrar v. Hobby*, 506 U.S. 102, 111 (1992) (also recognizing rule).

15. 21 F.3d 49, 51 (4th Cir. 1994) (en banc).

16. 506 U.S. 103.

17. *Stanton v. S. Berkshire Regl. Sch. Dist.*, 197 F.3d 574, 577 n.2 (1st Cir. 1999); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999); *Payne v. Bd. of Educ.*, 88 F.3d 392, 397 (6th Cir. 1996); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Zinn v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994); *Beard v. Teska*, 31 F.3d 942, 951-52 (10th Cir. 1994); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 546-50 (3d Cir. 1994); *Little Rock Sch. Dist. v. Pulaski City Sch. Dist. No. 1*, 17 F.3d 260, 263 n.2 (8th Cir. 1994). The Supreme Court majority opinion vindicated those courts in some measure by noting that *Farrar* is irrelevant to the catalyst theory's validity. See *Buckhannon*, 121 S. Ct. at

*Buckhannon* decision, the catalyst theory was alive and well everywhere except the Fourth Circuit.

## II. THE *BUCKHANNON* DECISION

Buckhannon, an operator of assisted living residences, received an order from the West Virginia state fire marshal to shut down its facilities because some of its residents were so disabled that they could not get to an emergency exit without assistance in the event of a fire.<sup>18</sup> Buckhannon argued that it could provide the necessary help in evacuating the residents and that failure to modify the rule constituted disability discrimination.<sup>19</sup> Buckhannon sued<sup>20</sup> under the Fair Housing Act Amendments of 1988<sup>21</sup> and the Americans with Disabilities Act (ADA) of 1990.<sup>22</sup> The court awarded Buckhannon a temporary restraining order against enforcement of the provision and then extended that relief under an interim agreed order.<sup>23</sup> Plaintiffs voluntarily dismissed their damages claims in the face of defendants' sovereign immunity defense but defeated the defendants' motion to dismiss the claim for permanent injunctive relief.<sup>24</sup> Less than a month after denial of the defendants' motion, the state legislature repealed the rule under which the fire marshal had acted.<sup>25</sup> The court granted the defendants' motion to dismiss the case as moot, though it sanctioned the defendants for multiplying plaintiffs' expenses by failing to notify them of the imminent repeal of the rule.<sup>26</sup> Plaintiffs moved for attorneys' fees, contending that the suit motivated the legislature to change the rule, but the court denied the motion under the then-unique rule of the Fourth Cir-

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1839 n.4.

18. *Buckhannon*, 121 S. Ct. at 1839.

19. *Id.*

20. Co-plaintiff with the facilities operator was 102-year-old Dorsey Pierce, one of the residents who could not exit without assistance but who apparently wanted to continue to live in the less restrictive environment of an assisted living facility rather than a nursing home or institutional setting. *See id.* at 1850 (Ginsburg, J., dissenting). Presidential history buffs (or perhaps those looking for bad omens for the plaintiffs) may note the odd conjunction of Pierce and a homophone of Buchanan.

21. 42 U.S.C. §§ 3601-3607 (1994).

22. 42 U.S.C. §§ 12101-12213 (1994).

23. *Buckhannon*, 121 S. Ct. at 1838.

24. *Id.* at 1838 n. 1, 1850 (Ginsburg, J., dissenting).

25. *Id.* at 1850.

26. *Id.* at 1838 n. 2.

cuit that fees are available only when there is a judgment, consent decree, or settlement. The court of appeals affirmed, and the Supreme Court granted certiorari.<sup>27</sup>

The Supreme Court affirmed in an opinion by Chief Justice Rehnquist. The Court reasoned that fees are available only to civil rights claimants who are "prevailing" parties, and that the term "prevailing" means one who has been awarded some relief by the court.<sup>28</sup> A legal dictionary and language used in earlier cases supported the definition.<sup>29</sup> Although a consent decree justifies fees on the ground that it is a judicially-ordered change in the legal relationship between the parties, success without judicially-sanctioned change does not justify fees. The Court found the language in earlier cases approving the catalyst theory unpersuasive and similarly rejected language in the legislative history of the Civil Rights Attorney's Fees Awards Act.<sup>30</sup> Finally, the Court discounted predictions by the plaintiffs that defendants would intentionally moot cases to avoid fees and hence diminish the incentives for civil rights litigation, noting that no empirical evidence had emerged from the Fourth Circuit to support those results; the Court also weighed the potential harm against the possibility that fear of fees may keep some defendants from settling cases.<sup>31</sup> Justice Scalia wrote a concurrence, joined by Justice Thomas, dilating on the meaning of the term "prevailing" and on the risk of settlements "extorted" by the fear of fees awards.<sup>32</sup>

Justice Ginsburg dissented, joined by Justices Stevens, Souter, and Breyer.<sup>33</sup> She stressed the extensive precedent from the circuit courts supporting the catalyst theory and contended that "prevailing," if interpreted in a practical sense and in the sense found in previous Supreme Court cases, means obtaining what the party sought, even without a judgment.<sup>34</sup> She

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27. *Id.* at 1839.

28. *Id.*

29. *Id.* at 1839-40.

30. *Id.* at 1841-42.

31. *Id.* at 1842. The Court noted the limits on mootness doctrine and the desirability of avoiding satellite litigation over fees. *Id.* at 1843.

32. *Id.* at 1843-48 (Scalia, J., concurring). Justice Scalia further disparaged the post-S-1 circuit court cases as instances in which the Supreme Court's dicta had misled the courts. *Id.* at 1849.

33. *Id.* at 1849 (Ginsburg, J., dissenting).

34. *Id.* at 1851-53. Justice Ginsburg also relied on a Supreme Court case, *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379 (1884), in which a cost award, which

argued that the legislative history provisions found unconvincing by the majority were "hardly ambiguous" and evinced clear congressional intent to interpret the term "prevailing" in a practical way that embraces the catalyst rule.<sup>35</sup> She rejected the majority's policy arguments, suggesting that far from inducing defendants to resist change in order to avoid fees awards, the catalyst rule provides an incentive for defendants to act promptly to avoid additional fees liability. The factual determination whether the lawsuit motivated the change is no more difficult than other factual determinations, and the role of the district court is to insure that fees are not awarded when the case lacks enough legal merit to have motivated the defendant to change its ways to avoid an unfavorable court decision.<sup>36</sup>

### III. *BUCKHANNON*'S APPLICABILITY TO SPECIAL EDUCATION LITIGATION

*Buckhannon* did not involve the attorneys' fees provision in the Individuals with Disabilities Education Act (IDEA), the statute that establishes the rights at issue in most special education cases.<sup>37</sup> Nevertheless, an observer needs little foresight to predict that many courts will be inclined to apply *Buckhannon* to special education disputes. Not only do the courts typically construe all civil rights attorneys' fees provisions in a like manner,<sup>38</sup> but also the Fourth Circuit first departed from the catalyst theory in a special education attorneys' fees case.<sup>39</sup> Although the Supreme Court rejected the reasoning of the Fourth Circuit's decision, it endorsed the result.

In response, it may be argued that the IDEA fees provision

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would be available only to a prevailing party, was given to a party that did not succeed in court. *Buckhannon*, 121 S. Ct. at 1853-54 (Ginsburg, J., dissenting). The majority distinguished the case by stating that the Court must have used its discretion to award costs to the party that did not prevail on account of the "legally successful whipsawing tactics" of its opponent. *Id.* at 1841 n.8. Justice Ginsburg further supported her practical definition of the term with treatises and state cases regarding costs. *Id.* at 1855 (Ginsburg, J., dissenting).

35. *Id.* at 1857-58.

36. *Id.* at 1859.

37. 20 U.S.C.A. §1400 *et seq.* (West 2001)

38. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7 (1983).

39. See *S-1*, 21 F.3d at 49.



was adopted ten years after the original Civil Rights Attorney's Fees Awards Act of 1976, at a time when Congress was well aware of the wide use of the catalyst theory and long before the Fourth Circuit's rejection of the theory. The catalyst theory was so well-recognized that Strom Thurmond and Orrin Hatch sponsored bills to overturn it in 1985 and 1987. As Senator Hatch declaimed to the Senate in 1985:

Due to the protracted nature of some litigation, a claim may be rendered moot by State and Federal legislation enacted prior to judicial resolution of the conflict. Under existing case law, such a turn of events would not preclude a recovery of attorneys' fees where a court determined that the case was a catalyst for the legislative change.<sup>40</sup>

Despite Senator Hatch's effort to illustrate what he saw as one of the fatal flaws in the catalyst theory, both his and Senator Thurmond's bills were unsuccessful.

Congress might be said to have acquiesced in the lower courts' adoption of the catalyst theory, and by failing to make an exception to the theory when it adopted the IDEA provision, Congress enacted the catalyst approach. Notably, the IDEA provision does create exceptions to several other constructions of the civil rights attorneys' fees laws by barring multipliers and bonuses and creating an elaborate administrative offer of judgment rule.<sup>41</sup> By failing to act as it did in those instances, Congress adopted the widely understood construction of the term "prevailing" in the attorneys' fees provision.

However persuasive that argument may be, a skeptic would reply that *Buckhannon* itself concerned two fee provisions that were also adopted well after the passage of the 1976 Act, at a time when the catalyst theory was well established and presumably well known to Congress; yet the *Buckhannon* opinion does not even bother to discuss the argument of Congressional acquiescence. That oversight may have been a result of the Court's rush to complete its business before the end of the term,<sup>42</sup> and it is of course possible that the Court might revise its position if it were to consider the argument soberly. Nonetheless, the Court's complete omission of the topic provides little encouragement to those who would make a congressional

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40. 131 Cong. Rec. S10800-01 (daily ed. Aug. 1, 1985).

41. See 20 U.S.C. § 1415(i)(3)(C)-(D)(i) (West 2001).

42. The opinion came down May 29, 2001.

acquiescence argument in a special education attorneys' fees case.

It remains true that the argument that Congress intended to adopt the existing construction of "prevailing" in the Handicapped Children's Protection Act is stronger than the argument implicitly rejected with regard to the ADA and Fair Housing Act Amendments, for those latter statutes did not include provisions rejecting various other extant interpretations of section 1988.<sup>43</sup> The failure to reject the construction of "prevailing" thus looks more intentional with regard to IDEA than with the other two statutes. Whether courts will credit that distinction remains uncertain.

If the courts do apply *Buckhannon* to special education cases, the application could be either broad or narrow. The facts of *Buckhannon* are extreme in that a legislative change in the law mooted the case, and legislative motivation is notoriously difficult to discern.<sup>44</sup> Some members of the legislature may have acted to moot the case, others because they believed in the merits of the position being adopted, others because of logrolling or political considerations, and still others because they hit the wrong button on their desks. A decision by a special education director to provide requested services to a specific student, say a decision taken immediately after a settlement conference and memorialized in an enforceable, written document such as an Individualized Education Program (IEP), is a much clearer instance in which the litigation led to the result without adjudication. *Buckhannon's* facts do not require the denial of fees in that utterly dissimilar situation. Nor would an analogy to the case require denial of fees for relief written into a new IEP after a mediation session or in a stipulation to dismiss that does not amount to a consent decree.

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43. See *Fair Housing Act*, 42 U.S.C. § 3613(c)(2) (1994); *Americans with Disabilities Act*, 42 U.S.C. § 12205 (1994).

44. See *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment."). On occasion, however, the Supreme Court has scrutinized legislative motivation and found statutes unconstitutional on account of illegitimate purposes. See e.g. *Hunter v. Underwood*, 471 U.S. 222 (1985) (finding enactment unconstitutional on account of racially discriminatory motivation); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (same). See generally John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1970) (discussing necessity of discerning legislative intent in many instances and problems with doing so).

The Court's language, however, suggests a much broader application of the case. At various points, the majority opinion says that fees are not available unless the party has been "awarded some relief by the court," unless there has been a "judicially sanctioned change in the legal relationship of the parties," and unless there is a "judicial imprimatur on the change."<sup>45</sup> The crucial "unless" is that unless *Buckhannon* is strictly limited to its facts, it would bar fees awards in the situation posited above however clear the defendant's motivation might in fact have been.

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45. *Buckhannon*, 121 S. Ct. at 1839-40. Preliminary indications are that courts are applying *Buckhannon* to special education cases, in some instances taking the Court's comments broadly. See e.g. *J.C. v. Reg'l Sch. Dist.* 10, 278 F.3d 119 (2d Cir. 2002) (overturning award of fees when hearing officer dismissed due process hearing as moot after district made changes in IEP and dropped expulsion proceedings); *Jose Luis R. v. Joliet Township High Sch. Dist.* 204, 2002 WL 54544 (N.D. Ill. Jan. 15, 2002) (denying fees for settlement agreement reached at mediation following hearing request, when agreement had been read into record before hearing officer without statement of approval by hearing officer); *John T. v. Del. County Intermediate Unit*, 2001 WL 1391500 (Nov. 7, 2001) (denying fees when action ended in voluntary dismissal by plaintiffs); *J.S. v. Ramapo Cent. Sch. Dist.*, 165 F. Supp. 2d 570 (S.D.N.Y. 2001) (denying fees when defendant paid child's tuition at private school and reimbursed parents and parents did not pursue due process hearing request to resolution); *Baer v. Klagholz*, 786 A.2d 907 (N.J. Super. Ct. 2001) (denying fees for hours spent challenging regulations that defendant ultimately amended without court order or consent judgment); see also *Akinseye v. D.C.*, 2002 WL 522883 (D.D.C. Mar. 19, 2002) (denying interest on previous fee awards for settlements on basis of *Buckhannon*, but expressing reservations about wisdom of application of *Buckhannon* to IDEA administrative proceedings). But see *Johnson v. D.C.*, 190 F. Supp. 2d 34, 45 (D.D.C. 2002) (not extending *Buckhannon* to bar fees for private settlements of IDEA cases during administrative proceedings); *Brandon K. v. New Lenox Sch. Dist.*, 2001 WL 1491499 (N.D. Ill. Nov. 23, 2001) (denying motion to dismiss fees claim when settlement reached before hearing was transcribed and entered into due process hearing record as agreed order of hearing officer); *Christina A. v. Bloomberg*, 167 F. Supp. 2d 1094 (D.S.D. 2001) (awarding fees based on settlement agreement approved by district court with retention of jurisdiction, though recognizing agreement not to be formal consent decree); *Sabatini v. Corning-Painted Post Area Sch. Dist.*, 190 F. Supp. 2d 509 (W.D.N.Y. 2001) (awarding fees when action terminated in settlement agreement incorporated in consent order, following entry of preliminary injunction); see also *L.C. v. Waterbury Bd. of Educ.*, 2002 WL 519715 (D. Conn. Mar. 21, 2002) (awarding fees despite argument based on *Buckhannon* when hearing officer ordered residential placement but parents chose not to enroll child). The *Johnson* court ruled that a district's consistent policy or practice of conditioning settlement officers on fee waivers may constitute a violation of IDEA. *Johnson*, 190 F. Supp. 2d at 42-48 (denying motion to dismiss challenge to policy but denying request for immediate injunctive relief).

#### IV. STRATEGIC EFFECTS OF APPLICATION OF *BUCKHANNON* TO SPECIAL EDUCATION CASES

If *Buckhannon* reaches special education disputes and is applied in a broad fashion, it will affect the parties' litigation strategies, both with regard to their settlement postures and the claims they make and defenses they assert.

##### *A. Settlement Dynamics*

Application of *Buckhannon* to special education attorneys' fees would affect the dynamics of settlement negotiations. For a rational school district, a dollar spent on attorneys' fees is the same as a dollar spent on services for a child. A rational but impecunious parent must balance the need for educational services for her child against the need to pay the family's bills. If a school district can plausibly threaten to moot the case and thus eliminate all entitlement to fees, that threat will induce a rational parent to sign a formal settlement for a lesser amount of services or other relief as long as settling the case now will provide some cash to pay the parent's attorney or at least eliminate additional payments for the attorney's services. Thus a change in the fees entitlement can be expected to work a change in posture of both sides of the dispute and a reduction in the relief that parents obtain in settled cases.

With regard to a more narrow aspect of litigation strategy, application of *Buckhannon* would diminish the parent's incentive to pursue mediation, an option that the law currently encourages.<sup>46</sup> Although the parent would retain some incentive to pursue mediation in order to dispose of the dispute promptly and stop amassing legal bills, a new incentive would exist for parents and their lawyers to keep the dispute alive through the hearing in the hope of obtaining relief and with it an entitlement to fees.

##### *B. Asserting Claims and Defenses*

If *Buckhannon* governs special education attorneys' fees, the impact will not be limited to settlement dynamics but will also affect the framing of special education claims and the defenses that school districts raise against them. The obvious de-

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46. See 20 U.S.C. § 1415(e) (West 2001) (establishing procedures to implement and encourage use of mediation of special education disputes).

fense to consider is that of mootness, and the relevant claims include those for specific relief and for damages.

### 1. *The Mootness Defense*

In actions initiated by parents, school districts may voluntarily provide the child with the relief the parents sought and then seek to dismiss the case on the ground that it is moot. Courts in the federal system and in most states refuse to decide moot cases.<sup>47</sup> If *Buckhannon* is applied to special education attorneys' fees, parent attorneys can be expected to resist mootness dismissals with new vigor.

Two doctrines may assist the parents' effort. The first doctrine is that the mere voluntary cessation of illegal activity does not moot a case if the defendant remains free to resume its actions. This is the familiar rule of *United States v. W.T. Grant Co.*:<sup>48</sup> even if the defendant has changed its ways under the threat or reality of litigation, there remains a viable case for injunctive relief to keep the defendant in line. However, there must be some probability that the defendant will in fact return to its old ways.<sup>49</sup>

The second, independent doctrine that limits mootness dismissals is that an action remains alive when the conduct at issue is capable of repetition yet evades review in the course of a typical proceeding. The most familiar application of this doctrine is a case challenging the constitutionality of abortion restrictions. By the time the case is adjudicated, the pregnancy will have ended. The Supreme Court has held that the events do not moot the case in those circumstances, for otherwise the case will never be adjudicated.<sup>50</sup> Nevertheless, the repetition-yet-evasion-of-review must apply to the party actually before the court. In a special education case challenging a disciplinary suspension, the Court permitted the case to proceed on behalf

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47. See e.g. *Smith v. Special Sch. Dist. No. 1*, 184 F.3d 764 (8th Cir. 1999) (dismissing IDEA claim for services as moot when student had moved); *N.Y. St. Sch. Bds. Assn. v. N.Y. St. Bd. of Regents*, 619 N.Y.S.2d 837 (N.Y. App. Div. 1994) (dismissing challenge to regulation after change in regulation).

48. 345 U.S. 629 (1953).

49. See e.g. *Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975) (finding challenge to transfer of prisoner moot); Richard H. Fallon, Daniel J. Metzger & David L. Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* 219-220 (4th ed., Foundation Press, Inc. 1996) (collecting additional cases).

50. *Roe v. Wade*, 410 U.S. 113, 125 (1973).

of one student on the ground that there was a reasonable probability he would again be subject to suspension<sup>51</sup> but held the case moot as to a second student who had graduated and was no longer eligible for public school services.<sup>52</sup>

The degree of success that parents will have in resisting mootness dismissals is one of the areas of uncertainty with regard to *Buckhannon's* application to special education disputes. School districts can be expected to argue that changes they make in an IEP create an enforceable document that effectively ends a controversy. Parents can be expected to argue that the IEP is subject to change by the school district at any time on any ground, real or pretextual. Satellite litigation will ensue over the permanence of the changes in the program. Claims for compensatory education<sup>53</sup> or monetary relief<sup>54</sup> also keep a case from being considered moot, though many special education cases lack the grounds for those claims. The availability of damages relief is discussed at greater length below.<sup>55</sup>

## 2. Claims for Specific Relief

Until now, the advice for lawyers eager to obtain fees has been to resist making extravagant claims for specific relief, such as improved programs or placements, on behalf of a student. Frequently, courts weigh what the parent originally sought against what she obtained and reduce the fees proportionally,<sup>56</sup> so it makes sense not to make outlandish demands in the first place. This advice may no longer hold because the more restrained the request for relief, the easier it is for the district to moot the case and eliminate fees altogether. Of

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51. *Honig v. Doe*, 484 U.S. 305, 318-23 n. 6 (1988).

52. *Id.* at 318. Not bound by the federal approach to mootness, a state court has applied a broader exception to conventional mootness rules, refusing to dismiss a case challenging disciplinary procedures on the ground that the conduct complained of was capable of repetition yet evading review with regard to other students. *Bd. of Trustees v. Doe*, 508 S.2d 1081 (Miss. 1987).

53. *Mason v. Schenectady City Sch. Dist.*, 879 F. Supp. 215 (N.D.N.Y. 1993).

54. *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884 (9th Cir. 1995).

55. See *infra* text accompanying notes 59-65.

56. See *e.g. Andrew S. v. Sch. Comm.*, 59 F. Supp. 2d 237 (D. Mass. 1999) (awarding reduced fees when parents obtained staff and teacher training but not private placement). Some courts have denied fees altogether when parents achieved minimal success after making more extreme demands. See *e.g. Linda W. v. Ind. Dept. of Educ.*, 200 F.3d 504 (7th Cir. 1999), cert. denied, 531 U.S. 816 (2000) (denying fees when parents won compensation for tutoring but failed on main tuition reimbursement claim).

course, if the parent throws caution to the wind in framing her request for relief, the district may be able to reduce fees liability by using the offer of judgment rules<sup>57</sup> or making motions to dismiss parts of the claim.

### 3. Damages Claims

A pending claim for damages relief keeps a case from being moot, as Chief Justice Rehnquist recognized in *Buckhannon*.<sup>58</sup> Although the range of special education cases in which parents can obtain monetary relief is limited, *Buckhannon* gives parents an inducement to push the limits and add money claims to keep the case from becoming moot. Hearing officers generally deny that they have the power to afford any damages relief other than tuition reimbursement, so a dispute that includes a damages claim will remain alive at least up through the filing of an action in court. Districts may be able to counter the prayer for damages by using the offer of judgment rules to limit fees liability to that incurred prior to an offer that is at least as good as what the parent ultimately receives through litigation, but the damages strategy affords at least some prospect of fees if not of cash relief itself.

The federal circuits are in disarray as to what factual predicates support damages claims beyond tuition reimbursement,<sup>59</sup> but courts have permitted compensatory damages awards for conduct such as educational neglect,<sup>60</sup> failure to provide accessible facilities,<sup>61</sup> violations of procedural rights,<sup>62</sup> and disability

57. See 20 U.S.C. § 1415(i)(3)(D)(i) (West 2001); see also Fed. R. Civ. P. 68.

58. See *Buckhannon*, 121 S. Ct. at 1842 (“[S]o long as the plaintiff has a cause of action for damages, a defendant’s change in conduct will not moot the case.”).

59. See Mark C. Weber, *Damages Liability in Special Education Cases*, 21 Rev. Litig. 83, 84-92 (2002) (collecting and discussing authorities). In order to have a claim for tuition reimbursement (as opposed to compensatory damages), the parent must have expended money for private schooling in a situation in which the school district failed to make a free, appropriate public education available to the child in a timely manner. 20 U.S.C.A. § 1412(a)(10)(C)(ii) (West 2001); see *Florence County Sch. Dist. 4 v. Carter*, 510 U.S. 7 (1993) (discussing reimbursement relief under IDEA).

60. See e.g. *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995) (upholding claim for damages for alleged delay in evaluation and placement of child with disabilities).

61. See e.g. *McKay v. Bd. of Educ.*, 1997 WL 816505 (D. Me. 1997) (denying motion to dismiss damages claims for failure to make school building accessible).

62. See e.g. *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141 (2d Cir. 1983) (permitting action for damages when defendant allegedly forged form, preventing exercise of procedural rights).

harassment.<sup>63</sup> Many courts allow such claims whenever there is a supported assertion of bad faith conduct or gross misjudgment.<sup>64</sup> More claims of this type should be anticipated as parents and their advocates push for more effective relief and try to stave off mootness in the meantime.

#### V. POLICY IMPLICATIONS OF APPLYING *BUCKHANNON* TO SPECIAL EDUCATION CASES

Loss of an entitlement to judicial relief is a reallocation of resources. Parents who lose the opportunity to obtain fees when the litigation causes a school district to provide relief prior to adjudication will be out of pocket for the attorney fees. Thus, they have less of an incentive to pursue their rights under IDEA, and attorneys who hope to be paid have less of an incentive to take special education cases.

The loss is particularly acute when parents have the choice of purchasing educational services for the child on the open market for a set number of years before either high school graduation or age twenty-one (and the loss of IDEA eligibility), or continuing within the public education system and fighting the inevitable legal battles to procure acceptable special education services. The parent with scarce resources can spend the money on private tuition and forgo her rights under the law, or she can incur the expense of an attorney on the prospect of getting the services from the school district and the now-diminished prospect of obtaining fees on account of getting the services via adjudication or consent order. Since a dollar spent on tuition is equal to a dollar spent on an attorney, the parent may well choose to give up the right to a free education to ensure that the child actually receives necessary services. The policy effect of the abolition of the catalyst rule is the loss of cost-free schooling for children with disabilities.

As indicated above, in cases that are formally settled, there

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63. See e.g. *Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999) (denying motion to dismiss damages claim in which teacher allegedly humiliated student with severe depression and excluded her from academic activity). See generally Mark C. Weber, *Disability Harassment in the Public Schools*, 43 Wm. & Mary L. Rev. 1079 (2002).

64. This test is frequently applied for damages claims under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994). See e.g. *Walker v. D.C.*, 969 F. Supp. 794 (D.D.C. 1997) (permitting liability); *T.J.W. v. Bd. of Educ.*, 26 IDELR 999 (M.D. Ala. 1997) (same); see also *Thompson v. Bd. of Special Sch. Dist. No. 1*, 144 F.3d 574 (8th Cir. 1998) (applying test but denying liability).



will be a similar dynamic in which the parent is induced to trade relief for the child against payment of legal bills. The higher the fees, the stronger the incentive to settle for some amount in cash to cover them even if it means less in the way of services for the child. Again, the child's right to free, appropriate public education is lost.

The increased difficulty of recovering fees is also likely to diminish the market for legal services in special education cases. The whole purpose of the fee-shifting statutes is to enhance the availability of attorneys who will take on the litigation. Chipping away at the entitlement reduces the incentive for lawyers to allocate their time to special education cases rather than more lucrative matters.

These policy implications of *Buckhannon* are simply specific applications of what can be expected to happen in public interest litigation in general as a result of the case. A prominent legal newspaper reported:

The ruling will have a "profound adverse effect on the economics of public interest litigation," says veteran environmental litigator John Eccheverria of Georgetown University School of Law. "It will increase the risk that thousands of hours of legal time invested in a case will never be reimbursed even if the litigation in fact is successful and accomplished its objective." . . . Plaintiffs' attorneys say that the ruling gives defendants an incentive to drive litigation along, requiring plaintiffs' counsel to expend significant resources and then, at the 11th hour when plaintiffs appear likely to prevail, unilaterally change their policies to moot the litigation and avoid a fees award.<sup>65</sup>

On the other side of the coin, there may be some positive impact on the availability of special education services if the school districts are currently withholding provision of services so that it does not look as though litigation caused them to give them to the child, thus creating the basis for a fees award.<sup>66</sup> Whether this incentive matters is dubious, however. Under the catalyst rule, the defendant always has an incentive to afford the relief to which the claimant is entitled in order to stop accumulating additional fees liability.<sup>67</sup>

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65. Marcia Coyle, *Fee Change is a Sea-Change*, Natl. L.J., A1 (June 11, 2001).

66. See *Buckhannon*, 121 S. Ct. at 1842 ("[T]he possibility of being assessed attorney's fees may well deter a defendant from altering its conduct.")

67. See *id.* at 1859 (Ginsburg, J., dissenting).

If parents' attorneys make the predictable response of appending damages claims to their special education complaints, additional systemic results will ensue. Few things raise the tension in a lawsuit more than a claim for damages, and this is especially likely in the context of special education. Since bad faith conduct or gross misjudgment is a basis for the claim,<sup>68</sup> charges of personal misconduct are inevitable and will give rise to wounded feelings and lingering resentment. Subtle or less-than-subtle retaliation may visit the child who continues in the school environment with the personnel who have been subject to the charges of bad faith and misconduct.<sup>69</sup>

## VI. CONCLUSION

The courts may not apply *Buckhannon* to special education litigation fee awards, but there is a clear likelihood that they will. If *Buckhannon* is adopted, the policy effects could be profound, eroding the availability of legal services in an area in which Congress provided fee awards specifically to enhance the supply of legal counsel. As lawyers pursue damages claims and other more aggressive forms of relief, they may provide some insulation from claims of mootness but may create more antagonistic relationships between parents and school districts.

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68. See *supra* note 63 and accompanying text.

69. Long-term deterioration in the relationship between parents and school district, with attendant potential harm to the child, is not unknown in special education disputes. In one case, the court ordered a child placed in a different school in the district on account of the hostility between the personnel in the child's original school and the parents. *Metro. Govt. v. Guest*, 28 IDLER 290 (M.D. Tenn. 1998); see also *Bd. of Educ. v. Ill. St. Bd. of Educ.*, 938 F.2d 712 (7th Cir. 1991) (affirming private placement in part on basis of parental hostility).