Observations from the Transom
by
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Snow began falling in my part of Vermont on the evening that was set aside to do some of the absolutely must do it now kinds of tasks that were piled around the floor of the study. One of those tasks was to think about expert witnesses for this edition of The Beacon.

Snowfall during late February and March is an especially mysterious and untimely event for an uprooted Texan transplanted in Vermont.

With a deadline looming, and thoughts meandering between the visual luxury of the snow and the desperation from trying to think about the broad subject of the expert witness, expert witness ideas were just not happening.

If a learned treatise has not recorded the following technique for relief from desperation, it should be:

- Relief from desperation comes with trips to the fridge.

While peering into the freezer part of the fridge deciding whether to have ice cream with or without chocolate syrup, the voice of a former mentor, Mr. Hull (now deceased), spoke from a distant corner of my memory:

- "Expert witnesses are there to snow the jury". [1]

This edition will present various viewpoints about expert witnesses and provide some solid practice pointers that fall somewhere beyond the spectrum between Mr. Hull's "snow job" instruction and the observation of Professor Langbein, who, in a 1985 article, likened the manipulation of experts by some lawyers to "playing the saxophone". [2]

We expect this issue of The Beacon to stimulate a discussion among special education attorneys and advocates about how, when, and for what purposes the services of expert witnesses are used. Although non-attorney advocates have enormously different responsibilities than do attorneys with respect to expert witnesses, the principles and ethical considerations regarding the use of expert witnesses are as relevant for parents and lay advocates as they are for practicing attorneys.

Beyond the technical, legal, and ethical considerations of expert witness testimony is the continuing effort by education agencies and their legal counsel to restrict the ability of parent attorneys and advocates to adequately argue on behalf of disabled children and their parents.

Squarely before us are two challenges that threaten to further impede petitioners' ability to retain counsel, hire experts, gain equal access to a fair and impartial formal

disputing process, and - in the end, to participate in the enforcement process guaranteed by section 1415:

- the boot-strapping application of *Buckhannon* [3] to I.D.E.A. special education litigation, and
- the concerted efforts of the education agencies and their attorneys to convince legislators and the general public that parents of disabled children are driving up the cost of education through frivolous suits in their too numerous treks to feed, at what some snidely describe as, the "justice trough." [4]

Aside from these political challenges, expert witness testimony presents a number of demanding problems because unusual expert witness situations are inherent in the system of disputing under Section 1415. This section of the I.D.E.A. is the principal controlling statutory legal procedure that sets the stage for formal hearings. This hearing, in turn, sets the procedural stage for each subsequent appeal.

Yet each jurisdiction applies its own formal, and sometimes informal, procedural rules. Furthermore, we are aware that school district defense attorneys often use local rules to perform end-runs around the "rules" contained in Section 1415. This is especially true if the petitioner is appearing pro se or has non-attorney advocate representation.

Many of the hearing officer and judicial decisions that we reviewed for this edition describe, in dicta, special education matters as being "battles of experts" and as fact-intensive (sometimes described as fact-dependent). A quick review of reported state administrative hearing and court cases plainly instructs us that the purpose and role of expert witnesses in successful cases brought by parents is not for providing the hearing officer with a "snow the jury" cantata.

For instance, consider the following statement in *Montgomery County Public Schools*, 27 IDELR 658, (SEA Maryland 1997):

> The documentary evidence presented by the parents, supported by credible expert testimony, indicates that this child's need for a one-to-one aide is a related service, not a methodology or something that impinges on the school system's staffing and personnel decisions, as argued by MCPS. The child currently requires this service so he can benefit from his special education program.

School district attorneys understand both the necessity and the benefits of using expert witnesses. One reason they do understand is because many firms retained by school districts are primarily civil tort and criminal law defense firms. (See Note [1] below for the "there's more white meat left on that turkey" doctrine).

Nevertheless, LRP publishes a practice manual written for school district attorneys that offers insights into the special education defense attorney's thinking and tactics.

> Although school personnel also should be considered "expert witnesses," the use of the outside expert witness is vital in every special education case. Special education litigation generally has

> become a "battle of the experts," as more and more hearing officers and courts feel uncomfortable making decisions about the educational needs of children with disabilities. The need for outside expert assistance is obvious.

And further,

> If a party does not use an attorney during the hearing, their witnesses probably will try to give a narrative or speech for their direct testimony rather than respond to specific questions. District attorneys should not allow this procedure as it makes cross-examination difficult. The district's attorney should insist that the witnesses testify by responding to specific questions posed to them by the person representing that side or from a prepared list of questions given to the hearing officer and asked by him or her. This situation, occurring primarily when parents represent themselves at a hearing, presents difficulties for the hearing officer as well as the attorney representing the school district. [5]

Of the cases examined for this article, the most common influence upon decision-makers related to the credibility of the expert witnesses. The following dicta from a 1994 decision of the Ninth Circuit Court of Appeals is instructive:

> Each side presented expert testimony which is summarized in the margin.4 The court noted that the District's evidence focused on Rachel's limitations, but did not establish that the educational opportunities available through special education were better or equal to those available in a regular classroom. Moreover, the court found that the testimony of the Hollands' experts was more credible because they had more background in evaluating children with disabilities placed in regular classrooms, and they had a greater opportunity to observe Rachel over an extended period of time in normal circumstances.

Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. by Holland, 4 F.3d 1398, 20 IDELR 812, (9th Cir. 1994).

There are a few reported and prize-worthy examples of hearing officers finding school district expert witness testimony to be unsupportable.

A favorite comes from a case tried by attorney Mary Broadhurst before Hearing Officer Darrell D. Walker. [6]

In her the request for relief, Ms. Broadhurst's client requested reimbursement for the cost of a private school where her client had placed her son, a middle school student with learning and emotional disabilities. Prior to the hearing, the district offered various placement options within the district. The parent rejected each offered placement option.

One of the issues in this case was the reading goal written into the child's IEP. This goal called for a six-month gain in "readability" with specific short-term objectives of six-month gains in reading comprehension and vocabulary.

Mr. Lewis, a school witness, testified that the reading goal was chosen by the team *because it seemed to be an expectation commonly used by the District in similar cases and was one that children like the student in question could quite likely meet*. Thus, the district established the goal before they tested the child to determine the present levels of performance. The team determined the child's prior history of reading skill improvement by using an unwritten "policy" supported by guesswork.

Enter stage right, Ms. Carter, the school district's special education coordinator and expert witness.

Ms. Carter testified that a 1.0 grade increase in reading skills was appropriate for the student. She speculated that a 0.5 grade level goal was not reasonable for a student who is already three years behind in performance.

Hearing Officer Walker wrote:

> The IEP team's decision about such matters as reading goals is usually due great deference. That deference, that presumption that the professional educators and the parent in the IEP meeting can establish a proper goal far better than some lay reviewer months later, is severely strained by Mr. Leslie's testimony indicating that goals are arrived at based on past experience with general classes of disabled children and on what is a safe bet to achieve rather than on the individual student's unique record. But, given Ms. Carter's equivocal opinion and the varying test results, observations, and professional "gut" feelings about R.A.'s reading ability through the years, it cannot be said that the .5 year goal was inappropriate. [7]

Hearing Officer Walker, bless your heart. Here's to surviving snowstorms and saxophone concerts.

Brice Palmer
Managing Editor

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Endnotes

[1] Mr. Hull was a respected and extraordinarily good trial attorney. One of the founding partners of an insurance defense firm in Vermont, he, in addition to the "snow the jury" gambit, also articulated the "there's more white meat left on that turkey" doctrine of billable hours.

[2] See Langbein, "The German Advantage in Civil Procedure" (1985) 52 U Chi Rev 823. Note: The presiding judge in German civil and criminal trials is the inquisitor.

Attorneys for the parties have a limited role in the examination of witnesses, and do not perform cross-examinations. This sort of system has some allure, but it is doubtful that its application to special education, or, for that matter, any court proceeding in the United States would be an acceptable alternative to the adversarial process tempered with the evolving ADR and plea bargaining practices here.

[3] In *Buckhannon Board & Care Home Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), the court disapproved the so-called "catalyst" theory applied by some federal courts under statutes authorizing awards of attorneys' fees to "prevailing parties." The case before the court did not involve the Civil Rights Attorney's Fees Awards Act, 42 USC 1988, but the court drew from cases under that act, and the reasoning in the opinion appears to be applicable to that act. The I.D.E.A. has long been thought to be a civil rights act - but - on close analysis of the Act together with its legislative history, a showing can be made that the I.D.E.A. is an enabling act for the furtherance of the purposes of the 14th. amendment. (References and supporting arguments are available by sending a request to askotis@shoreham.net).

[4] Miller, Arthur R., *The Adversary System: Dinosaur or Phoenix*, 69 Minn.L.Rev. 1, 8-9, (1984). (Quoted by Magistrate Judge Mason in his recommendation adopted by the District Court in In re Buffets Securities Litigation, 906 F. Supp. 1293, (USDC Minnesota, Fourth Division 1995).

[5] See Chapter 5, *Special Education Law and Practice: A Manual for the Special Education Practitioner*, edited by Gary M. Reusch, published by LRP Publications, 747 Dresher Road, Suite 500, P.O. Box 980, Horsham, PA 19044. Website: http://www.lrp.com

[6] *Salem-Keizer School District #24J*, 23 IDELR 922, (SEA Oregon 1996).

[7] *Ibid*.

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In addition to his work as an active non-attorney advocate, Mr. Palmer is managing editor of ***The Beacon*** and writes ***Observations from the Transom***.

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