

# COURTSIDE

## Reversal of Fortune?

BY PERRY A. ZIRKEL

In spring 2000, Angelo Calabrese's school district in Amherst, Ohio, determined that he was eligible for special education services based on diagnoses of a specific learning disability and AD/HD.

In 10th grade (2004-05), Angelo had an excessive number of absences and tardies, and he failed to hand in or complete several assignments and tests. He failed various courses. Yet, he passed the statewide assessments in reading, science, and math. In 11th grade (2005-06), his problems, including poor attendance and failing grades, worsened.

On July 3, 2006, his mother, through attorney Donald R. Menefee, filed for a due process hearing. She alleged that the district had failed to provide Angelo with a free appropriate public education (FAPE), but her complaint did not specify any particular shortcoming in Angelo's IEPs. She sought reimbursement from the school district for tutoring expenses during grades 5-10 and compensatory placement, with transportation, for a private school.

On August 24, the district extended a formal offer of settlement consisting of two years of private school tuition, but Calabrese, through Menefee, rejected it and advanced a counteroffer that included attorneys' fees. The district declined. But on August 31, the district made a second offer, adding transportation to and from the private school and 50 hours of after-school or weekend private tutoring to allow Angelo to make up lost credits. On September 6, Menefee rejected this offer, contending that it wasn't enough to ensure Angelo's graduation.

The hearing officer conducted two sessions. He limited Calabrese's claims to the IEPs for 10th and 11th grade, based on the two-year statute of limitations in the 2004 amendments of the Individuals with Disabilities Education Act (IDEA). Calabrese presented no evidence of her tutoring expenses or of any procedural violations by the district. In her testimony,

she offered only Angelo's failing grades as purported proof of the denial of FAPE. Calabrese's only other witness was the admissions director of a private school to which Angelo had not applied. The hearing officer ruled that Calabrese fell far short of meeting her burden of proof, and he denied all her requested remedies.

In January 2007, Calabrese appealed to the state-level review officer. Noting that she had failed to question any of the hearing officer's findings of fact and that she had failed to provide any evidence that the IEPs in question were inappropriate, the review officer affirmed the hearing officer's decision.

Calabrese declined to seek judicial review. However, on March 29, 2007, the school district filed suit against Calabrese and Menefee for recovery of its attorneys' fees, which is allowed by a provision in the 2004 IDEA amendments. The district alleged that it had spent more than \$35,000 in attorneys' fees in this case.

Menefee first requested a 30-day postponement to file his answer. Two weeks after the deadline, he filed for an additional continuance. Menefee also failed to comply with that deadline, and he did not attend a case-management conference that the court scheduled. Menefee then filed for another continuance, and he finally filed his answer on the last day of this new deadline. However, his answer failed to comply with the Federal Rules of Civil Procedure, which required him to address each of the district's specific allegations. The district moved to have the court recognize that Menefee, by failing to respond, had admitted each of the district's allegations. After another late and incomplete response from Menefee, the court granted the district's motion.

On October 11, Calabrese, with a new attorney, filed a cross-claim against the district and a third-party complaint against Menefee. On February 18, 2008, the district moved for summary judgment. Menefee failed to file a timely opposition to this motion. On February 29, the district moved to dismiss Calabrese as a defendant.

The magistrate judge, who assists the federal district court judge in such matters, recommended the following: 1) to grant the district's motion to dismiss Calabrese as a defendant, 2) to grant the district's motion for summary judgment against Menefee for attorneys' fees amounting to \$2,970 for defending against the appeal to the review officer and \$10,000 for pursuing this judicial action, and 3) to grant in part Calabrese's motion for sanctions against the district, entitling her to reimbursement for the court costs to defend this judicial action.

■ PERRY A. ZIRKEL is the Robinson Senior Scholar in Educational Policy, University of North Florida, Jacksonville, Florida, on leave for the spring semester from Lehigh University.

On July 3, Menefee filed his objections, arguing that his delay in filing answers was due to a bacterial infection leading to blindness in his left eye and that he had followed the Canons of Professional Responsibility. He also argued that adopting the recommendations would have a chilling effect on parents who wanted to pursue their rights under the IDEA.

## **The judicial proceedings were completely concerned with the procedures and costs of adjudication rather than the substance and students of special education.**

On the same date, the district filed objections to the magistrate's recommendation that it pay Calabrese's court costs, arguing that she did not prevail or that, even if she did, such a sanction would be inequitable under the circumstances. In her response, Calabrese countered that despite repeated efforts by her new attorney to have her dismissed from the case, the district did not agree to do so until the last minute.

On July 21, 2008, the federal district court adopted the magistrate judge's report and recommendations, thus ordering Menefee to pay the district \$12,970 in attorneys' fees plus court costs and partially granting Calabrese's motion for sanctions, amounting to her court costs.<sup>1</sup> Finally, the court ordered that Calabrese's claims against Menefee for legal malpractice be dismissed without prejudice so that she could pursue them in state court.

Subsequently, the district requested \$2,600 for its court costs; the parent requested attorneys' fees; and, after more litigation, the district agreed, via settlement, to pay the parent \$18,000 for court costs and attorneys' fees. In addition, Menefee has appealed the court's decision to the Sixth Circuit.

### **Concluding Comments**

The district's legal counsel, Helen S. Carroll, concluded: "While a victory was gratifying, the final outcome was disappointing based upon the effort and resources expended by the district." Calabrese's second attorney, Kenneth D. Myers, said this case proves that if districts misuse the new IDEA provision "to intimidate parents in special education cases. . . they could end up paying the parents' attorneys' fees."

In my view, this case is both an example and an exception. First, this case illustrates over-legalization<sup>2</sup> of special education. In contrast with the two levels of ad-

ministrative proceedings, the judicial proceedings were completely concerned with procedures and costs.

Second and not otherwise obvious, however, this case is a limited exception for — rather than a potent example of — reverse attorneys' fees under the IDEA. After all of the time and expense of the judicial proceedings, the award was limited to less than \$3,000 of the more than \$35,000 in the district's attorneys' fees. The bulk of the award was for the \$10,000 expended in collecting the \$3,000, and the court costs awarded to the district were outweighed by the settled amount for the parents' court costs and attorneys' fees.

The reverse attorneys' fees provision of IDEA 2004 has proven to be mostly symbolic. This provision largely repeated the sanctions already available for frivolous suits in federal cases,<sup>3</sup> and most of the other cases to date have been unsuccessful.<sup>4</sup> What may be frivolous, unreasonable, or without foundation to district personnel is often not so in the judicial context. The real reason that the court ruled against the parent's attorney in this case may well have been the umbrage occasioned by his flaunting of its procedural rules, including deadlines.

The effects of this court decision on Angelo's education, Menefee's career, and the participants' pocketbooks are all unsettling questions at this point. Yet, the paper trail of the official court opinion illustrates the extreme ends of what most folks have voted to be, on balance, a good IDEA. **K**

### **NOTES**

1. *Amherst Exempted Vill. Sch. Dist. Bd. of Educ. v. Calabrese*, 50 IDELR ¶ 218 (N. D. Ohio 2008). I obtained supplementary information by e-mail interviews in late November 2008 with attorneys Kenneth D. Myers, who was the parent's second attorney, and Helen S. Carroll, who represented the school district.
2. See, for example, Perry A. Zirkel, "The Over-Legalization of Special Education," *West's Education Law Reporter*, v. 195, 2005, pp. 35-40.
3. The two primary avenues already available under the Federal Rules of Civil Procedure and federal statutes are, respectively, Rule 11 and 28 U.S.C. § 1927.
4. See, for example, *Oscar v. Alaska Dept. of Educ.* 541 F.3d 978 (9th Cir. 2008); *T.R. v. St. Johns County Sch. Dist.*, 50 IDELR ¶ 254 (M.D. Fla. 2008); *C.H. v. Northwest Indep. Sch. Dist.*, 50 IDELR ¶ 214 (N.D. Tex. 2008); *Taylor P. v. Missouri Dep't of Elementary & Secondary Educ.*, 47 IDELR ¶ 185 (W.D. Mo. 2007); and *Grenon v. Taconic Hills Cent. Sch. Dist.*, 47 IDELR ¶ 10 (S.D.N.Y. 2006).

## File Name and Bibliographic Information

**k0902zir.pdf**

**Perry A. Zirkel, COURTSIDE: Reversal of Fortune?, Phi Delta Kappan, Vol. 90, No. 06, February 2008, pp. 452-453.**

### Copyright Notice

Phi Delta Kappa International, Inc., holds copyright to this article, which may be reproduced or otherwise used only in accordance with U.S. law governing fair use. MULTIPLE copies, in print and electronic formats, may not be made or distributed without express permission from Phi Delta Kappa International, Inc. All rights reserved.

Note that photographs, artwork, advertising, and other elements to which Phi Delta Kappa does not hold copyright may have been removed from these pages.

All images included with this document are used with permission and may not be separated from this editorial content or used for any other purpose without the express written permission of the copyright holder.

Please fax permission requests to the attention of KAPPAN Permissions Editor at 812/339-0018 or e-mail permission requests to [kappan@pdkintl.org](mailto:kappan@pdkintl.org).

For further information, contact:

Phi Delta Kappa International, Inc.  
408 N. Union St.  
P.O. Box 789  
Bloomington, Indiana 47402-0789  
812/339-1156 Phone  
800/766-1156 Tollfree  
812/339-0018 Fax

<http://www.pdkintl.org>

Find more articles using PDK's Publication Archives Search at  
<http://www.pdkintl.org/search.htm>.