Golden Gate University Law Review

Volume 22
Issue 1 *Ninth Circuit Survey*

Article 6

January 1992

Administrative Law - Barlow-Gresham Union High School Dist. No.2 v. Mitchell: Attorneys' Fees Awarded When Settlement Reached Prior to Due Process Hearing

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Recommended Citation

Sara Vukson Winter, *Administrative Law - Barlow-Gresham Union High School Dist. No.2 v. Mitchell: Attorneys' Fees Awarded When Settlement Reached Prior to Due Process Hearing*, 22 Golden Gate U. L. Rev. (1992).
http://digitalcommons.law.ggu.edu/ggulrev/vol22/iss1/6

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ADMINISTRATIVE LAW

SUMMARY

BARLOW-GRESHAM UNION HIGH SCHOOL DIST. NO. 2 v. MITCHELL: ATTORNEYS' FEES AWARDED WHEN SETTLEMENT REACHED PRIOR TO DUE PROCESS HEARING

I. INTRODUCTION

In *Barlow-Gresham Union High School Dist. No. 2 v. Mitchell*,[1] the Ninth Circuit held the Handicapped Children's Protection Act of 1986 (HCPA)[2] allows the parents of a child with a disability[3] to recover attorneys' fees from a school district when settlement is reached prior to a due process hearing.[4] The court found the parents in *Mitchell* were the prevailing party and no special circumstances rendered the award unjust.[5]

The Ninth Circuit had previously determined that when parents prevail at the administrative hearing concerning their child's school placement, they are entitled to attorneys' fees under the HCPA.[6] However, the question of whether the HCPA

1. Barlow-Gresham Union High School Dist. No. 2 v. Mitchell, 940 F.2d 1280 (9th Cir. 1991) (per Hug, J.; the other panel members were Nelson, J., and Walker, J., U.S. District Judge, Northern District of California, sitting by designation).
2. 20 U.S.C. § § 1415(e)(4) and 1415(f). These provisions amended section 1415 of the Education of the Handicapped Act (EHA), 20 U.S.C. § § 1400-85 (1990). The EHA was amended again in 1990 and is now known as the Individuals with Disabilities Education Act.
3. This author wishes to use the term "disability" in lieu of "handicapped" to reflect the language used in the 1990 amendment of the EHA.
4. *Mitchell*, 940 F.2d at 1285.
5. *Id.*
6. *Id.* at 1284. *See infra* note 39 and accompanying text.

allows attorneys' fees when settlement is reached before the administrative hearing was one of first impression for the Ninth Circuit.[7]

II. FACTS

Nineteen-year-old Wesley Mitchell (Wesley) attended Barlow-Gresham Union High School (BGUHS).[8] Wesley received special education services[9] due to his epilepsy and related behavioral and learning problems,[10] and accordingly he had an individualized educational program (IEP).[11] On January 31, 1989, Wesley received a five-day suspension from BGUHS for assaulting three persons.[12] Thereafter, the school district developed a multi-disciplinary team which found Wesley's behavior may have been related to conditions which were part of his disability, and therefore, the school district was legally unable to expel him.[13]

On February 2, 1989, the school district filed an action in federal district court seeking injunctive relief[14] to exclude

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7. *Id.*

8. Barlow-Gresham Union High School Dist. No. 2 v. Mitchell, 940 F.2d 1280, 1282 (9th Cir. 1991). Persons with disabilities are entitled to a free appropriate public education between the ages of three and twenty-one. *See* 20 U.S.C. § 1412(2)(B).

9. *Mitchell*, 940 F.2d at 1282. *See also* 20 U.S.C. § 1401(a)(16) which provides "'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child . . . ."

10. *Mitchell*, 940 F.2d at 1282. *See also* 20 U.S.C. § 1401(a)(1) which defines "handicapped children" to include "other health impaired children . . . who by reason thereof require special education and related services."

11. *Mitchell*, 940 F.2d at 1282. *See also* 20 U.S.C. § 1401(a)(19) which defines IEP as "a written statement for each handicapped child developed . . . to meet the unique needs of handicapped children . . . ."

12. *Mitchell*, 940 F.2d at 1282. The suspension accorded with school district policy and also state and federal law. *Id.*

13. *Id.* Wesley's automatic expulsion would have violated the "stay-put provision" of 20 U.S.C. § 1415(e)(3) which provides "[d]uring the pendency of any proceedings conducted pursuant to this section, unless . . . otherwise agree[d], the child shall remain in the then current educational placement . . . ."

14. *Mitchell*, 940 F.2d at 1282. "In order to enjoin the student from attending school, there needs to be a showing that the student's current placement is substantially likely to result in injury to himself or others." *Id.* The school district sought to change Wesley's placement prior to exhausting administrative remedies. *Id.* *See* Honig v. Doe, 484 U.S. 305 (1988) in which the Court found that section 1415(e)(3) "creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury to himself or herself or to others." *Id.* at 328.

Wesley from attending BGUHS.[15] The judge granted a temporary restraining order, extending Wesley's suspension until February 8, 1989, and then set a hearing date for the school district's preliminary injunction motion.[16]

Prior to filing the complaint, the school district gave the Mitchells notice that it intended to change Wesley's placement from BGUHS to the school district's Central Administrative Office (CAO).[17] The day after receiving the notice, the Mitchells objected to the school district's proposed placement and requested a due process hearing.[18]

The school district's complaint was amended at the preliminary injunction hearing February 8, 1989, from termination of educational services to providing such services at CAO until the due process hearing, as stated in the prior notice.[19] The judge at the evidentiary hearing found Wesley presented "a substantial likelihood of danger to himself or others."[20] The judge, therefore, issued a stipulated temporary restraining order prohibiting Wesley from returning to BGUHS and ordered the school district to provide services for Wesley at CAO pending the administrative hearing outcome.[21]

At a February 21, 1989, hearing the judge denied the school district's motion for the preliminary injunction, dissolved the temporary restraining order, and issued a stipulated order which indicated the parties' agreement that Wesley would

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15. *Mitchell*, 940 F.2d at 1282. In the original complaint the school district sought a temporary restraining order and a preliminary and permanent injunction excluding Wesley from BGUHS for the rest of the school year. *Id.* The school district also sought the court's permission to terminate its educational services. *Id.*

16. *Id.*

17. *Id.* at 1282-83. This notice was pursuant to 20 U.S.C. § 1415(b)(1)(E) which provides "an opportunity to present complaints with respect to any matter relating to the . . . educational placement of the child . . . ." Thus the notice stated the school district would provide Wesley with individual tutoring ten hours per week at CAO and transportation to and from CAO by cab. *Id.* at 1283. Note, the notice differs from the original complaint. *See supra* note 15 for original complaint contents.

18. *Mitchell*, 940 F.2d at 1283. *See also* 20 U.S.C. § 1415(b)(2) which provides "[w]henever a complaint has been received . . . the parents . . . shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency."

19. *Mitchell*, 940 F.2d at 1283.

20. *Id. See supra* note 14 and accompanying text.

21. *Id.* The Mitchells "were ordered to appear on February 21, 1989 to report on the progress of negotiations regarding compromise of the underlying complaint, the status of the administrative hearing process and to show cause why preliminary and permanent injunctive relief should not be granted against them." *Id.*

continue at CAO.[22] Subsequently, the Mitchells filed an answer and counterclaim requesting attorneys' fees[23] and that Wesley be placed back at BGUHS.[24] Before the next hearing date[25] the parties settled on a new placement at BGUHS for Wesley.[26]

To reflect the parties' settlement, the hearing officer issued a stipulated order of dismissal of the due process hearing.[27] The district court dismissed the action,[28] and the Mitchells filed for $18,642 in attorneys' fees pursuant to 20 U.S.C. § 1415(e)(4)(B).[29] The judge granted the award, finding it to be reasonable and finding the Mitchells to be the prevailing party.[30] The school district timely appealed.[31]

III. COURT'S ANALYSIS

A. ATTORNEYS' FEES

The Ninth Circuit reviewed the district court's statutory interpretation of section 1415(e)(4)(B) *de novo*.[32] Looking at the legislative history of the law,[33] the court determined Congress

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22. *Id.* The court was informed the Mitchells had initiated an administrative proceeding and that the parties had temporarily agreed to keep Wesley at CAO. *Id.*

23. *Mitchell*, 940 F.2d at 1283. The Mitchells also sought declaratory and injunctive relief. *Id.*

24. *Id.*

25. *Id.* The administrative hearing finally convened three months later and the hearing officer granted two continuances at the school district's request. *Id.* The first continuance was until May 22, 1989, and the second until June 30, 1989. *Id.*

26. *Id.* The multi-disciplinary team recommended a new program, with two other students, which the parties agreed upon. *Id.* This agreement accorded with Wesley's IEP. *Id.*

27. *Mitchell*, 940 F.2d at 1283. This order was issued on June 28, 1989. *Id.*

28. *Id.* The action was dismissed without prejudice on July 27, 1989. *Id.* All agreements and orders of dismissal were silent to the issue of attorneys' fees. *Id.*

29. *Id.* 20 U.S.C. § 1415(e)(4)(B) provides "[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party."

30. *Mitchell*, 940 F.2d at 1283.

31. *Id.*

32. Barlow-Gresham Union High School Dist. No. 2 v. Mitchell, 940 F.2d 1280, 1284 (9th Cir. 1991). *See* Hall v. Bolger, 768 F.2d 1148, 1150 (9th Cir. 1985) (In an award of attorneys' fees under 42 U.S.C. § 1988, "any elements of legal analysis and statutory interpretation which figure in the district court's decision are reviewable *de novo*.").

33. *Mitchell*, 940 F.2d at 1284. *See also* Abu-Sahyun v. Palo Alto Unified School Dist., 843 F.2d 1250, 1252 (9th Cir. 1988) ("Although [section 1415(e)(4)(B)] grants the district court discretion to award fees, Congress intended [section 1415(e)(4)(B)] to be interpreted consistent with fee provisions under 42 U.S.C. § 1988

intended it to be interpreted consistently with the fee provisions of 42 U.S.C. § 1988[34] and Title VII of the Civil Rights Act of 1964,[35] which allow attorneys' fees to the prevailing party in the court's discretion.

The Ninth Circuit also determined the HCPA clearly contemplated an award of attorneys' fees for parents, in certain circumstances, at the administrative level.[36] The court reasoned the law's reference to "any action or proceeding"[37] included fees incurred prior to a due process determination.[38] The court also relied on previous Ninth Circuit decisions that held the HCPA provides attorneys' fees for parents who prevail at the administrative hearing.[39]

Since the Ninth Circuit had not decided the exact issue of whether 20 U.S.C. § 1415(e)(4)(B) allows attorneys' fees when a settlement is reached prior to a due process hearing, it turned to other judicial decisions for guidance.[40] The court looked briefly at *Maher v. Gagne*,[41] where the Supreme Court determined the "fact that respondent prevailed through a settlement rather than through litigation, does not weaken [the party's] claim to [attorney's] fees."[42] The court also relied on

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and Title VII of the Civil Rights Act of 1964."); S. REP. NO. 112, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1804 ("The committee also intends that [section 1415(e)(4)(B)] should be interpreted consistent with fee provisions of statutes such as [T]itle VII of the Civil Rights Act of 1964 which authorizes courts to award fees for time spent by counsel in mandatory administrative proceedings under those statutes.").

34. 42 U.S.C. § 1988 (1981) provides in pertinent part "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

35. 42 U.S.C. § 2000e-5(K) (1981) provides "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ."

36. *Mitchell*, 940 F.2d at 1284.

37. *Id. See supra* note 29 for full text of 20 U.S.C. § 1415(e)(4)(B).

38. *Id.*

39. *Id. See* McSomebodies (No. 1) v. Burlingame Elementary School Dist., 897 F.2d 974, 975 (9th Cir. 1989); *accord* Moore v. District of Columbia, 907 F.2d 165 (D.C. Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 556 (1990); Mitten v. Muscogee County School Dist., 877 F.2d 932 (11th Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990); Duane M. v. Orleans Parish School Bd., 861 F.2d 115 (5th Cir. 1988); Eggers v. Bullitt County School Dist., 854 F.2d 892 (6th Cir. 1988).

40. *Mitchell*, 940 F.2d at 1284.

41. 448 U.S. 122 (1980).

42. *Id.* at 129. The Court further stated:

> Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be

the Fifth Circuit case *Shelly C. v. Venus Indep. School Dist.*,[43] which held "attorneys' fees are available under the HCPA for work done prior to the holding of an administrative hearing."[44]

The court went on to examine *Dodds v. Simpson*.[45] In *Dodds*, the district judge[46] assumed it was in his discretion[47] to deny the parents' request for attorney's fees expended prior to the due process hearing.[48] The judge reasoned that under the particular circumstances, an attorney's fee award would have contravened the congressional purpose of avoiding costly litigation and would have acted as a disincentive to settlements at the administrative level.[49] The Ninth Circuit concluded, however, that the district court in *Mitchell* had properly distinguished *Dodds* on its facts.[50] Thus, if the Mitchells could establish they had prevailed below, the Ninth

> considered to have prevailed when they vindicate rights through a consent judgement or without formally obtaining relief."

Id. (citations omitted). However, court proceedings were pending when the action in *Maher* settled.

43. 878 F.2d 862 (5th Cir. 1989). In *Shelly C.*, the parents requested a due process hearing against the school district to settle a dispute over the IEP. *Id.* at 862. The parties settled prior to the due process hearing, and the parents then sued for attorneys' fees. *Id.*

44. *Id.* at 864. However, the court did not determine if the plaintiff was actually entitled to fees and remanded the decision to the district court. *Id.*

45. 1987-88 EHLR Dec. 559:320 (D. Or.). In *Dodds*, the parents requested a due process hearing to determine their son's special education eligibility. *Id.* at 321. The hearing was dismissed after a stipulation that their son had a learning disability and therefore was eligible for special education services. *Id.* The parents subsequently filed a civil rights suit in which they sought attorneys' fees against the school district. *Id.* The school district also moved for attorneys' fees. *Id.* At the trial, the jury found there was no civil rights violation. *Id.*

46. *Id.* at 322. Judge Panner was the presiding Judge in both the *Dodds* decision and Barlow-Gresham Union High School Dist. No. 2 v. Mitchell, No. 89-122 (D. Or. Dec. 18, 1989).

47. *Id.* ("*Assuming* that under the new amendments I have discretion to award fees to a party who obtains the relief sought through settlement prior to an administrative hearing . . . .") (emphasis added).

48. *Id.*

49. *Id.*

50. *Mitchell*, 940 F.2d at 1285. The district court distinguished *Dodds* on the basis the parents in *Dodds* initiated the suit, whereas here, the school district initiated it. *Mitchell*, No. 89-122, slip op. at 6. Additionally, the district court emphasized "this does not mean that the parents acted improperly or failed to minimize the extent and costs of litigation because they vigorously contested Barlow-Gresham's action." *Id.* at 6-7. Wesley's parents had only two options: concede, or obtain counsel and defend. *Id.* at 6. Also relevant was the fact Barlow-Gresham had acted with extreme caution in light of the stay-put provision. *Id.*

Circuit was willing to allow attorneys' fees under 20 U.S.C. § 1415(e)(4)(B).[51]

B. PREVAILING PARTY

The Ninth Circuit reviewed the district court's factual determination the Mitchells were the prevailing party under the clearly erroneous standard.[52] The court approved the district court's comparison of the hearing officer's stipulated order[53] with the school district's prior notice[54] in making the prevailing party determination.[55] The court implicitly rejected the school district's claim that the prevailing party should be determined by gauging the "relative positions of the parties in the negotiations hearing as compared to their settlement positions."[56]

Since the stipulated order went against the school district's desire to exclude Wesley from the school grounds, the court upheld the lower court's finding that the Mitchells prevailed for purposes of awarding attorneys' fees.[57]

C. SPECIAL CIRCUMSTANCES

The school district claimed special circumstances of the case rendered the attorneys' fees award unjust.[58] First, it claimed

51. *Mitchell*, 940 F.2d at 1285.

52. Barlow-Gresham Union High School Dist. No. 2 v. Mitchell, 940 F.2d 1280, 1285 (9th Cir. 1991). *See* Sablan v. Department of Finance of N. Mariana Islands, 856 F.2d 1317, 1324 (9th Cir. 1988) (in a 42 U.S.C. § 1988 action for attorneys' fees, the district court's factual determination of who is the prevailing party, "will not be set aside absent clear error").

53. *See supra* notes 26-27 and accompanying text.

54. *See supra* note 17 for text of prior notice.

55. *Mitchell*, 940 F.2d at 1285.

56. *Id. See also* 20 U.S.C. § 1415(b)(1)(C) which provides "written prior notice to the parents or guardian of the child whenever such agency or unit . . . proposes to initiate or change . . . educational placement of the child or the provision of a free appropriate public education to the child." *See also supra* note 17 and accompanying text.

57. *Mitchell*, 940 F.2d at 1285. In this regard, the district court expressly found "that a major concern of Wesley's parents, and perhaps their most important concern, was that Wesley be permitted to attend school in as close to normal environment as possible, so that he could improve his social skills." *Mitchell*, No. 89-122, slip op. at 8. Wesley's parents strongly objected to CAO because it denied Wesley "all opportunity to learn how to interact with his peers and manage the associated stresses." *Id.*

58. Barlow-Gresham Union High School Dist. No. 2 v. Mitchell, 940 F.2d 1280, 1285 (9th Cir. 1991).

such an award constituted a penalty "for its exemplary behavior in response to the life threatening emergency posed by Wesley's violent behavior."[59] Secondly, the school district argued the award would create a disincentive to settlement.[60] The Ninth Circuit rejected both of these contentions.[61]

The court considered two factors in determining whether "special circumstances" exist to justify a denial of attorneys' fees: "(1) whether awarding fees would further the congressional purpose in enacting the [Education of the Handicapped Act (EHA)], and (2) the balance of the equities."[62] The EHA was enacted to ensure a free appropriate public education to all children with disabilities.[63] Additionally, the 1986 amendment makes attorneys' fees available to prevailing parents.[64] This amendment was intended to retroactively overrule *Smith v. Robinson*,[65] a Supreme Court decision which held that because the statute contained no provision for attorneys' fees, they could not be awarded in actions brought to enforce these rights.[66] Since the congressional intent behind the EHA and HCPA was to provide parents of children with disabilities substantive and legislative rights, including attorneys' fees if they prevail, the school district was left to argue only the second factor of the special circumstances test, i.e.; equitable considerations.[67]

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59. *Id.*

60. *Id.*

61. *Id. See* Abu-Sahyun v. Palo Alto Unified School Dist., 843 F.2d 1250, 1252 (9th Cir. 1988) (prevailing party should ordinarily be permitted attorney's fees absent special circumstances rendering award unjust).

62. *Mitchell*, 940 F.2d at 1285. *See Abu-Sahyun*, 843 F.2d at 1253. As explained in note 2 *supra*, the EHA was amended with the HCPA in 1986.

63. 20 U.S.C. § 1400(c) provides:

> [i]t is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

64. *See supra* note 29.

65. 468 U.S. 992 (1984).

66. *Id.* at 1021.

67. *Mitchell*, 940 F.2d at 1286. "Clearly, the congressional intent with regard to the EHA and the HCPA was to provide parents of handicapped children a substantive right that could be enforced through the procedural mechanisms in the Act, including a right to attorneys' fees if the parents prevail." *Id.*

In balancing the equities, the Ninth Circuit looked to its previous decision, *Teitelbaum v. Sorenson*,[68] in which it found good faith by the losing party alone was not enough to constitute a special circumstance to render an award of attorneys' fees unjust.[69] The court emphasized "attorney fees awards are not designed to penalize defendants, but are rather to encourage injured individuals to seek judicial relief."[70]

The court acknowledged the difficult situation the school district was in,[71] but reprimanded the school district for intentionally attempting[72] to unilaterally displace Wesley from BGUHS.[73] Therefore, the Ninth Circuit found no abuse of discretion in the district court's finding of no special circumstances.[74]

D. Attorneys' Fees on Appeal

The Ninth Circuit determined the Mitchells were also entitled to reasonable attorneys' fees on appeal.[75] The court reasoned that since the Ninth Circuit finds 42 U.S.C. § 1988 fees available to prevailing parties for work on appeal, fees should also be made available here.[76]

IV. CONCLUSION

The Ninth Circuit in *Mitchell*[77] addressed the issue of whether prevailing parents may be awarded attorneys' fees against a school district prior to reaching a due process administrative hearing. Based on the congressional intent of the

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68. 648 F.2d 1248 (9th Cir. 1981).

69. *Id.* at 1250.

70. *Mitchell*, 940 F.2d at 1286 (quoting *Teitelbaum*, 648 F.2d at 1251) (citations omitted).

71. *Id. See also supra* note 14 and accompanying text.

72. *Id.* The school district's initial response of attempting to terminate all its educational services to Wesley and the fact the school district never amended its prior notice stating it wished to keep Wesley at CAO persuaded the court it acted intentionally. *Id.*

73. *Mitchell*, 940 F.2d at 1286. *See supra* note 17.

74. *Id.*

75. Barlow-Gresham Union High School Dist. No. 2 v. Mitchell, 940 F.2d 1280, 1286 (9th Cir. 1991). The school district did not address this issue. *Id.*

76. *Id. See* Cunningham v. County of Los Angeles, 879 F.2d 481, 490 (9th Cir. 1988) *cert. denied*, 493 U.S. 1035 (1990) (appellate fees awarded in 42 U.S.C. § 1988 action).

77. Barlow-Gresham Union High School Dist. No. 2 v. Mitchell, 940 F.2d 1280 (9th Cir. 1991).

HCPA, the court found attorneys' fees were in fact available. In so doing, the Ninth Circuit has greatly increased the opportunities for parents to enforce the rights already due their children to a free appropriate public education under the EHA.

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