

Initiative to Cap Special Education Legal Costs

As school district representatives are keenly aware, liability exposures constitute a significant financial threat to our school districts' general funds. Some expensive claims are constant such as automobile liability, while others are cyclical or emerging and promise to develop as very expensive losses. In the 1990's, employment liability exposures emerged as a dominant financial challenge, and significant time and thought was devoted to the cost containment of EPL claims. While EPL claims remain as a distinct financial challenge, a new ravenous beast is devouring school districts' severely limited funds: special education legal costs now demand a center stage position.

ASCIP has monitored this emerging trend over the past decade as the special education legal battlefield began shifting from the state administrative hearing venue to the Federal courts as litigants filed civil rights claims under the Individuals with Educational Disabilities Act (IDEA). Such claims asserted that school districts were denying students' constitutional entitlement to receive a free appropriate public education (FAPE). Violation of this civil right and deprivation of the due process attendant thereto effectively shifted the focus of action into the more lucrative Federal venue, escalating the costs of plaintiffs' awards....and saddling school districts with the legal expenses of both parties as is provided for in the Federal system.

As jolting as an ice-water bath, ***Porter vs. Manhattan*** delivered a piercing wakeup call to Manhattan Beach Unified School District, its primary liability insurer, the Alliance of Schools for Cooperative Insurance Programs (ASCIP), and the District's excess liability insurer, Schools Excess Liability Fund (SELF) when the U.S. District Court, to which the case had been remanded by the Ninth Circuit Court of Appeals, ruled in favor of Porter. A record **\$6.7 million** settlement resulted with the District, the California Department of Education, ASCIP and SELF each paying shares to the plaintiff and attorneys. Of this sum, in excess of \$1.5 million is known to have been paid to the law firm representing the Porter family. Details pertaining to this case may be found in the attached Wrightslaw article published on August 18, 2005, and in the attached United States District Court brief for Case No. 01-55032.

Since 2005, ASCIP has handled scores of special education claims, a number of which have been very expensive FAPE claims with attendant high legal costs. As is frequently the case, knowledge or announcement of a lucrative settlement tends to attract zealous advocates and spur a proliferation of sister suits. Several ASCIP FAPE cases are summarized in the attached "Summary of Expensive ASCIP FAPE Cases" where the legal costs for special education civil rights claims filed under 42 U.S.C. 1983 total \$1.09MM, \$133MM and 83MM. In a companion document, John Vinke, the Associate Superintendent for Business Services, a long-time special education cost-containment expert and an ASCIP Board member, describes the special education environment in which his district operates and some of the special education challenges facing his district's administrators.

Faced with these cost containment challenges, ASCIP--like many school pools throughout the nation--has sought to create and implement effective risk control strategies. Additionally, we have caucused with other school pool executives and discussed this issue with the Board of Directors of the California Association of Joint Power Authorities (CAJPA) to solicit help in addressing our common problem. In January 2010, ASCIP met with the CAJPA Legislative Committee along with John Vinke, Adonai Mack who is the legislative



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advocate for the Association of California School Administrators (ACSA), and Dennis Meyers, legislative advocate for the California Association of School Business Officials (CASBO). This group unanimously agreed that legal expenses attendant to FAPE litigation constituted a major expense and a problem which deserved the focus of a broad group of professional stakeholders in order to form a coalition to seek legislative relief.

One issue raised by CAJPA's legislative advocate, Julianne Broyles, was whether the problem should be legislatively addressed on the state level or on a federal level. She believed that the latter venue was more appropriate, and her view was subsequently supported by an opinion written at ASCIP's request by a member of ASCIP's legal panel, Hans Gillinger, Esq., of Gibeaut, Mahan & Brisco. Counsel Gillinger's opinion is attached for reference.

It was the consensus of the CAJPA Legislative Committee and meeting attendees that the form of redress which was desirable needed, politically, to take the form of a plea for capping special education legal expenses rather than any effort to reduce settlements awarded to special education students. It was further agreed that it would be advisable to form as broad a coalition as possible, potentially involving special education advocate groups as well as the National Association of School Boards (NASB), states' association stakeholders, and risk pool stakeholders along with AGRIP.

Subsequent to this meeting, at the request of John Vinke, ASCIP staff met with lobbyist Kevin Gordon of SI&A School Advocacy lobbying group. We were impressed with his expertise and his description of the strategy he is currently employing and which he would continue to follow if he were retained to seek legislative relief on a federal level; and our staff and our Board felt that the engagement of this advocacy group--or some other similarly qualified advocacy group--would constitute money well spent.

Which brings us to this point...our presentation of ASCIP's perspective based on our claims experience and our discussions with other pool leaders. We believe the problem is pervasive throughout the country and that it can most effectively be addressed by seeking the support of a national coalition of stakeholders. While we are not directly seeking monetary support (although we would not reject it), our goal is to seek the formal support and endorsement of major professional groups such as AGRIP to secure legislative relief in the form of capping the cost of special education legal fees.

Attachments:

Wrightslaw Article published August 18, 2005
United States District Court Brief for the Central District of California, No. 01-55032
Summary of Expensive ASCIP FAPE Cases
John Vinke [ASCIP Newsletter](#) Article
Counsel Gillinger's Letter dated April 20, 2010



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