IN THE
SUPREME COURT OF VIRGINIA

RECORD NO. 090313

SCHOOL BOARD OF THE CITY OF NEWPORT NEWS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

Appellee's Brief

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STATEMENT OF THE CASE

The ruling of the trial court should be affirmed because the Virginia Local Government Risk Management Plan (Plan) does not provide indemnification to the School Board for the City of Newport News (Board) for the underlying action on two independent grounds. Consequently, the Commonwealth did not have a duty to defend the Board in the underlying action nor does it have any duty to reimburse the Board for the legal costs it incurred in defending the underlying action.

The Plan does not provide indemnification to the Board for the underlying action to the case at bar, which proceeded under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq*. There are two distinct and independently sufficient grounds for this. First, the action for which the Board seeks indemnification is an administrative procedure or a similar law or procedure, which are specifically excluded by the Plan. The Plan clearly places administrative hearings and procedures beyond the scope of coverage under the Plan, App. 39 ¶ V(A), as well as "any similar law or proceeding." App. 37 ¶ IV(A)(1). Because IDEA is an administrative procedure and remains an administrative or similar procedure throughout, the underlying action is not covered by the Plan.

Secondly, the Board incurred “other than monetary damages” in the underlying action. The Plan specifically excludes “other than monetary damages” from its coverage. App. 38 ¶ IV(A)(10). According to the United States Supreme Court, the legal and educational reimbursement the Board was ordered to pay under IDEA does not fall under the rubric of damages at all. For each of these reasons alone, the trial court was correct in denying the Board’s petition for indemnification under the Plan.

Because the underlying action clearly falls beyond the Plan’s coverage on two distinct and independently sufficient grounds, the Commonwealth had no duty to provide the Board with a defense to the underlying action or to pay for its defense costs. As such, the trial court properly denied the Board’s request for defense costs.

Because the trial court was operating well within its discretion when it held that the Plan does not cover the underlying action and that defense costs are not owed, the Commonwealth asks this Court to affirm the ruling of the trial court.

QUESTIONS PRESENTED

I. WAS THE TRIAL COURT OPERATING WITHIN ITS DISCRETION WHEN IT FOUND THAT THE PLAN DOES NOT PROVIDE INDEMNIFICATION TO THE BOARD FOR THE UNDERLYING 'IDEA' PROCEDURE WHERE THE PLAN SPECIFICALLY EXCLUDES COVERAGE FOR ADMINISTRATIVE PROCEDURES AND SIMILAR LAWS AND PROCEDURES AND WHERE 'IDEA' IS AN ADMINISTRATIVE PROCEDURE AND WHERE IT REMAINS AN ADMINISTRATIVE OR SIMILAR PROCEDURE WHEN IT IS APPEALED TO A FEDERAL DISTRICT COURT?

II. WAS THE TRIAL COURT OPERATING WITHIN ITS DISCRETION WHEN IT FOUND THAT THE BOARD DID NOT SUFFER DAMAGES IN THE UNDERLYING 'IDEA' PROCEDURE WHERE THE UNITED STATES SUPREME COURT HAS HELD THAT AWARDS IN 'IDEA' PROCEDURES ARE NOT DAMAGES AND WHERE THE BOARD WAS SIMPLY ORDERED TO REIMBURSE THE PARENTS OF AN AUTISTIC CHILD FOR EDUCATIONAL EXPENSES THE BOARD SHOULD HAVE BORNE IN THE FIRST PLACE?

III. WAS THE TRIAL COURT OPERATING WITHIN ITS DISCRETION WHEN IT FOUND THAT THE COMMONWEALTH HAD NO DUTY TO DEFEND THE BOARD AND NO DUTY TO PAY THE BOARD'S DEFENSE COSTS WHERE IT HAD PROPERLY DETERMINED THAT THE PLAN DOES NOT PROVIDE INDEMNIFICATION TO THE BOARD ON TWO INDEPENDENT AND ADEQUATE GROUNDS?

STATEMENT OF FACTS

In a letter dated January 14, 1999, attorneys for Stefan and his parents informed the interim superintendent of the Department of Public Schools for the City of Newport News that they were representing Stefan's interests in securing an appropriate education despite his

autism. App. 46-57. According to this letter, the Newport News Public School System had failed to comply with the Individuals with Disabilities Education Act (IDEA), among other laws governing educational programs for children with disabilities. App. 46-47. Sometime after this, an administrative hearing was held.

On July 23, 1999, the director of student services for the City of Newport News sent a memorandum to the City's accounting supervisor. App. 70. In pertinent part, it states that "[t]he *administrative hearing officer's decision* in the case of Stefan Jaynes v. NNPS has been rendered, favorable to the Jaynes. The amount of *reimbursement* awarded the Jayne's [sic] is $117,979.78." *Id*. (emphasis added). This memorandum was forwarded to the Commonwealth of Virginia's Department of General Services, Division of Risk Management (DRM). On August 10, 1999, DRM responded by letter to the Newport News Public Schools. App. 71-72. After pointing out that DRM is "charged with administering the Local Government Risk Management 'pool,' VARisk-2 (the Plan) [and is] not a commercial insurance company," App. 71 ¶ 2, it goes on to cite the Plan, emphasizing that a "[c]laim means any demand, suit or legal action. However, administrative hearings or procedures…will not be considered claims, regardless of whether or not

monetary relief is sought." *Id*. at ¶ 3 (quoting the Plan's definition of "claim"). *See also* App. 39 ¶ V(A) (defining claim within the Plan itself) and App. 37 ¶ IV(A)(1) (specifically excluding administrative procedures or any similar law or proceeding under the Plan's coverage).

After the Board's appeal from the first level of administrative decision, the officer issuing the opinion in the state level administrative review informs the parties that they are "entitled to *appeal* this decision to either a state court of competent jurisdiction or a federal district court…" App. 138 (emphasis added).

In a letter dated September 28, 1999, the City of Newport News, through the chief deputy of its city attorney's office, begins by acknowledging that Stefan's parents are "to be *reimbursed* for certain expenses…" App. 75 ¶ 2 (emphasis added). This letter goes on to say that the "case has now completed the final administrative stage with a State Review Officer decision that the School Board is liable for a portion of the expenses sought by the Jaynes," *id*., and sets forth the opinion that the Plan covers this administratively determined reimbursement. *See id.* at ¶ 3. DRM reiterates its position in a letter dated September 28, 1999 and again quotes the definition of claim under the Plan. App. 77.

In a letter dated October 4, 1999, the City of Newport News, again through its chief deputy city attorney, twice acknowledges that the underlying matter has been through "two levels of administrative review." App. 81 (quoting from the second paragraph on that page). *See also* App. 82 (stating "A decision…has now been made by the second level administrative decision-maker…").

Under a cover letter dated December 10, 1999, DRM is informed that Stefan's parents have continued the action in the federal district court for the Eastern District of Virginia. App. 100. According to the pleading enclosed under cover of that letter, the action is "an appeal," App. 104 ¶ 2, of the administrative action and is limited to one issue of law: "whether a statute of limitations bars claims within the limitations period and prior to the filing date." *Id*. In the second level of administrative review, the State Hearing Officer reduced the amount of reimbursement from $117,979.78 to $56,090.84 on the grounds that "the statute of limitations barred all claims that existed prior to the date of filing…rather than the date of the claim…" App. 104 ¶ 1. The relief requested from the federal district court is *to reverse and to reinstate the*

reimbursement of $117,979.78 and their costs and fees in accordance with 20 U.S.C. § 1415.[1] App. 116 ¶ B (emphasis added).

The Board acknowledges that the underlying action came to the federal district court by means of the administrative process through the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et. seq.* In its answer to the appeal, the Board concedes that jurisdiction lies in accordance with the administrative procedures set forth in 20 U.S.C. § 1415(i)(3)(A). App. 182 ¶ 3. In an agreed order, the Board stipulates that "[j]urisdiction is conferred upon [the district court] by the Individuals with Disabilities Education Act (IDEA), (20 U.S.C. § 1400 et. seq.)." App. 203 ¶ 1. In its memorandum in support of its motion to dismiss, the Board again states that the district court "has jurisdiction pursuant to the Individuals with Disabilities Education Act ('IDEA'), 20 U.S.C. § 1415(e)(3)." App. 223 ¶ A. As the Board repeatedly acknowledged in the underlying claim, the parties exclusively employed the administrative procedures set forth in 20 U.S.C. § 1415 of the IDEA. These administrative procedures expressly provide for bringing the matter to the federal district court. *See generally* 20 U.S.C. § 1415(i). This Act is the

[1] 20 U.S.C. § 1415 sets forth the administrative procedure for the Individuals with Disabilities Education Act.

sole mechanism through which the federal district court was vested with jurisdiction to review the underlying action.

On September 7, 2000, the federal district court issued an order on the plaintiffs' motion for summary judgment. App. 382-95. After pointing out that IDEA provides for reimbursing parents for costs associated with securing private placement that meets the needs of the child, it points to the United States Supreme Court's decision in *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985), which explains "that such a remedy is necessary to promote the *remedial nature* of the IDEA." App. 393 (emphasis added). The federal district court goes on to explain that "[t]o find otherwise would leave parents with the Hobson's choice of either 'go[ing] along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement' and thereby forego the right to a free education." *Id.* (quoting *Burlington*, 471 U.S. at 370). The Court goes on to clarify the nature of the relief available under IDEA by explaining that "[t]he Act permits a *reimbursement remedy*, but it does not create a private cause of action for damages for educational malpractice." App. 394 (quoting *Anderson v. Thompson*, 658 F.2d 1205, 1211-13 (7th Cir. 1981)) (emphasis added).

On October 6, 2000, the Board promulgated its notice of appeal of the district court's decision on the summary judgment motion. App. 233.

On November 17, 2000, the federal district court issued an opinion and order on the plaintiffs' claim for damages. App. 403-06. In pertinent part, the court found that "the Plaintiffs may only receive *indemnification for educational expenses* incurred after June 30, 1995…[and] are awarded interest at this Court's judgment rate from September 14, 1999 and taxable costs." App. 406 (emphasis added).

On November 28, 2000, the Board promulgated an amended notice of appeal adding the district court's November 17th order to its appeal. App. at 235-36.

In a letter dated November 28, 2000, the City of Newport News informs DRM that the underlying matter is before the United States Court of Appeals, Fourth Circuit, that the City has retained private counsel, and that it is engaged in seeking to settle the matter. The letter also asks DRM to participate in the settlement discussions. App. 154. In its December 4, 2000 letter sent in response, DRM declines and reiterates that IDEA does not create a private cause of action for damages for educational malpractice, reiterating the Plan does not cover the

underlying action. App. 161. DRM goes on to point out that the remedy awarded was limited to reimbursement for education expenses. *See id*.

On December 27, 2000, the District Court stayed its November 17th order pending the outcome of the Board's appeal to the Fourth Circuit. On this same day, the Board filed its docketing statement with the Fourth Circuit. App. 238-43. In it, the Board correctly points out that the "plaintiffs *appealed* to the United States District Court, Eastern District of Virginia…The appeal was limited to whether a statute of limitations bars claims within the limitations period and prior to the date of filing." App. 242 (emphasis added). This is affirmed in the Board's brief submitted to the Fourth Circuit: "On December 6, 1999, the parents *appealed* the Review Officers' decision to federal court." R. 366 ¶ E (emphasis added).[2] Again, the Board acknowledges that the underlying matter proceeded to the federal district court by IDEA's administrative procedure. The Board goes on to recognize that "[t]he Court ordered Newport News to *reimburse* the parents for expenses incurred after July 1, 1995." *Id*. (emphasis added).

[2] It Appears that this portion of the docketing statement was inadvertently omitted from the Appendix. As such, the citation is to the page in the record.

On July 10, 2001, the Fourth Circuit issued its opinion affirming the decision of the district court. App. 410-18. In its opinion, the Fourth Circuit confirms not only that the action in the district court is a continuation of the administrative procedure, but that the Board acknowledges this as well. In paragraph II of its opinion, the Fourth Circuit notes that "Newport next challenges the [trial] court's application of the *standard of review*…" App. 415 ¶ II (emphasis added). The opinion goes on to say that "Courts *reviewing administrative decisions* in IDEA cases…," *id.* (emphasis added), showing that the action in the district court is clearly a continuation of IDEA's administrative procedure.

This action was filed in this Court on August 30, 2001 and refiled on December 9, 2002. On February 8, 2008, this action was removed from the Court's docket for inactivity under § 8.01-335(B) of the Virginia Code (1950), as amended. On April 8, 2008, the matter was reinstated over the Commonwealth's objection. On October 28, 2008 the trial court heard argument on whether the Plan covers the underlying action and whether the Commonwealth properly denied the Board's request for reimbursement of its defense costs. The trial court ruled in favor of the Commonwealth on both issues. This appeal followed.

ARGUMENT

The trial court's ruling should be affirmed. The Plan does not provide indemnification to the Board for the action underlying the case at bar. There are two distinct and independently sufficient grounds for this. First, the action for which the Board seeks indemnification is an administrative or similar procedure, which is specifically excluded from coverage by the Plan. Secondly, the Board incurred "other than monetary damages" in the underlying action, which is also a specific coverage exclusion under the terms of the Plan. As such, the Plan does not cover the underlying action for each of these reasons standing alone. Therefore, the Plan does not provide for the indemnification that the Board seeks here. To give the Plan the interpretation the Board seeks would allow it to shift paying the educational expenses that it should have paid all along, and would have borne in the first instance had it developed a proper IEP, from itself to the Commonwealth. The Plan does not intend to shift this expense to the Commonwealth. To so hold would be to say that the Commonwealth agreed to bear the costs of educating every disabled child in the Commonwealth should a local school board decline to do so.

Finally, because the underlying action is clearly excluded from coverage under the Plan, the Commonwealth had no duty to provide a defense for the Board and has no obligation to reimburse it for defense costs.

A. The Action for Which the Board Seeks Indemnification is an Administrative or Similar Procedure, Which is Specifically Excluded from Coverage Under the Plan.

The Plan specifically excludes administrative and similar procedures from its coverage. In pertinent part, the Plan says that it

> …will pay all sums, *except as herein limited*, on behalf of the ENROLLED COVERED PARTY which the Enrolled Covered Party is legally obliged to pay on all claims first made or arising from any act occurring during the term of coverage on causes of action established by law by reason of liability arising out of acts or omissions of any nature while acting in an authorized governmental or propriety capacity and in the course and scope of employment or authorization…"

App. 35 ¶ I(A) (emphasis added). The Plan later defines a claim under the Plan as "any demand, suit, or legal action. However, *administrative hearings or procedures*…will not be considered claims, regardless of whether or not monetary relief is sought." App. 39 ¶ V(A) (emphasis added). Additionally, the Plan excludes "administrative hearings or procedures or any similar law or proceeding." App. 37 ¶ IV(A)(1).

The Plan does not cover the underlying action. The underlying action is an IDEA claim that is an administrative procedure per the Act and remained an administrative procedure throughout. Even if the Board is correct and the appeal to the federal district court is a new action, this matter remained a proceeding similar to an administrative action in its appeal to the federal court. There was only one issue being considered in bringing this action to the federal court – how the statute of limitations impacted the amount of reimbursement the Board was required to pay; this is not a different kind of matter, it is a continuation of the prior matter regardless. Accordingly, this procedure, whether administrative in nature or simply one that is similar to it, is specifically excluded by the Plan.

The Board has continually acknowledged that this is an administrative procedure throughout the events giving rise to this matter. In its July 23, 1999 memorandum, the director of student services for the City of Newport News states that "[t]he *administrative hearing officer's decision* in the case of Stefan Jaynes v. NNPS has been rendered, favorable to the Jaynes." App. 70 (emphasis added). In a letter dated October 4, 1999, the Board, through the city's chief deputy City attorney, twice acknowledges that the underlying matter has been through "two levels of administrative review." App. 81 ¶ 2, *see also* App. 82 (stating "A

decision…has now been made by the second level administrative decision-maker…”).

The Board cannot now claim that the proceedings became anything other than an administrative or similar procedure by operation of the appeal of the underlying action to the federal district court. The underlying action remains an administrative or similar procedure because IDEA specifically identifies the action filed in the federal district court as a part of IDEA’s administrative procedure. *Compare* 20 U.S.C. § 1415(i) (titled “Administrative procedures”) with § 1415(i)(2) (titled “civil action” but falling under the heading of 20 U.S.C. § 1415(i) titled “Administrative procedures”). Furthermore, the opinion rendered by the State Level Hearing Officer goes on to inform the parties that either may appeal the decision. App. 138. This guidance flows from 20 U.S.C. § 1415(i), titled “Administrative procedures,” which allows an aggrieved party to bring the action to either state or federal court for review. It is only by the parties continuing employment of IDEA’s administrative procedure that the federal district court has jurisdiction over underlying action. So even if the underlying action does become a new action, as the Board asserts, it remains similar to an administrative procedure or law on appeal since it is the administrative action being reviewed.

Furthermore, the administrative procedure provided by IDEA is the sole means employed by the parties in the underlying action that brings the matter to the federal district court. In its answer to the appeal from the state level administrative hearing officer, the Board concedes that jurisdiction lies in accordance with 20 U.S.C. § 1415(i)(3)(A) of IDEA. App. 182 ¶ 3. In an agreed order, it stipulates that "[j]urisdiction is conferred upon [the District Court] by the Individuals with Disabilities Education Act (IDEA), (20 U.S.C. § 1400 et. seq.)." App. 203 ¶ 1. In its memorandum in support of its motion to dismiss, the Board again states that the district court "has jurisdiction pursuant to the Individuals with Disabilities Education Act ('IDEA'), 20 U.S.C. § 1415(e)(3)." App. 223 ¶ A. IDEA, through 20 U.S.C. § 1415, sets forth the administrative process employed by the parties in the underlying action by which the underlying matter continued as an administrative action through the federal district court.

Section 1415 of 20 U.S.C. outlines the process for resolving claims brought under IDEA. Section 1415(e) requires state and local educational agencies to provide for mediation. Section 1415(f) provides for an impartial due process hearing. Section 1415(g) permits an aggrieved party to appeal this decision to the state level of administrative

review. All of this guidance flows from 20 U.S.C. § 1415(i), titled "Administrative procedures," which allows an aggrieved party to bring a civil action to either state or federal court for review. While 20 U.S.C. § 1415(i)(2) does call this step in the proceedings a "civil action," it falls within the ambit of 20 U.S.C. § 1415(i), titled "Administrative procedures." In the underlying case, the district court was conducting a review of the administrative action. The underlying action came to it solely by means of the administrative procedure provided by IDEA. If it somehow does not retain its administrative character, it is certainly a procedure similar to an administrative case by means of how the action continues.

The Board's own understanding of the procedural posture of the underlying matter clearly acknowledges the continuing administrative procedure of the action in federal court. Nor can the Board now retreat from that position. On July 10, 2001, the Fourth Circuit issued its opinion affirming the decision of the district court. App. 408-18. In its opinion, the Fourth Circuit confirms not only that the action in the district court is a continuation of the administrative procedure, but that the Board acknowledges this as well. In paragraph II of its opinion, the Fourth Circuit notes that "Newport next challenges the court's application of the *standard of review*…" App. 415 (emphasis added). The opinion goes on

to say that "Courts *reviewing administrative decisions* in IDEA cases…," *id*. (emphasis added), showing that the action in the district court was nothing more than a continuation of the administrative procedure and that the Board understands this to be the case.

The Plan defines a claim as "any demand, suit, or legal action. However, *administrative hearings or procedures*…will not be considered claims, regardless of whether or not monetary relief is sought." App. 39 ¶ V(A). Additionally, the Plan excludes "administrative hearings or procedures or any similar law or proceeding." App. 37 ¶ IV(A)(1). The litigation prior to the federal court filing was a series of administrative hearings. Continuing the matter by appealing it to federal court did not alter its character from that of an administrative procedure under IDEA. As such, the underlying action is not covered under the Plan.

B. The Board Incurred "Other Than Monetary Damages" in the Underlying Action, Which is a Specific Coverage Exclusion Under the Terms of the Plan.

Additionally, the Plan specifically excludes "other than monetary damages" from its coverage. The reimbursement the Board was ordered to pay is "other than money damages." Reimbursement under IDEA is not construed as damages at all. As such, the Plan does not provide for

indemnification for the underlying action to the case at bar because the only award available is "other than money damages," which falls squarely within a specific coverage exclusion of the Plan.

Turning to the exclusion at issue, the Plan enumerates specific coverage exclusions. App. 37-38 ¶ IV. In pertinent part, the Plan excludes "[c]laims, demands, or other actions seeking relief or redress in any form other than monetary damages, including, but not limited to injunctive relief. For the purposes of this exclusion, a claim for attorney's fees, costs, or expenses shall not be construed as a claim for money damages." App. 38 ¶ 10.

In addressing the issue of reimbursement falling within the scope of damages under IDEA, the United States Supreme Court lays its finger right on the issue when it says, "In this Court, the Town repeatedly characterizes reimbursement as 'damages,' but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 370-01. The United States Supreme Court, in discussing damages in IDEA cases, clearly places reimbursement outside the rubric of damages.

In the underlying case, the first level of administrative proceedings resulted in Stefan's parents being "awarded *reimbursement* for the costs, legal and educational, incurred in seeking to provide an education for their son, in the sum of $117,979.78." App. 131 (emphasis added). In the order issued from the state level administrative review, the hearing officer reduced "the sum of the *reimbursement* to $56,090.84." App. 137 (emphasis added). At the federal court level, the Board was not ordered to pay anything more than reimbursement of educational expenses, interest for the reimbursement, and taxable costs. App. 406. What is more, the federal courts were simply reviewing the applicability of the statute of limitations to the requests for reimbursement.

The Board may seek to characterize the ordered reimbursement as damages but, as the United States Supreme Court says in *Burlington*, 471 U.S. at 370-01, that simply is not the case. Reimbursement merely requires the Board to *belatedly pay expenses that it should have paid all along and should have borne in the first instance.* The Plan does not provide for indemnification of the Board for the underlying action because the remedy underlying action sought "other than money damages," a specific exclusion under the Plan.

C. The Commonwealth had No Duty to Defend the Board in the Underlying Action Because it was Specifically Excluded from Coverage on Two Adequate and Independent Grounds.

Because the underlying action was clearly not covered by the Plan, the Commonwealth had no duty under the Plan to provide a defense to the Board or to reimburse it for defense costs. The underlying action was clearly an administrative or similar proceeding from start to finish; it is specifically excluded from coverage under the Plan. Further, the Board was exposed only to "other than money damages" under IDEA and, as such, was specifically excluded from coverage by the Plan on this ground as well.

"Only when 'it appears clearly [the insurer] would not be liable under its contract for any judgment based upon the allegations,' does the company have no duty to defend." *Parker v. Hartford Fire Ins. Co.*, 222 Va. 33, 35, 278 S.E.2d 803, 804 (1981) (citing *Travelers Indem. Co. v. Obenshain*, 219 Va. 44, 46, 245 S.E.2d 247, 249 (1978)).

The Plan expressly excludes administrative procedures and those similar to administrative procedures from coverage. App. 39 ¶ V(A) (excluding administrative procedures from coverage) and App. 37 ¶ IV(A)(1)(excluding administrative procedures or any similar law or

proceedings). IDEA is an administrative procedure. *See* 20 U.S.C. § 1415(i) (titled "Administrative procedures"). Even if it becomes a new action when brought to federal court, as the Board argues, it remains a similar procedure and so remains a specific exclusion under the Plan. Again, the federal courts simply reviewed one narrow issue on an appeal from the state hearing officer. As such, the underlying action did not fall within the scope of coverage under the Plan. On this ground alone, the Commonwealth was never under any obligation to provide a defense to the Board or to reimburse it for its defense costs.

What is more, the underlying action is specifically excluded from the Plan on another ground. The Board was never subject to damages under IDEA. Again, the United States Supreme Court lays its finger right on the issue when it says, "In this Court, the Town repeatedly characterizes reimbursement as 'damages,' but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Burlington*, 471 U.S. at 370-01. The United States Supreme Court clearly places reimbursement outside the rubric of damages under IDEA. As reimbursement under IDEA is not damages, the underlying action is expressly excluded from

coverage under the Plan as the Board incurred "other than money damages." App. 38 ¶ IV(A)(10) (citing the Plan's exclusion). On this ground alone, the Commonwealth was never under any obligation to provide a defense to the Board or to reimburse it for its defense costs.

For each of these reasons alone, the Commonwealth was never under any obligation to provide a defense to the Board or to reimburse it for defense costs. The trial court properly denied the Board's request for defense costs.

CONCLUSION

The trial court's ruling should be affirmed. The Plan does not extend coverage to the underlying action. The Board is seeking indemnification for administrative or similar procedure. This is not covered under the Plan. What is more, the plaintiffs in the underlying action were seeking reimbursement, not "monetary damages" as contemplated by the Plan. Either reason standing alone places the underlying action beyond the Plan's coverage. Because the underlying action was clearly an administrative or similar proceeding and because the Board was never exposed to damages under IDEA, it had no duty to provide a defense to the Board.

To give the Plan the interpretation the Board seeks would allow it to shift paying the expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP from itself to the Commonwealth. The Plan does not shift this expense to the Commonwealth. The trial court is without error. Accordingly, the trial court's ruling should be affirmed.

RESPECTFULLY SUBMITTED,

COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF SERVICE

I certify that on this 17th day of June, 2009, I mailed by first class mail, postage prepaid, a true copy of the foregoing Appellee's Brief to:

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and counsel further certifies that, in accordance with Rule 5:26(d), 15 copies of this brief have been filed with the Clerk by hand, a copy has been emailed to scvbriefs@courts.state.va.us, and three copies sent to opposing counsel.

_____
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