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AN END TO EMPTY DISTINCTIONS: FEE SHIFTING, THE
INDIVIDUALS WITH DISABILITIES EDUCATION ACT, AND *DOE*
V. BOSTON PUBLIC SCHOOLS

MICHAEL GIUSEPPE CONGIU*

INTRODUCTION

Under the “American Rule,” absent an express statutory provision, the prevailing litigant is ordinarily not permitted to collect reasonable attorneys’ fees.¹ Congress, however, in response to the judiciary’s general inability to award attorneys’ fees to successful litigants, has enacted numerous statutes authorizing the award of attorneys’ fees to the “prevailing party.”² The focus of this Comment is the definition of the phrase “prevailing party” as it relates to the award of attorneys’ fees under the Individuals with Disabilities Education Act’s (“IDEA”) fee-shifting provision.

The Supreme Court, in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, concluded that a party cannot “prevail” without provoking a judicially sanctioned alteration in the legal relationship between the parties.³ In dictum, the *Buckhannon* Court indicated that a judgment on the merits or a court-ordered consent decree suffices as a basis for awarding attorneys’ fees.⁴ In response, a ma-

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1. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975). For more information on the American Rule, see Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651.

2. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 260.

3. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604 (2001) (noting that Congress intended an interlocutory award to a party only when the party established entitlement to the relief through the merits of its claim).

4. *Id.* (noting that a consent decree, judgment on the merits, and the award of nominal damages all have been held by the Supreme Court to be bases for attorneys’ fees).

majority of the federal courts of appeals applying *Buckhannon* have held that a party prevails only when it obtains a judgment on the merits or court-ordered consent decree.

In *Doe v. Boston Public Schools*, the First Circuit Court of Appeals addressed whether the Supreme Court's *Buckhannon* decision applied to the IDEA's fee-shifting provision.⁵ Relying heavily on other circuits' interpretations of the IDEA,⁶ the *Doe* court reasoned that *Buckhannon*'s interpretation of "prevailing party" applied to the IDEA.⁷ Accordingly, the *Doe* court held that because the plaintiff achieved her desired result through a private settlement lacking judicial *imprimatur*, she was not entitled to attorneys' fees as a prevailing party.⁸

Part I of this Comment will detail the relevant judicial and legislative history necessary to provide the analytical framework to discuss the *Doe* decision. Part II gives an overview of the IDEA. Part III presents the facts of *Doe* and the First Circuit's reasoning. Part IV discusses why *Doe* was incorrectly decided and, moreover, why the Supreme Court should overturn *Doe* and endorse private settlement as a means of obtaining prevailing party status under the IDEA. This conclusion is grounded in the text of the IDEA, which, by limiting counsel fees based on the rejection of a previous settlement offer, indicates that a settling plaintiff should be considered a prevailing party.⁹ This conclusion is also founded in the legislative history of the IDEA, which clearly demonstrates that Congress intended to award attorneys' fees to parties absent some form of court-ordered relief.¹⁰

Although the *Buckhannon* decision may be criticized, and the virtues of the "catalyst theory" argued, this Comment focuses instead on the *Doe* court's overly formalistic and misguided analysis. The *Buckhannon* Court decided that plaintiffs are not entitled to attorneys' fees when they obtain their sought-after relief through legislative change or a unilateral alteration of the defendant's conduct. The *Buckhannon* Court premised its reasoning almost exclusively on whether the catalyst theory, and not private settle-

5. *Doe v. Boston Pub. Schs.*, 358 F.3d 20, 22 (1st Cir. 2004). The fee-shifting provision of the IDEA states: "In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of the child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B) (2000).

6. *Doe*, 358 F.3d at 25.

7. *Id.*

8. *Id.* at 30 (holding that "plaintiffs who achieve their desired result via private settlement may not, in the absence of judicial *imprimatur*, be considered 'prevailing parties'").

9. See *infra* note 97.

10. See *infra* note 28.

ment, could justifiably authorize courts to assess fee awards.¹¹ As such, and given that private settlement is free from the practical and definitional difficulties of the catalyst theory, the distinction between private settlements and consent decrees relied upon by *Doe* is meaningless when viewed within the context of the IDEA.

I. HISTORICAL BACKGROUND OF FEE SHIFTING IN THE UNITED STATES

The United States is part of a small minority of industrialized democracies that do not routinely require losing litigants to pay their adversaries' attorneys' fees.¹² Since 1796, the Supreme Court has refused to create a general rule independent of statutory authorization allowing the award of attorneys' fees to a prevailing litigant.¹³

However, American courts have routinely exercised their equitable powers absent statutory authority to assess attorneys' fees when a losing party has willfully disobeyed a court order, or when successful litigants have created a common fund for recovery or extended a substantial benefit to a class.¹⁴ In the early 1970s, the federal judiciary attempted to create another, more pervasive exception to the "American Rule" by awarding attorneys' fees to parties acting as "private attorneys general."¹⁵ Under the "private attorney general" rationale, courts acknowledged that the American Rule significantly diminished private parties' incentive to bring socially desirable litigation.¹⁶ To encourage such litigation, courts began to award attorneys' fees to parties advancing actions that furthered substantial and concrete public interests.¹⁷

The Supreme Court in *Alyeska Pipeline Service Company v. Wilderness Society* responded to this trend by admonishing federal courts against fashioning this exception to the long-standing American Rule.¹⁸ In *Alyeska*, the appellate court had awarded attorneys' fees to the respondent environ-

11. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

12. See generally *Rowe*, *supra* note 1, at 651.

13. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 249 (1975).

14. *Id.* at 257-59.

15. *Id.* at 285 (Marshall, J., dissenting). Justice Marshall wrote that under the "private attorney general" theory, a party is entitled to counsel fees when:

(1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.

Id. For more information on the private attorney general theory, see *Rowe*, *supra* note 1, at 662-63.

16. See *Rowe*, *supra* note 1, at 662-63.

17. *Id.*

18. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 269.

mental groups after their action to prevent the issuance of permits to build a trans-Alaskan pipeline prompted Congress to amend the Mineral Leasing Act of 1920.¹⁹ Although the legislative change embodied the relief sought by the respondents,²⁰ it also effectively mooted the substantive issues of their suit, thus leaving the Supreme Court to evaluate the award of attorneys' fees.²¹ The Court acknowledged Congress' historical power to set fee-shifting policy²² as well as the narrow set of circumstances²³ in which the judiciary has been empowered to award attorneys' fees. Ultimately, the *Alyeska* Court rejected the private attorney general theory, reasoning that, without explicit legislative guidance, the federal judiciary should not redistribute the costs of litigation in such a manner.²⁴

Responding to the *Alyeska* decision, Congress passed the Civil Rights Attorney's Fees Awards Act (the "Act").²⁵ The Act's explicit purpose was to empower courts to allocate reasonable counsel fees to parties prevailing in litigation brought to enforce private civil rights.²⁶ Congress reasoned that the right to counsel fees was essential to preserve meaningful opportunities for all citizens to vindicate their civil rights.²⁷ To ensure those rights, the Senate expressly acknowledged that a party may "prevail," for the purpose of obtaining counsel fees, without formally attaining relief.²⁸

19. *Id.* at 243, 245.

20. *Id.* at 285 (Marshall, J., dissenting) (noting that Respondents' litigation forced Congress to revise the Mineral Leasing Act thus forcing the petitioners to pay their fair share for a pipeline right-of-way).

21. *Id.* at 245.

22. *Id.* at 271.

23. *Id.* at 257-59.

24. *Id.* at 271. Justice Marshall, in his dissent, argued that the majority erred by failing to recognize the equitable power of the judiciary to award attorneys' fees "when the interests of justice so require." Justice Marshall opined that "precedent" and "policy" both suggest the conclusion that the award of attorneys' fees is not a matter of pure statutory interpretation, but rather has an independent basis in the judiciary's power. *Id.* at 272-75.

25. Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988(b) (2000)).

26. S. Rep. No. 94-1011, at 1 (1976), reprinted in 1976 U.S.C.C.A.N. 5908.

27. *Id.* ("The purpose of this amendment is to remedy the anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society*.").

28. *Id.* at 5; see also H.R. Rep. No. 94-1558, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 5908. The House Report corroborated the Senate Report to the Civil Rights Attorney's Fees Awards Act by stating:

The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. . . . A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.

Id.

Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources presented the Court with a situation analogous to *Alyeska*. The plaintiffs in *Buckhannon* sought attorneys' fees after their pending lawsuit prompted the West Virginia legislature to repeal a statute that violated the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990.²⁹ As in *Alyeska*, a legislative change mooted the plaintiffs' action.³⁰ However, unlike *Alyeska*, the plaintiffs in *Buckhannon* sued under statutes that authorized courts to award reasonable attorneys' fees to a prevailing party.³¹ The plaintiffs argued that they were prevailing parties because the West Virginia legislature's action embodied the ultimate objective of their lawsuit.³²

The Court disagreed and rejected the so-called "catalyst theory,"³³ holding that prevailing party status requires some measure of court-ordered relief.³⁴ Echoing the limits of judicial authority to award counsel fees espoused in *Alyeska*,³⁵ the *Buckhannon* Court held that a party cannot prevail without a judicially sanctioned, "material alteration of the legal relationship of the parties."³⁶ The Court reasoned that some merits-based judicial decree was necessary to avoid the award of attorneys' fees to plaintiffs bringing meritless actions.³⁷ Additionally, the Court was concerned that a fee award under the catalyst theory would result in satellite litigation requiring the subjective analysis of a defendant's motives for altering its conduct.³⁸ In dictum, the majority indicated that judgments on the merits or private settlements enforceable through consent decree were examples of sufficient judicial *imprimatur*.³⁹

In her dissent, Justice Ginsburg denounced the majority's failure to acknowledge the substantial body of precedent supporting the notion that a

29. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 601 (2001).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 610 (noting the three factors of the catalyst rule include: (1) the defendant must have provided some of the benefit sought in bringing the lawsuit, (2) the plaintiff must have stated a genuine, nonfrivolous claim, and (3) the suit must have been a substantial or significant cause of defendant's action to provide the relief).

34. *Id.* at 604. Justice Scalia argued in his concurrence that the concept of "prevailing," as confirmed by many statutes using the term "*presumes* the existence of a judicial ruling." *Id.* at 614.

35. *Id.* at 610 (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 (1975), for the proposition that Congress had not "extended any roving authority" to the judiciary to award counsel fees whenever the court deems them warranted).

36. *Id.* at 604.

37. *Id.* at 606.

38. *Id.* at 609.

39. *Id.* at 604.

party may prevail, within the well-established meaning of the phrase,⁴⁰ absent a final judgment or consent decree.⁴¹ Justice Ginsburg reasoned that a party that obtains the ultimate objective of its lawsuit still prevails even in the absence of judicial *imprimatur*.⁴² The dissent further criticized the majority's strict construction of the phrase "prevailing party," noting that the majority's view contravened the Civil Rights Attorney's Fees Awards Act's express purpose of providing individuals with an incentive to bring actions enforcing their civil rights.⁴³

Five months after *Buckhannon*, the Second Circuit interpreted the fee-shifting provision of the Civil Rights Attorney's Fees Awards Act in *New York State Federation of Taxi Drivers v. Westchester County Taxi and Limousine Commission*.⁴⁴ Following *Buckhannon's* reasoning, the *Taxi Drivers* court held that a private reciprocity agreement⁴⁵ mooted pending litigation could not be considered a judicially sanctioned alteration in the legal relationship between the parties.⁴⁶ Although the case was brought to vindicate the civil rights of the plaintiff trade organization,⁴⁷ the Second Circuit held that the plaintiff was not entitled to attorneys' fees as a prevailing party.⁴⁸

Since the *Taxi Drivers* decision, the majority view has been that *Buckhannon* applies expansively to virtually all free-shifting statutes.⁴⁹

40. *Id.* at 625–26 (Ginsburg, J., dissenting) (noting that “[p]rior to 1994, every Federal Court of Appeals (except the Federal Circuit, which had not addressed the issue)” awarded attorneys’ fees to plaintiffs who acted as “catalysts” for the desired change they sought).

41. *Id.* at 634.

42. *Id.*

43. *Id.* at 622–23 (reasoning that the majority's rejection of the catalyst theory will “impede access to the court for the less well heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general”).

44. *N.Y. St. Fed. of Taxi Drivers v. Westchester County Taxi & Limousine Comm'n*, 272 F.3d 154, 158–59 (2d Cir. 2001).

45. The reciprocity agreement reached between for-hire drivers in Westchester County and New York City allowed for each party to recognize for-hire licenses granted by the other. *Id.* at 156.

46. *Id.* at 158–59.

47. Plaintiff trade organization sought declaratory and permanent injunctive relief alleging that For-Hire Vehicle Law was unconstitutionally vague under the Federal and New York Constitutions, that the enforcement of the law was arbitrary and capricious, that the law was an undue burden on the Federation members' right to travel, and that the Federation members were being stopped and searched in violation of their rights under the Fourth and Fourteenth Amendments of the U.S. Constitution. *Id.* at 156–57.

48. *Id.* at 159.

49. See *Doe v. Boston Pub. Schs.*, 358 F.3d 20, 24–25 (1st Cir. 2004); *Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003) (holding that a private settlement did not entitle plaintiffs to attorneys' fees under 42 U.S.C. § 1988); *Union of Needletrades, Indus. & Textile Employees, AFL-CIO, CLC v. U.S. Immigration & Naturalization Serv.*, 336 F.3d 200, 206 (2d Cir. 2003) (holding that *Buckhannon* applied to claims brought by union under the Freedom of Information Act although the fee-shifting provision of the Act used the language “substantially prevailed”).

Notably, the Second, Third, and Seventh Circuits all hold that the fee-shifting provision of the IDEA, which also authorizes the award of attorneys' fees to the prevailing party, falls within the ambit of *Buckhannon's* interpretation of "prevailing party."⁵⁰

With respect to private settlement, several courts have rejected the rigid view that a party must obtain at minimum a consent decree to merit prevailing party status.⁵¹ As set forth by the Ninth Circuit in *Barrios v. California Interscholastic Federation*, this minority interpretation reasons that the Supreme Court's limitation on prevailing party status to plaintiffs who obtain judgments or consent decrees was merely dictum.⁵² However, this interpretation would not have any practical effect on settling plaintiffs like Jane Doe.

To illustrate, in *Barrios*, a paraplegic baseball coach was excluded from on-field coaching because his specially designed athletic wheelchair allegedly disrupted play.⁵³ The Coach subsequently sued the interscholastic athletic association under the Americans with Disabilities Act of 1990, and the parties ultimately entered into a settlement agreement.⁵⁴ The *Barrios* court held that the plaintiff's private settlement did not preclude his "prevailing" for the purpose of attorneys' fees.⁵⁵ Instead, the court reasoned that a settling party may "prevail" when it obtains the primary benefit sought in bringing the suit.⁵⁶ However, the plaintiff in *Barrios* "prevailed" because the terms of his settlement were enforceable by virtue of their being incorporated into a court order. Thus, *Barrios* does not stand for the proposition that a party may prevail without some form of judicial *imprimatur*. Although language from *Barrios* may suggest that conclusion, the case, and the approach that it espouses, differs because the court refused to rely on a final judgment or consent decree as the only means of relief suffi-

50. *John T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003) (holding that the fee-shifting provision of the IDEA was subject to *Buckhannon*); *T.D. v. LaGrange Sch. Dist.*, No. 102, 349 F.3d 469, 474, 478-80 (7th Cir. 2003) (reasoning that although the case was privately settled, because the IDEA allows the award of attorneys' fees to parties who "prevail" in any action or administrative proceeding, and because the plaintiff was awarded reimbursement of the cost of attending a private school at an IDEA due process hearing, the plaintiff was a "prevailing party"); *J.C. v. Reg'l Sch. Dist. 10, Bd. of Educ.*, 278 F.3d 119, 125 (2d Cir. 2002) (holding that *Buckhannon* applied to a disabled child's claims under the IDEA).

51. See *Barrios v. Cal. Interscholastic Fed.*, 277 F.3d 1128, 1134 n.5 (9th Cir. 2002); see also *Roberson v. Giuliani*, 346 F.3d 75, 82 n.7 (2d Cir. 2003) (noting that only the Eighth Circuit has adopted the narrow view that a party prevails only when it obtains a judgment of the merits or court-ordered consent decree); *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002).

52. *Barrios*, 277 F.3d at 1134 n.5.

53. *Id.* at 1131.

54. *Id.* at 1133.

55. *Id.* at 1137.

56. *Id.*

cient to warrant prevailing party status.⁵⁷ As such, this interpretation would not benefit settling IDEA plaintiffs like Jane Doe who do not have any aspect of their agreement sanctioned by a judge or hearing officer.

II. OVERVIEW OF THE IDEA

Originally enacted as the Education of the Handicapped Act of 1975,⁵⁸ the IDEA was drafted by Congress to ensure that all disabled children receive a "free appropriate public education."⁵⁹ In light of that purpose, the IDEA was drafted to provide state and local agencies with the framework in which to provide appropriate placement to students with special needs.⁶⁰

Under the IDEA, schools are required to provide parents the opportunity to present complaints "with respect to any matter relating to the identification, evaluation or educational placement of their child."⁶¹ If the parent is not satisfied with the manner in which his complaint has been resolved, the parent also has the right to a mediation or impartial due process hearing.⁶² Furthermore, if the placement dispute is not resolved at this preliminary stage, a parent is then permitted to commence a civil action in state or federal court.⁶³ Significantly, a parent is entitled to be represented by counsel throughout all phases of IDEA administrative hearings.⁶⁴ To alleviate the financial burden on parents throughout this process, the IDEA contains a fee-shifting provision that awards attorneys' fees to the "prevailing party."⁶⁵

In addition to providing the framework for resolving educational placement disputes, the IDEA encourages, through the incentive of attorneys' fees, the prompt resolution of such disputes. For example, the statute precludes a fee award where the parent has unreasonably protracted the dispute.⁶⁶ Further, the IDEA provides that the student must remain in the current educational setting during the pendency of IDEA administrative

57. *Id.* at 1134 n.5. The *Barrios* court also distinguished *Buckhannon* on the basis that the plaintiff's lawsuit resulted in an enforceable instrument against the defendant rather than a legislative or policy change. *Id.*

58. Education of the Handicapped Act of 1975, Pub. L. No. 91-230, 84 Stat. 175.

59. 20 U.S.C. § 1400(d)(1)(A) (2000).

60. § 1400(d)(2).

61. § 1415(b)(6).

62. §§ 1415(e)(1), 1415(f)(1).

63. § 1415(i)(2)(A).

64. § 1415(h)(1).

65. The fee-shifting provision of the IDEA states: "In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of the child with a disability who is the prevailing party." § 1415(i)(3)(B).

66. § 1415(i)(3)(F)(i).

hearings unless a move is otherwise agreed upon by parents and school personnel.⁶⁷ Although this Comment focuses on fee awards to the parents of special-needs children, the language and purpose of the IDEA centers squarely on the educational interests of the child whose placement is in dispute. The statute seeks to provide appropriate placement as quickly as possible while minimizing the disruption caused by placement disputes.

III. *DOE V. BOSTON PUBLIC SCHOOLS*

A. *Facts*

At the time of suit, plaintiff Jane Doe (“Jane”) was a nineteen year-old Boston resident suffering from a severe mental disability.⁶⁸ Pursuant to the IDEA, Jane was entitled to special educational services and defendant City of Boston Public Schools (“Boston”) was obligated to prepare an Individualized Education Program (“IEP”) to ensure her appropriate placement.⁶⁹

Initially, Jane attended a public vocational school in Boston.⁷⁰ Her father subsequently requested that she be placed in a private residential school.⁷¹ Pursuant to IDEA protocol, the parties met to discuss Jane’s father’s request.⁷² Boston rejected his request and subsequently offered Jane additional educational services at the public school she already attended as well residential services at a state mental health facility.⁷³

After Jane’s father rejected the proposal, the two parties unsuccessfully attempted to mediate their dispute before the Bureau of Special Education Appeals (“BSEA”).⁷⁴ On July 22, 2002, Jane’s father filed for a BSEA hearing, requesting placement at a small, therapeutic day school.⁷⁵ Just prior to the BSEA hearing on October 9, 2002, Boston presented Jane’s father with an IEP that included placement in a private therapeutic day school program.⁷⁶ Jane’s father accepted the IEP and requested that the placement be read into the record and signed by a BSEA hearing officer.⁷⁷ The hearing officer denied the request, stating that it was “against his usual

67. § 1415(j).

68. *Doe v. Boston Pub. Schs.*, 358 F.3d 20, 21 (1st Cir. 2004).

69. *Id.* at 21–22.

70. *Id.* at 22.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

practice.”⁷⁸ After the hearing, Jane’s father filed an unsuccessful motion to establish Jane’s placement as a final judgment and to direct the BSEA to implement her IEP.⁷⁹

On March 4, 2003, Jane filed a complaint in district court seeking attorneys’ fees.⁸⁰ The district court granted Boston’s motion to dismiss the complaint, finding that Jane was not a prevailing party under *Buckhannon* because she did not achieve a merit-based final judgment or a court-ordered consent decree.⁸¹

B. *The First Circuit Court of Appeals Decision*

Thus, the issue before the *Doe* court was whether *Buckhannon*’s interpretation of “prevailing party” applied to the IDEA’s fee-shifting provision.⁸² As a case of first impression, the court began by addressing the statutory history of the IDEA, as well as the expansive application of *Buckhannon* to virtually all fee-shifting statutes.⁸³ The *Doe* court rejected the *Barrios* court’s interpretation, noting *Buckhannon*’s express view that private settlement lacked the judicial oversight necessary to warrant prevailing party status.⁸⁴ The *Doe* court also recognized that each federal court of appeals to consider *Buckhannon*’s application to the IDEA had held that privately settling plaintiffs should not be considered prevailing parties.⁸⁵ Accordingly, the *Doe* court held that *Buckhannon* presumptively applied to the IDEA unless the statutory text, structure, or legislative history of the statute indicated the contrary.⁸⁶

With this analytical framework in place, the court first evaluated whether the language or structure of the IDEA suggested that the phrase “prevailing party” was intended to include settlement-based fee awards.⁸⁷ The court reasoned that the IDEA’s complexity and comprehensive nature were not enough to place it beyond the ambit of *Buckhannon*.⁸⁸ Additionally, the *Doe* court held that the IDEA’s limiting provisions, specifically

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Doe*, 358 F.3d at 22–25. The First Circuit began their analysis by characterizing Jane’s IEP placement as a private settlement. *Id.* at 22–23 n.1.

84. *Id.* at 25.

85. *Id.*

86. *Id.* at 25–26.

87. *Id.* at 26–27.

88. *Id.*

the provision that limited the recovery of attorneys' fees for services performed subsequent to "a written offer of settlement," did not broaden the meaning of "prevail" under the IDEA to include settlement because the limiting provisions became relevant "only after a plaintiff has been deemed a prevailing party."⁸⁹

Second, the court assessed whether the IDEA's legislative history placed it beyond the scope of *Buckhannon*. The court found that the legislative history indicated that Congress intended courts to interpret the IDEA's fee-shifting provision in harmony with Supreme Court decisions interpreting the Civil Rights Attorney's Fees Awards Act.⁹⁰ Although conceding that the evidence provided by plaintiff and amicus curiae suggested that Congress intended to define "prevailing party" to include private settlement, the *Doe* court held that the IDEA's legislative history did not indicate the convincing intent necessary to overcome the strong presumption of *Buckhannon's* applicability.⁹¹

Finally, Jane leveled two policy arguments. Jane first argued that recognizing private settlement as a means of prevailing under the IDEA furthered the IDEA's purpose to encourage the prompt resolution of disputes regarding a handicapped child's educational placement.⁹² Second, Jane argued that precluding the award of attorneys' fees incurred to achieve proper educational placement violated the IDEA's guarantee of a "free appropriate public education."⁹³ The *Doe* court quickly dismissed Jane's policy arguments reasoning that in light of *Buckhannon* and *Alyeska*, such concerns were within the exclusive province of Congress.⁹⁴

IV. THE SUPREME COURT SHOULD OVERTURN *DOE* AND ENDORSE PRIVATE SETTLEMENT AS A MEANS OF OBTAINING PREVAILING PARTY STATUS UNDER THE IDEA.

Doe was incorrectly decided. Specifically, the *Doe* court incorrectly interpreted the legislative text and history of the IDEA. The court failed to acknowledge that distinguishing consent decrees from private IDEA settlements constitutes a meaningless distinction that works against the well established purpose of the IDEA. Accordingly, the Supreme Court should

89. *Id.*

90. *Id.* at 27.

91. *Id.* at 28.

92. *Id.* at 29.

93. *Id.*

94. *Id.*

overturn *Doe* and endorse private settlement as a means of obtaining prevailing party status under the IDEA.

First, the *Doe* court incorrectly interpreted the legislative text of the IDEA. The IDEA contains several provisions that limit the amount of attorneys' fees to which a plaintiff is entitled based on the nature and rejection of a previous settlement offer.⁹⁵ The court reasoned that these IDEA provisions limiting the recovery of attorneys' fees for services performed subsequent to "a written offer of settlement" are not relevant because they apply only after a plaintiff had been deemed a prevailing party.⁹⁶

However, the court failed to consider that because the IDEA limits fee awards based on the rejection of a previous settlement offer,⁹⁷ the statute indicates that a settling plaintiff should be considered a prevailing party. In other words, under the IDEA, a party must achieve prevailing party status in order to obtain counsel fees. However, by refusing to award attorneys' fees to "prevailing" plaintiffs who have rejected settlement offers, the language of the statute places an equal if not greater significance on settlement as opposed to final judgments or other, more established forms of *imprimatur*. As will be discussed further below, the premium given to the resolution of IDEA disputes through settlement is consistent with the statute's purpose of ensuring the prompt resolution of such disputes. Moreover, awarding attorneys' fees to settling plaintiffs honors the statute's language indicating settlement's integral role in IDEA proceedings. As such, it is of no consequence that the aforesaid provisions may speak to circumstances after a party has been deemed "prevailing" because the clear import of the statute's language indicates that settling parents are prevailing plaintiffs that should be awarded attorneys' fees.

The *Doe* court also failed to fully consider that the IDEA expressly proscribes the award of attorneys' fees to any parent who ultimately obtains relief through an administrative hearing or court proceeding that is less

95. See *infra* note 97.

96. *Doe*, 358 F.3d at 26–27.

97. 20 U.S.C. § 1415(i)(3)(D)(i) (2000). The IDEA provides:

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

Id.; see also § 1415(i)(3)(E) ("Notwithstanding subparagraph (D), [i.e. all provisions regarding the prohibition of attorneys' fees], an award of attorneys' fees and related costs may be made to a parent who is the prevailing parent and who was substantially justified in rejecting the settlement offer.").

favorable than a previous offer of settlement.⁹⁸ By prohibiting a fee award in excess of the costs incurred prior to a settlement offer to a parent who ultimately prevails in this manner, the IDEA encourages settlement, thus effectuating the statute's well-established purpose of ensuring the prompt resolution of disputes concerning the educational placement of handicapped children.⁹⁹ As stated previously, in addition to the provision aimed at ensuring the prompt resolution of disputes, the IDEA also contains a "stay-put provision"¹⁰⁰ to limit the disruption created by such disputes. Again, this stay-put provision requires that a child remain in their current educational placement throughout the duration of an IDEA hearing.¹⁰¹

As a whole, the unambiguous purpose of the IDEA is to provide a free and appropriate education to children with disabilities.¹⁰² The purpose of providing free appropriate education demands the handling of disputes regarding such placement in a timely manner free of unnecessary disruption.¹⁰³ Thus, given the statutory text clearly intending to effectuate these aims and the fact that allowing settling parents to recover attorneys' fees facilitates those aims, the *Doe* court erred in holding that the text of the IDEA did not place it beyond the scope of *Buckhannon*.

Second, the *Doe* court incorrectly interpreted the legislative history of the IDEA. The court recognized that the legislative history indicated that courts should interpret its fee-shifting provision in harmony with the Civil

98. See § 1415(i)(3)(E).

99. See *Blackman v. District of Columbia*, 277 F. Supp. 2d 71, 80 (D.D.C. 2003) (holding that a school board's denial of a timely due process hearing constitutes a denial of a free appropriate education); *Rapid City Sch. Dist. 51/4 v. Vahle*, 922 F.2d 476, 478 (8th Cir. 1990) (holding that under the IDEA, parents who unilaterally place their children in a private school may be reimbursed for the costs thereof if the school district fails to conduct a timely due process hearing and such unilateral placement is deemed to be appropriate); *Spiegler v. District of Columbia*, 866 F.2d 461, 467 (D.C. Cir. 1989) (holding that the underlying purpose of the IDEA is "to ensure the prompt resolution of disputes regarding appropriate education of handicapped children").

100. § 1415(j) ("[D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child").

101. *Id.*

102. § 1400(d)(1)(A) ("The purposes of this chapter are—to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.").

103. See *Spiegler*, 866 F.2d at 467 (citing 121 Cong. Rec. 37,416 (1975)). Senator Williams stated: I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development. Thus, in view of the urgent need for prompt resolution of questions involving the education of handicapped children it is expected that all hearings and reviews conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable consistent with a fair consideration of the issues involved.

Id. (emphasis omitted).

Rights Attorney's Fees Awards Act and Supreme Court interpretations thereof.¹⁰⁴ Added in response to the Supreme Court's decision in *Alyeska*,¹⁰⁵ the legislative history of the Act clearly reflects Congress' intent to authorize fee awards to parties vindicating their civil rights without obtaining some measure of court-ordered relief.¹⁰⁶ For example, the House Report accompanying the Act states that a party "should not be penalized for seeking an out-of-court settlement," and the Senate Report accompanying the Act indicates that a party may be awarded counsel fees absent some form of judicial relief.¹⁰⁷ Further, the Supreme Court's interpretation of the Act unequivocally indicates that a party prevailing under a fee-shifting statute ordinarily should be awarded attorneys' fees "unless special circumstances make such an award unjust."¹⁰⁸ For example, the Court in *Hensley v. Eckerhart* reasoned that although the plaintiff prevailed through private settlement rather than litigation, such a resolution did not weaken her claim to attorneys' fees under the Act.¹⁰⁹ Thus, it is clear that judicial *imprimatur* was not a necessary component to the awarding of attorneys' fees as contemplated by the Act and its subsequent interpretations.

However, it is still unclear what form of nonjudicial relief would justify a fee award. Although *Buckhannon* closed the door on the catalyst theory, it did not foreclose the possibility of a settlement-based fee award.¹¹⁰ Presumably, the *Doe* court refused to construe the IDEA's legislative history to evidence the authorization of settlement-based fee awards because the *Buckhannon* Court asserted that no measure of legislative history could overcome the "clear meaning of 'prevailing party.'"¹¹¹

104. *Doe v. Boston Pub. Schs.*, 358 F.3d 20, 27 (1st Cir. 2004) (noting that Congressional history indicates an intent that the IDEA be interpreted in a manner consistent with the Civil Rights Attorney's Fees Awards Act and other fee-shifting statutes, and not be considered *sui generis*).

105. S. Rep. No. 94-1011, at 1 (1976), reprinted in 1976 U.S.C.C.A.N. 5908.

106. *Id.* at 5; see also H.R. Rep. 94-1558, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 5908.

107. *Id.*

108. See *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (internal quotation marks and citation omitted); *Maher v. Gagne*, 448 U.S. 122, 129 (1980).

109. *Hensley*, 461 U.S. at 429.

110. In a footnote, the Court distinguished consent decrees—a form of *imprimatur* endorsed by the Court as a means of obtaining counsel fees—from private settlement on the sole basis that consent decrees ensured federal jurisdiction to enforce private contractual settlement. *Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep't Health & Human Res.*, 532 U.S. 598, 604 n.7 (2001).

111. Although the meaning of the phrase "prevailing party" may have been clear to the *Buckhannon* majority, Justice Ginsburg's dissent and the subsequent circuit split regarding the meaning of the phrase is sufficient indication that the phrase's meaning is not conclusive enough to dismiss, as the *Buckhannon* majority did, clear indicia of legislative history that "prevailing party" may include some forms of nonjudicial relief. *Id.* at 607.

However, the *Buckhannon* Court premised its analysis almost completely on the availability of the catalyst theory.¹¹² The Court did not address whether the IDEA's legislative history indicated whether a party can prevail through private settlement. This is significant because the practical and definitional difficulties associated with the catalyst theory do not attach to private settlement in the manner contemplated by the *Buckhannon* Court.¹¹³ As a definitional matter, private settlement is a much more unambiguous means of prevailing than that recognized by the catalyst theory—namely, a favorable alteration in the defendant's conduct brought about by litigation. Moreover, as a practical matter, a private settlement agreement does not require additional litigation to discover the underlying motivation behind a defendant's changed conduct.¹¹⁴

In other words, it is a much closer question as to whether a party “prevails” through private settlement than whether a favorable alteration in the defendant's conduct manifests a “prevailing party.” Indeed, the Second Circuit has recognized the qualitative difference between settlement agreements and resolutions that were a result of the catalyst theory.¹¹⁵ Thus, the *Buckhannon* Court's analysis of legislative history, which was premised on the availability of the catalyst theory, was largely inapposite to the *Doe* case. Further, a significant amount of IDEA legislative history suggests that a privately settling plaintiff may recover attorneys' fees.¹¹⁶ For example, the IDEA's legislative history unambiguously establishes that the IDEA was meant to allow parents meaningful opportunities to take part in the educational placement of their children and that the handling of disputes regarding such placement be prompt.¹¹⁷ Providing an award of attorneys' fees to a privately settling plaintiff is a clear manifestation of this congressional purpose in a manner free of the definitional and practical difficulties inherent to the catalyst theory that troubled the *Buckhannon* Court.

Additionally, two issues further indicate that private settlement is a proper basis for an attorneys' fees award under the IDEA. First, the *Doe*

112. See generally *id.*

113. *Id.* at 609.

114. *Id.*

115. *Roberson v. Giuliani*, 346 F.3d 75, 81 (2d Cir. 2003).

116. *Id.* at 637–38 (Ginsburg, J., dissenting) (noting that both the Senate and House reports on the 1976 Civil Rights Attorney's Fees Awards Act and subsequent judicial interpretations thereof clearly demonstrate a congressional intent to award attorneys' fees absent court-ordered relief). Curiously, the *Doe* court failed to directly address these reports and concentrated instead on rebuking other, less germane pieces of legislative history utilized by the Plaintiff and amicus curiae. *Doe v. Boston Pub. Schs.*, 358 F.3d 20, 27–28 (1st Cir. 2004).

117. See *supra* note 103.

court relied on dictum from *Buckhannon* to reason that private settlement cannot create prevailing party status because it lacks the federal judicial oversight necessary to grant federal courts jurisdiction to enforce such settlement agreements.¹¹⁸ Initially, it must be noted that federal power to enforce settlement agreements has little if anything to do with the authorization to award attorneys' fees. That notwithstanding, even if federal jurisdiction regarding such matters were foreclosed, the federal judiciary's interest in hearing such disputes cannot outweigh the IDEA's underlying purpose to provide parents with reasonable opportunities to seek the prompt resolutions of such disputes. This is especially true considering that state law, and not the broad, general guidelines provided by the IDEA, will likely govern these disputes.¹¹⁹ As such, state courts will have greater familiarity with the idiosyncrasies of their own law and thus be better equipped to hear disputes arising under state law than federal courts.

Second, the BSEA hearing officer's refusal to read the placement into the record or affirm the placement as a final judgment illustrates the inherent emptiness of the technical distinctions that a reliance on judicial *imprimatur* necessitates in the context of IDEA proceedings. In *Doe*, the simple act of failing to include a settlement agreement into the record precluded an attorneys' fee award.

Similarly, in *J.C. v. Regional School District 10, Board of Education*, an IDEA administrative board also declined to read an agreed-upon educational placement into the record, fearing that doing so would expose the board to liability for attorneys' fees.¹²⁰ In *Doe*, had the hearing officer read the agreed-upon IEP into the record, such an action would have been sufficient to establish judicial *imprimatur*. Furthermore, Jane sought the very same judicial oversight that would have converted her settlement into a consent decree by filing a motion seeking the BSEA to direct implementation of the IEP. It should be beyond dispute that parental reliance on recouping attorneys' fees effectively preserves the right to bring actions in vindication of civil rights under the IDEA. As such, the fine distinction between judicially sanctioned settlement and private settlement ceases to be principled¹²¹ when the power to create judicial oversight has the potential

118. *Doe*, 358 F.3d at 25.

119. The IDEA empowers "[a]ny State educational agency, State agency, or local educational agency" to establish and maintain procedures in accordance with the guidelines set forth by the statute's section regarding procedural safeguards. 20 U.S.C. § 1415(a) (2000).

120. *J.C. v. Reg'l Sch. Dist. 10, Bd. of Educ.*, 278 F.3d 119; 122 (2d Cir. 2002).

121. See *Local Number 93, Int'l Ass'n of Firefighters, AFL-CIO, CLC, v. City of Cleveland*, 478 U.S. 501, 519 (1986) (holding that a consent decree, depending on the circumstances, can be characterized as a judicial order or a private contractual agreement); *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) (distinguishing consent decrees from private settlements by reasoning that private settle-

to be wielded in such an arbitrary manner. To reason otherwise supplants the substance and underlying policy of the IDEA with a meaningless distinction.

CONCLUSION

Using the very same analytical framework employed by *Doe*, the foregoing illustrates that the IDEA's legislative history and text overcomes the presumption of *Buckhannon's* applicability in this context. In its most generic form, the *Buckhannon* holding requires that some measure of court-ordered relief create a "material alteration of the legal relationship of the parties" to justify an attorneys' fee award.¹²² However, the *Buckhannon* holding should not be analyzed in a vacuum. To do so gives undue breadth to a judicial decision without properly employing the sources of legislative guidance necessary to comply with the "American Rule." As stated in *Alyeska*, the judiciary has no "roving authority" to make fee-shifting determinations without legislative assistance.¹²³ In *Doe*, the court improperly interpreted the IDEA's legislative text and history to conclude that a privately settling plaintiff could not "prevail" for the purpose of awarding attorneys' fees. Hence, although the *Doe* court did not ignore Congress, its failure to properly effectuate Congressional purpose abrogated the text and underlying policy of the IDEA. Accordingly, the Supreme Court should revisit *Doe* and hold that private settlement is sufficient to warrant prevailing party status under the IDEA because this conclusion evinces the text, history, and purpose of the IDEA without being encumbered by the definitional and practical difficulties of the catalyst theory.

ments are not entered as court orders, do not receive court approval, and are not subject to judicial oversight attendant to the court's authority to enforce its orders).

122. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001).

123. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 (1975).

