Future TRENDS

In Disability Law:

Recent Supreme Court Rulings and How They Affect Students with AD/HD

BY ROBERT M. TUDISCO, ESQ.

Both individually and through its partner organizations in the disability community, CHADD constantly seeks to provide its members with current information on pending legislation at the state and federal level that can potentially impact families with special needs. Another significant aspect of this legislation: judicial interpretation of specific legislation. Recently, a troubling trend has developed with two significant rulings by the U.S. Supreme Court that will undoubtedly impact the ability of families to seek protection under the Individuals with Disabilities Education Improvement Act (IDEA).

Rulings unfavorable to families

The Supreme Court issued a decision in *Weast v. Schaffer* [377 F.3d 449 (4th Cir. 2004)], which held that parents of children with disabilities who seek to challenge the decision of a school district in a due process hearing have the burden of persuasion. In other words, it is the parents' responsibility to prove that the school district's decisions are not appropriate for the student rather than the school district's responsibility to show how its plan meets the needs of the student. (See the October 2005 issue of *Attention!*® magazine for an in-depth discussion and the February 2006 issue for a follow-up). In its ruling, the Court rejected the parent's claim that the burden should be shifted to the school district because the district has more access to and resources for evaluations, expert information, funding and records. The Court reasoned that since IDEA requires that parents receive the benefit of procedural safeguards, there is no inherent advantage to the school district and therefore no reason to shift the burden.

More recently, in the case of *Arlington v. Murphy*, 548 U.S. __ (2006), the Supreme Court was faced with the issue of whether or not parents who win their case, known as prevailing, can recover fees for services rendered by experts, such as a fee charged by a doctor for testifying about a student's disability, in IDEA actions. IDEA expressly provides that a court "may award reasonable attorneys' fees as part of the costs" to the parents of a child with a disability who is the prevailing party.

The parents in *Arlington* filed an action based on IDEA to recover private school tuition for their child. The family prevailed in the District Court then sought to recover fees for the services of an educational consultant who assisted throughout the case. This request was granted by the District Court in part and affirmed by the U.S. Court of Appeals for the Second Circuit. The Supreme Court, in a 6–3 decision, reversed the decision of the lower Courts and held that, absent specific language granting fees for experts, prevailing parties may only recover reasonable attorneys' fees and not fees for expert witnesses.

Both the lower Courts and the dissenting opinions refer to the legislative intent behind the statute, what the lawmakers originally intended when they created the legislation. They cited a Conference report that specified the meaning of "the term 'attorneys' fees' as part of the costs includes reasonable expenses of expert witnesses and reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding."

Families reluctant to challenge

The decision in *Arlington* will undoubtedly make families reluctant and have a chilling effect on those families who might otherwise challenge the decision of their local school district and/or impartial hearing officer, now that they are unable to recover fees for expert witnesses, even when they win their case. In fact, many families are currently reluctant to seek legal representation and challenge the decisions of their local school district, even when they understand that they may recover those fees if they prevail. Such representation still involves an initial commitment and outlay of money with no guarantee of reimbursement if the outcome is uncertain.

Many families are currently reluctant to seek legal representation and challenge the decisions of their local school district.

Future difficulties for parents

As troubling as the decision in *Arlington* is, on its face, it also presents a problem when viewed along with the Court's previous decision in *Schaffer*. The Court in that case rejected the proposition that the school district has any inherent advantage in IDEA litigation. The holding in *Arlington*, however, places the family seeking to challenge their local school district at a distinct disadvantage in that they are now unable to recover fees for expert witnesses even if they prevail. Viewed together, the two decisions seem clearly illogical and have a devastating effect on the rights of children with special needs in an educational setting. On the one hand, the Court held that the school district has no advantage in such litigation, even though it readily has access to evaluations, psychologists and social workers, and then the Court took the next step in refusing to permit families to be reimbursed for retaining expert witnesses to challenge the school district's position, even when they prevail.

Many advocates in the disability community seek to influence public policy by influencing legislators' decision-making processes; however, we should also be aware that judges and the courts can significantly affect legislation through their rulings and interpretations. ■

Robert M. Tudisco, Esq., is a practicing attorney and adult diagnosed with AD/HD. He has researched and written extensively on adult coping mechanisms and legal and advocacy issues. Mr. Tudisco is a member of CHADD's board of directors and Attention!® *magazine's editorial advisory board. He welcomes questions and comments at his Web site, www.ADDcopingskills.com.*