IN THE

Supreme Court of Virginia

RECORD NO. 090313

SCHOOL BOARD OF THE CITY
OF NEWPORT NEWS,

Appellant,

V.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

I. A. THE COURT ERRED WHEN IT DETERMINED THAT THE PROCESS IN THE UNITED STATES DISTRICT COURT WAS SIMPLY AN APPEAL OF AN ADMINISTRATIVE ACTION RATHER THAN A CIVIL ACTION.

B. THE COURT ERRED IN DETERMINING THAT THE LANGUAGE OF THE INSURING AGREEMENT WAS EQUIVALENT TO THAT OF A LIABILITY INSURANCE POLICY AND WOULD NOT ALLOW COVERAGE FOR AN AWARD OF DAMAGES BASED ON REIMBURSEMENT.

II. THE COURT ERRED IN NOT ORDERING THAT THE DEFENDANT HAD A DUTY TO DEFEND UNDER THE POLICY.

VIRGINIA: IN THE SUPREME COURT

SCHOOL BOARD OF THE CITY OF NEWPORT NEWS, Appellant,	)	
v.	)	**Record No. 090313**
COMMONWEALTH OF VIRGINIA, Department of the Treasury, Division of Risk Management, Appellee.	)	

BRIEF OF APPELLANT

COMES NOW the Appellant, the School Board of the City of Newport News (hereafter "the School Board"), and states as follows:

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This matter arises out of a claim the School Board made under an insurance policy issued by the Appellee ("the Policy"). The insuring agreement of the Policy requires the Commonwealth of Virginia, through its Department of Risk Management ("the Commonwealth"), to "pay all sums" arising out of "acts or omissions of any nature". The "sum" that the School

Board is claiming under this policy is a judgment in the amount of $102,929.33 rendered against the School Board by the U.S. District Court on November 20, 2000, for violations of the Individual with Disabilities Education Act, 20 U.S.C. §1400, *et seq.* (the "IDEA"). The Commonwealth denied coverage based on an exclusion in the definition of "claim" under the Policy, which indicates the Policy did not cover administrative proceedings. The trial court found that this was an administrative claim, ruling *sua sponte* that the court's role in reviewing administrative proceedings was to review the record and check for defects in due process, and that, as such, this was a continuation of the administrative proceeding. This ruling contradicts the clear language of the statute, since the IDEA refers to the proceeding in the federal court as a "civil action" and not an appeal. This finding is also in direct contrast to current federal case law.

In addition, the Court ruled that the judgment of $102,929.33 was not "monetary damages", basing its decision on language from IDEA rather than the language employed in this specific insurance contract.

Also, the Commonwealth refused to provide a defense under the policy. Since the court found for the Commonwealth on the previous

matter, the issue of breach of the duty to defend was also determined adversely to the School Board.

This matter was originally filed as a declaratory judgment action on August 30, 2001. Appendix, p. 1. The Commonwealth filed their responsive pleadings on October 1, 2001. Based upon an order of the Court entered November 19, 2002, Plaintiff refiled this matter as a Petition on December 9, 2002. Appendix, p. 6. The Commonwealth filed responsive pleadings January 24, 2003.

The Court held a trial on the merits of this case, based upon briefs of the parties, facts stipulated therein, and argument on October 28, 2008, and issued the final order on November 6, 2008. Appendix, p. 305. The School Board thereafter filed its notice of appeal on December 3, 2008.

PARTIES

The Appellant is the School Board for the City of Newport News, a body corporate established under the general laws of the Commonwealth of Virginia. It is responsible for the supervision of the public school system for the City of Newport News, Virginia.

The Appellee is the Commonwealth of Virginia. Pursuant to Virginia Code §2.1-191.12 (1950, as amended) (now Va. Code §2.2-1839), the

Commonwealth, through its Division of Risk Management, formerly a part of the Department of General Services and now a part of the Department of the Treasury, with the approval of the Governor, at all times pertinent to the circumstances of this case, established, sold and administered an insurance plan for various government bodies, including school boards, pursuant to the then current Va. Code §2.1-526.8.1 (1950, as amended) (repealed in 2001). This insurance plan was known as the Virginia Local Government Risk Management Plan, also known as "VaRISK 2" ("the Plan").

STATEMENT OF FACTS

On or about July 7, 1995, the School Board purchased the Policy of insurance under the Plan. From July 1, 1995 until June 30, 1999, the School Board paid a total of $89,250.00 in premiums for coverage under the Plan for claims first made or arising during the period of coverage, as detailed at Appendix, p. 311.

The Policy, at Appendix, pp. 34-43, was in effect at the time of the underlying proceedings that gave rise to the claim at issue in this action. The sections of the Policy relevant to the case are:

I. What VaRISK2 Will Pay.

A. Coverage

VaRisk2 will pay all sums, except as herein limited, on behalf of the ENROLLED COVERED PARTY which the Enrolled Covered Party is legally obligated to pay on all claims, either first made or arising from any act occurring during the term of the 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 proprietary capacity and in the course and scope of employment or authorization…

B. Defense

On matters covered by this PLAN, VaRISK2 shall have the right and duty to defend any suit against the Covered Party, even if any allegations are groundless, false, or fraudulent.

II. Limit of Liability

A. [T]he most VaRisk2 will pay as COMPENSATION for any one CLAIM will be one million dollars ($1,000,000).

B. In addition to compensation for liability, VaRISK2 will pay, for claims covered by the Plan:

1. All expenses incurred by the PLAN, including defense costs.

IV. What VaRISK2 Will Not Cover (Exclusions)

A. This PLAN does not apply to:

10. Claims, 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 monetary damages.

V. Definitions Used in This Plan

A. ***Claim*** *means any demand, suit or legal action. However, administrative hearings or procedures, including but not limited to EEOC and grievance panels,* ***will not be*** *considered claims, regardless of whether or not monetary relief is sought.*

B. ***Compensation*** *shall include compensatory and punitive damages awarded by a court of competent jurisdiction including those awarded under 42 U.S.C. §1988. In no event, however, shall compensation mean (1) costs due or alleged to be due, including interest, solely on account of goods or services contracted for or allegedly contracted for, nor (2) expenses associated with complying with any injunction, or (3) any combination of these.*

D. ***Defense Costs*** *means all fees and expenses relating to the adjustment, investigation, defense or litigation of a claim including attorney's fees incurred by the PLAN, court costs applicable to the defense and interest on judgments accruing after entry of judgment.*

By letter dated January 14, 1997, counsel for Stefan Jaynes, an autistic child, and his parents (hereafter "the Jaynes") advised the School Board that they were making a claim under the Individuals with Disabilities Education Act and related federal and state laws. The letter alleged various failures on the part of the School Board to provide the child with a free appropriate education and to comply otherwise with both the

procedural and substantive requirements of the Act and related laws, by reason of which the Jaynes had incurred substantial expenses. Appendix, p. 46.

The School Board, through its insurance consultant, informed the Commonwealth about the claim by letter dated January 22, 1997. A copy of that letter is attached at Appendix, p. 64. The Commonwealth responded by letter dated January 27, 1997, acknowledging receipt of the claim and further asking that it be immediately provided with copies of any subsequent lawsuit. Appendix, p. 65. Thereafter the parties engaged in correspondence with each other about the underlying claim. That correspondence is included in the Appendix collectively at Appendix, pp. 64-164.

A local hearing officer conducted an administrative hearing on the claim during the week of December 7, 1998. At the beginning of the hearing, counsel for the parties indicated that, by agreement, the hearing would deal only with retroactive relief for damages alleged by the Jaynes, and that a future hearing would address any prospective relief. See, Appendix, pp. 313-314, excerpt from the Transcript of the hearing before

the Local Hearing Officer ("LHO"). This understanding was later memorialized in an Order executed by the LHO. Appendix, p. 315.

By letter dated December 21, 1998, after notice of the opinion of the LHO and in response in part to a settlement proposal from the Jaynes, the Commonwealth declined coverage because the Plan does not apply to administrative proceedings. Appendix, p. 69. In that same letter, the Commonwealth stated "if a subsequent lawsuit is served upon Newport News Public Schools, coverage may be provided".

On June 11, 1999 the LHO found that the School Board had failed to provide a free appropriate public education to the Jaynes' child, failed to provide notice to the Jaynes of rights to appeal the decision of the School Board, failed to comply with time limits for implementing the child's education program, and failed to involve the Jaynes in developing the program, among other things, all as required by federal and state law. The LHO awarded the Jaynes the sum of $117,979.78 to be paid by the School Board, which was the amount of the costs the Jaynes' incurred for educational services to their child. See, Appendix, pp. 316-330, Findings of Fact and Conclusions of Law of the LHO.

Effective June 30, 1999, the School Board ceased to be an enrolled covered party under the Plan. The Commonwealth noted this fact in conjunction with denial of the School Board's claim. See, Appendix, pp. 85-86.

By memorandum dated July 23, 1999, the School Board indicated that it had appealed the decision of the LHO to a state level administrative hearing (the "SHO"). See, Appendix, p. 70. The Commonwealth received a copy of this memo on July 29, 1999. See, date stamp in right margin at Appendix, p. 70. The memorandum suggested that the Commonwealth might wish to become involved in the defense of the claim even though it remained an administrative proceeding, because of the likelihood of subsequent litigation. By letter dated August 10, 1999, the Commonwealth again declined to afford coverage or a defense stating that the Plan does not cover administrative hearings or procedures. This letter also stated "please notify us immediately if a lawsuit is filed in connection with this dispute". Appendix, pp. 71-72.

When the School Board again sent notice of the administrative appeal to the Commonwealth, Appendix, pp. 75-76, the Commonwealth

again responded that there was no coverage as this was an administrative hearing. Appendix, p. 77.

On September 14, 1999, the SHO affirmed the substantive decision of the LHO, but modified the decision by reducing the award in favor of the Jaynes to $56,090.84 to reflect the SHO's determination that the statute of limitations barred some of the expenses for which the Jaynes sought recovery. See, Report of State Level Administrative Review, Appendix, pp. 132-137 .

Following an internal exchange of email messages on October 4 and 5, 1999, the Commonwealth decided to wait to make a determination of coverage until judicial proceedings had been commenced, in part because of the possibility that the School Board might initiate litigation by appealing the adverse decision of the SHO. The email messages emphasized that the School Board was no longer a member of the Plan. See, Appendix, pp. 85-86.

By letter dated October 6, 1999, the Commonwealth once again declined to extend coverage because the matter had not yet proceeded beyond the administrative level, and noted that the Plan would not assist in any litigation that might be initiated by the School Board. Appendix, p. 87.

However, the letter misquoted the language of the Plan which excludes from reimbursement the salaries of employees of a member who participate in the defense of a claim under the Plan, suggesting inaccurately that the Plan does not cover an award of back pay to a Plaintiff in employment cases. This letter further includes the sentence: "If or when a civil suit is filed in a court of law, we encourage [sic] to forward it for our consideration and possible coverage under VaRISK 2". See, Appendix, p. 87.

On December 9, 1999, the School Board was served with a complaint in the U.S. District Court for the Eastern District of Virginia, in which the Jaynes asked that the decision of the SHO be reversed, that the decision of the LHO be reinstated, and that they be awarded the sum of $117,979.78 plus costs and attorney's fees. See, Appendix, pp. 103-116.

On December 10, 1999, the School Board notified the Commonwealth that such a lawsuit had been filed. Appendix, p. 100. An internal memo of the Commonwealth dated December 13, 1999, indicates as to the claim: "It has been at the 'administrative level' for some years and now --- finally --- suit has been filed". Appendix, p. 145. The denial letter that followed relied upon the defense that the reported suit is an injunction

action and that damages are not covered. Appendix, pp. 150-151. No mention was made of a defense that there was no coverage for a suit that arose from an administrative action.

On September 7, 2000, the U.S. District Court issued its opinion on the Plaintiff's Summary Judgment Motion. The Court noted several actions or omissions in violation of the IDEA and determined that the majority of them were barred by the applicable statute of limitations. The Court, however, specifically found a violation of the IDEA pursuant to 20 U.S.C. §1415(d)(1), and found for the Plaintiff on that basis. The issue of the actual damages was reserved pending an attempt to prepare a stipulation. See, Opinion and Order on Plaintiff's Motion for Summary Judgment, Appendix, pp. 382-395.

The parties failed to reach a stipulation on the damages, and the Plaintiff filed a Claim for Damages, attached as Appendix, pp. 396-397. The Court found in favor of the Plaintiff in its Opinion and Order on Plaintiff's Claim for Damages, Appendix, pp. 403-406.

On November 20, 2000, the U.S. District Court entered judgment against the School Board in the amount of $102,929.33, exclusive of costs, interest and attorney's fees. The judgment order is found at Appendix, p.

407.

The School Board timely appealed the judgment of the U.S. District Court to the U.S. Court of Appeals for the Fourth Circuit. Appendix, pp. 233-237. The School Board sent notice of the appeal to the Commonwealth on November 28, 2000. See, Appendix, p. 154. The Commonwealth acknowledged receipt by email, noting that this was the fourth time the School Board had reported this claim. See, Appendix, p. 157.

After the School Board notified the Commonwealth that the matter had been appealed to the Fourth Circuit, Appendix, p. 156, an internal memo of the Commonwealth was composed, Appendix, p. 160, which states:

> It looks to me like an administrative procedure commenced when the Newport News Public Schools failed to place the plaintiff in a special education program, that the hearing officer granted some administrative relief which was appealed all the way through the process – up to this point there would have been no coverage because the matter fell outside the definition of a claim covered by the Plan. Subsequently the plaintiff filed an action in court, but the plaintiff sought only to have the hearing officer's order implemented – at this point there may have been a claim, but the matter was not covered because of exclusion 10 – relief sought in the form of monetary damages.

The memo goes on to say that reimbursement is not damages because no cause of action is recognized under the IDEA for "educational malpractice", Appendix, p. 160, a statement which is echoed in the denial letter of December 4, 2000. Appendix, p. 161. At no point after the suit was filed did the Commonwealth ever disclaim coverage on the basis of the claim having begun as an administrative proceeding.

On July 10, 2001, the U.S. Court of Appeals for the Fourth Circuit affirmed the judgment of the U.S. District Court. See, Judgment of Court, Appendix, pp. 408-409. A copy of the Opinion of the Court is attached at Appendix, pp. 410-418.

The Fourth Circuit refused to consider the Plaintiff's Bill of Costs and Attorney's Fees, Appendix, pp. 419-420, due to lack of timeliness pursuant to Federal Rule of Civil Procedure 39(d). See, Appendix, pp. 456-457. As such, Plaintiff received no recovery for attorney's fees and costs.

As of the date on which this action was filed, the School Board had paid the sum of $53,295.54 for the defense of the aforesaid litigation in federal courts. Appendix, pp. 458-459.

QUESTIONS PRESENTED

I. DOES THE SCHOOL BOARD HAVE A COMPENSABLE CLAIM UNDER THE POLICY FOR A JUDGMENT IN A CIVIL ACTION ? (Error 1)

A. WAS THE ACTION BEFORE THE U.S. DISTRICT COURT A CONTINUATION OF THE ADMINISTRATIVE PROCEEDING OR A LAWSUIT?

B. IS A CLAIM FOR MONETARY DAMAGES THAT IS COVERED UNDER THE LANGUAGE OF THE POLICY COVERED WHEN THE UNDERLYING JUDGMENT AROSE OUT OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT?

II. HAS THE DEFENDANT BREACHED ITS DUTY TO DEFEND UNDER THE POLICY? (Error 2)

ARGUMENT

I. The School Board Claim Is Within the Coverage of the Insuring Agreement of the Policy.

The insuring agreement requires the Commonwealth to "pay all sums" arising out of "acts or omissions of any nature". Appendix, p. 35, Section I. An insurance policy is a contract, and generally speaking, the words in the contract are given their ordinary meaning. Graphic Arts Mutual Insurance Company v. C. W. Warthen Company, Inc., 240 Va. 457, 459, 397 S.E. 2d. 876, 877 (1990). Courts interpret insurance policies, like

other contracts, in accordance with the intention of the parties gleaned from the words they have used in the document. Floyd v. Northern Neck Insurance Company, 245 Va. 153, 158, 427 S.E.2d 193, 196 (1993). When a policy does not define a given term, that term should be given its ordinary and accepted meaning. Scottsdale Insurance Company v. Glick, 240 Va. 283, 288, 397 S.E.2d. 105, 108 (1990); Transcontinental Insurance Co. v. RBMW, Inc., 262 Va. 502, 512, 551 S.E.2d. 313, 318 (2001).

As the Court stated in United States Fidelity and Guaranty Company v. Drinkard, 258 F.Supp. 380, 381 (W.D.Va. 1966):

> It is a well-established "general principle" of insurance law that in construing a contract of insurance the test is not what the insurer intended the policy to mean, but what a reasonable person in the position of the named insured would have understood it to mean.

Whether the insurer owes the insured a duty to indemnify [and defend] depends on whether the language of the policy unambiguously applies to a claim made. Fireman's Insurance Co. v. Kline & Son Cement Repair, Inc., 474 F.Supp. 779, 788 (E.D.Va. 2007). The terms of the policy are to be construed as a whole, but where two reasonable, but opposite, interpretations can be reached, the words are ambiguous. Id. at 788; Spence-Parker v. Maryland Insurance Group, 937 F.Supp. 551,556

(E.D.Va. 1996). As stated in White Tire Distributors, Inc. v. Pennsylvania National Mutual Casualty Insurance Company 235 Va. 439, 441, 367 S.E.2d. 518, 519 (1988):

> Insurance policies are to be construed according to their terms and provisions and are to be considered as a whole. Where there is doubt or uncertainty and where the language of a policy is susceptible of two constructions, it is to be construed liberally in favor of the insured and strictly against the insurer. Where two interpretations equally fair may be made, the one which permits a greater indemnity will prevail because indemnity is the ultimate object of insurance.

In addition to the determination that indemnity is the ultimate object of insurance, the Court also recognizes that persons buying insurance have virtually no input into the provisions of the policy, and that the language is selected by the insurer, not the insured. St. Paul Fire & Marine Insurance Company v. S.L. Nusbaum & Co., Inc., 227 Va. 407, 411, 316 S.E.2d. 734, 736 (1984).

In particular, exclusionary language must be construed most strongly against the insurer, and the burden is upon the insurer to prove that an exclusion applies. Johnson v. Insurance Company of North America, 232 Va. 340, 345, 350 S.E.2d. 616, 619 (1986); American Reliance Insurance Company v. Mitchell, 238 Va. 543, 547, 385

S.E.2d. 583, 585 (1989).

Reasonable exclusions will be enforced, but it is incumbent upon the insurer "to employ exclusionary language that is clear enough to avoid any ambiguity." Smith v. Allstate Insurance Company, 241 Va. 477, 480, 403 S.E.2d. 696, 698 (1991); State Farm Mutual Insurance Company v. Gandy, 238 Va. 257, 261, 383 S.E.2d. 717, 719 (1989); Granite State Insurance Co. v. Bottoms, 243 Va. 228, 233, 415 S.E.2d. 131, 134 (1992).

The Policy, Appendix, pp. 34-43, was prepared in its entirety by the Commonwealth. The School Board had no opportunity to participate in the drafting of the language of the Policy.

The action brought by the Jaynes under the IDEA began as an administrative proceeding. The Policy is clear and unambiguous that administrative proceedings are not claims as defined in the Policy. However, when a suit is filed, the Policy requires "paying all sums" arising out of "causes of action established by law by reason of liability arising out of acts and omissions of any nature". Appendix, p. 35, Section I. Thus, this insuring agreement is considerably broader than a typical liability policy that is drafted to cover only suits for bodily injury or property damage, as

described in Va. Code §38.2-117 (1950, as amended) and Va. Code §38.2-118 (1950, as amended).

In his Opinion, Judge Morgan specifically found a breach of 20 U.S.C. §1415(d)(1) in that the School Board failed to give appropriate notice of Due Process rights. Appendix, p. 390-392. This gave rise to the Court determining that damages for the amount expended by the parents was an appropriate measure of damages. Appendix, pp. 392-394.

There is little question that the suit was a civil action demanding damages. First, the administrative hearing itself was bifurcated into an action for previous damages and a later action for injunctive relief (which was ultimately settled). See, Appendix, pp. 313-315. Second, the ad damnum in the suit states:

> The plaintiffs request that this Court, upon a review of the administrative record, find that the decision of the state level reviewing officer should be reversed, the decision of the Administrative Hearing Officer should be reinstated, that the parents are awarded $117,979.78, plus interest, and that the parents, as prevailing parties, shall be awarded their court costs, witness fees, expenditures, and reasonable attorney's fees, pursuant to 20 U.S.C. §1415.

Appendix, p. 353. Third, the Court's final opinion, Appendix, pp. 403-406, and the final order, which immediately followed it, Appendix, p. 407,

specifically address only damages as the final outcome of the U.S. District Court suit. No additional relief is noted in the opinion and Order.

"Compensation", as defined under the policy, includes compensatory and punitive damages awarded by a court of competent jurisdiction. Reimbursement of the portion of the Jaynes' expenses that is represented by the federal court judgment is a compensatory damage for the purpose of this Policy. Appendix, p. 39, Section V.B.

Reimbursement must fall within the language of the Policy unless otherwise excluded by the Policy. Exclusion number 10, Section IV.A., in Appendix, p. 38, excludes injunctive relief other than monetary damages. The Commonwealth argues that the federal suit to reinstate the finding of damages by the LHO is somehow injunctive relief. See, Appendix, pp. 150-151. As stated above, the bifurcation of the actions, the ad damnum of the suit, and Judge Morgan's final Opinion and Order demonstrate that there was no injunctive relief sought or given.

Even if these exclusions possibly affect the mandate of the insuring agreement, any reasonable counter-arguments would render the Policy ambiguous, and thus it must be interpreted in favor of the insured and indemnity. This is particularly true since this is exclusionary language, and

it is the duty of the insurer "to employ exclusionary language clear enough to avoid any such ambiguity, if it wished to exclude coverage". Smith v. Allstate Insurance Company, 241 Va. at 480, 403 S.E.2d. at 698.

The School Board is entitled to reimbursement for the $102,929.33 judgment entered against it by the U.S. District Court.

A. The Action Filed in the U.S. District Court By the Jaynes Was a Separate Lawsuit, Not a Continuation of the Administrative Proceeding.

One of the major issues raised at trial is whether the proceeding filed in the U.S. District Court by the Jaynes was the continuation of an appeal, and thus remains administrative in nature, or whether it is a separate lawsuit, as the language of the IDEA would suggest.

The language of 20 U.S.C. §1415(i) indicates the two levels of administrative actions, and then sets out the method of review of the administrative decisions as "the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy".

The Commonwealth's position is that because the dispute under the IDEA went first through administrative proceedings, that the School Board's

claim against the Policy retains that character and thus does not come within the definition of "claim" under the policy. See, Transcript, pages 16-17, located in the Appendix at pp. 607-608.

The Court reviewed the process, and found that, because a court's jurisdiction in these cases was more in keeping with a review of due process issues and error by the hearing officer, in effect, the underlying case was an appeal of the administrative system, not a separate legal action. See, Transcript, pages 24 and 27, located in the Appendix at pp. 615 and 618.

This finding did not offer a response to anything in the arguments raised in the Commonwealth's brief in the trial court, Appendix, pp. 166-180, rather, the Court raised this issue *sua sponte* in its opinion given from the bench. This finding is in conflict with current case law in the Fourth Circuit.

The Fourth Circuit, in Kirkpatrick v. Lenoir County Board of Education, 216 F.3d. 380, 384 (4th Cir. 2000), reviewed this same question, and determined that the action filed in Court was a separate civil lawsuit, not simply an appeal. See also, CM v. Board of Education of Henderson County, 241 F.3d 374, 381 (4th Cir., 2000); County Sch. Bd. of Henrico v.

Z.P. ex rel. R.P., 399 F.3d 298, 304 (4th Cir., 2005).

In reaching this conclusion, the Fourth Circuit first consulted the legislative history of 20 U.S.C. §1415(i) and determined that the action in court was first referred to as an appeal in early drafts of the statute, but was specifically amended to "grant the aggrieved party the right to bring a civil action following the state review officers decision". Kirkpatrick, 216 F.3d. at 384, citing to U.S. Code Cong. & Admin. News, 1480, pages 1501, 1503; Tokarick v. Forest Hills School District, 665 F.2d. 443, 448 (3d. Cir. 1981).

The second reason for the Fourth Circuit's finding was the language of 20 U.S.C. §1415(i)(2)(A), which states that the Court may consider evidence in addition to the record developed in the administrative hearing, and the language of 20 U.S.C. §1415(i)(2)(B), which states that the Court shall hear additional evidence at the request of the party. Kirkpatrick, 216 F.3d. at 384.

Also, the Court, in reviewing these statutes, further determined that a reviewing court was not limited to the remedies available at the administrative level: "In fact, the statute explicitly authorizes district courts to exercise their discretion and grant such relief as the court determines is appropriate". Id at 384.

The Fourth Circuit recognizes that the fact that the statute requires review of the record has created confusion as to whether the action is essentially an appeal of an administrative procedure or a separate lawsuit. Id. at 385. Most of this confusion derives from a judicially-imposed deferential standard of review. Id. at 385. In spite of this standard of discretion, the Court states:

> Although federal courts may defer to the state review officer's decision and thus give the proceeding an appellate attribute, the manner of review does not convert IDEA actions into appeals in the face of explicitly clear statutory language that they are original civil actions.

Id. at 385.

Finally, the Court determined that to consider the "civil action" an appeal was contrary to principals of federalism. Id. at 386. As a rule, federal trial courts are reviewed by federal appeals courts and state trial courts by state appeals courts, and that these principles apply in the administrative realm as well. Id. at 386.

Quoting Fairfax County Redevelopment and Housing Authority v. W.M. Schlosser Co., 64 F.3d. 155 (4th Cir. 1995), the Court stated "the district court is a court of original jurisdiction, not an appellate tribunal, and thus is without jurisdiction to review on appeal action taken administratively

or judicially in a state proceeding". Id. at 386. Thus, the action authorized by 20 U.S.C. §1415(i) must be characterized as a separate civil action and was "intended to create an external check to guard against possible procedural defects or institutional pressures inherent in the educational administrative system". Id. at 387.

The actual exclusionary language in the definition of "Claim" under the Policy is "administrative hearings or procedures ... will not be considered claims". In light of the holding in the Kirkpatrick case, this limitation of the definition of "claim" would not apply here.

Even in the absence of Kirkpatrick, the language of 20 U.S.C. §1415(i) must reasonably be construed in favor of the matter being a separate lawsuit. As the Court stated in United States Fidelity and Guaranty Company, 258 F. Supp. at 381:

> It is a well-established "general principle" of insurance law that in construing a contract of insurance the test is not what the insurer intended the policy to mean, but what a reasonable person in the position of the named insured would have understood it to mean.

The most reasonable explanation of the meaning to the phrase, in light of the language in 20 U.S.C. 1415(i), is that the non-court related administrative procedures are not covered. After suit has been filed,

however, a different rule would apply, since the statute specifically refers to the proceeding in the court as a "civil action". Even if this were not the case, "an ambiguity exists when the language admits of being understood in more than one way". Smith v. Smith, 3 Va. App. 510, 518, 351 S.E.2d. 593, 598 (1986). This is particularly true since this is exclusionary language, and it is the duty of the insurer "to employ exclusionary language clear enough to avoid any such ambiguity, if it wished to exclude coverage". Smith v. Allstate Insurance Company, 241 Va. at 480, 403 S.E.2d. at 698.

As the court further states, in Smith v. Smith, 3 Va. App. at 518, 351 S.E.2d. at 598, when there is any ambiguity "the interpretation placed upon an agreement by the parties themselves is entitled to the greatest weight". Citing, Treakle v. Pocahontas Steamship Company, 273 F.Supp. 608, 611 (E.D.Va. 1967).

Two separate Claims Management Specialists sent letters to the City on four separate occasions indicating that while the case was still in the two stage administrative process, that no coverage was afforded, and recommending an immediate report should a suit be filed. See, Appendix, pp. 69, 71-72, 77, and 87. This determination was echoed by comments

by the Claims Management Specialist in an email to the effect that finally a suit had been filed. Appendix, p. 145. Her supervisor, in another email, Appendix, p. 160, quoted at length above in the Statement of Facts, comments that during the administrative hearings there was no coverage, but that a lawsuit would alter that.

Given this background, it was entirely reasonable for the School Board to assume that VaRisk2 would take up the case once a suit was filed. At worst, the Policy is ambiguous and must be construed in favor of the insured and of coverage.

The Commonwealth also argues that since 20 U.S.C. §1415(i) is entitled "Administrative procedures", all steps of the process detailed within it must likewise be administrative proceedings. The title cannot take precedence over the actual text of the statute. As the Supreme Court stated in Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 242, 124 S.Ct. 2466, 2470 (2004), "a statute's caption, however, cannot undo or limit its text's plain meaning".

In the Commonwealth's Response to the School Board of Newport News' Brief, p. 12 and 15, the Commonwealth essentially argues that the School Board waived any right to object to the continued classification of

the federal lawsuit as an appeal, because the City mentions the term "appeal" several times in its correspondence. First, this argument is being raised for the first time on appeal. The only issue of waiver raised below was the Commonwealth's assertion that its employees, in suggesting that a claim could be filed once a suit was filed and by failing to mention the administrative exclusion once suit was filed, did not amount to a waiver. See, Transcript, p. 15, which appears in the Appendix at page 607, and Transcript, page 21, which appears in the Appendix at page 612. The City indicated that its reference to the acts of the Division of Risk Management (DRM) employees was to show the understanding of those administering the policy as to the limits of coverage, not as a waiver. Appendix at page 612. However, if the Commonwealth contends statements by School Board employees result in waiver of its rights to bring the claim, the statements of the Commonwealth's agents would likewise be a waiver of any argument to the contrary.

Second, the City has not taken the position in this litigation that the first two administrative steps were not administrative in nature. Any admission to that fact or any reference to this as an "appeal" is irrelevant to the issue of whether the suit filed is a "civil action" and is distinct from the

administrative proceedings at that point. This is an issue addressed by the statutory language, as interpreted by the Kirkpatrick court.

The matter, once suit was filed in the United States District Court, was a civil action and lawsuit, not an administrative proceeding.

B. The Claim, Arising Out of a Federal Court Judgment Against the School Board for Reimbursement of Tuition, Is Within the Coverage Afforded Under the Language of the Insuring Agreement.

The basic question in this case is the meaning of the insuring agreement in the Policy under state law, not interpretation of the IDEA. The insuring agreement requires the Commonwealth to "pay all sums" arising out of "acts or omissions of any nature". Exclusion 10 in the Policy excludes "claims, demands or other actions seeking relief or redress in any form other than monetary damages, including, but not limited to, injunctive relief". (Emphasis added). As the state employee states at Appendix, p. 160, the Commonwealth denied this claim in part because the Commonwealth interpreted the Jaynes' demand to reinstate the decision of the LHO as an injunction, even though the ad damnum of the suit specifically requests reinstatement of the money judgment.

The basic question is whether the damages sought by the School

Board are monetary damages under state law or the application of the IDEA to the underlying federal court judgment that led to School Board's claim converts these damages into something else.

Black's Law Dictionary, 8th Ed., 2004, defines "monetary" as (1) of or relating to money, or (2) financial. The phrase "monetary damages" occurs many times in Virginia case law, and has been used on several occasions to refer to damages that are forms of reimbursement. Nichols Construction Corporation v. Virginia Machine Tool Company, LLC., 276 Va. 81, 91, 661 S.E.2d. 467 (Va. 2008) was a case where the Plaintiff contracted with the Defendant to put a new roof on an industrial building. The roof as installed was defective. Id. at 91, 471,. The Court ultimately determined that the cost of replacing the roof was the proper measure of "monetary damages". Id. at 91, 472.

In Martin v. Moore, 263 Va. 640, 644, 561 S.E.2d. 672, 674 (2002), the Supreme Court considered a case where the misuse of a driveway by a Defendant was causing siltation in the Plaintiff's lake. The "monetary damages" sought were the cost of removing the silt from the lake. 263 Va. at 644, 561 S.E.2d. at 674. The Court commented that this was the proper measure of damages. 263 Va. at 651, 561 S.E.2d. at 679.

In a breach of lease case, the trial court awarded "monetary damages" of past-due rent. West Square, L.L.C. v. Communication Technologies, Inc., 275 Va. 425, 429, 649 S.E.2d. 698, 700 (2007).

The finding of the Court was that damages that were ordered in regard to an IDEA case under federal law were not "monetary damages" and were therefore excluded from coverage. See, Transcript, page 27, Appendix, p. 618. The Court's finding and the argument of the Commonwealth regarding the status of "reimbursement" vis-à-vis the term "damages" rely on case law that is specific to the IDEA. The Commonwealth and the Court, Transcript at page 27, Appendix, p. 618, relied on language in the cases of Burlington School Committee v. Department of Education of Massachusetts, 471 U.S. 359, 105 S.Ct. 1996 (1985) and Anderson v. Thompson, 658 F.2d. 1205 (7th Cir. 1981).

These cases are cited for the proposition that a reimbursement remedy is available under 20 U.S.C. §1415. Also, Commonwealth argues, and the Court ruled, Transcript, page 28, Appendix, p. 619, that reimbursement is not "damages", but a requirement to pay what the school should have paid all along. See, Burlington, 471 U.S. at 370-371, 105 S.Ct. at 2003.

The context of these federal cases must be considered. As the Anderson court pointed out, the legislative history of the IDEA is void of any mention of a "private right of action for damages" under the IDEA, but the Court nonetheless found a "limited damage award" for reimbursement. Anderson, 658 F.2d. at 1211, 1213.

In Sellers v. School Board of the City of Manassas, 141 F.3d. 524 (4th Cir. 1998), the plaintiff was the father of a child whom the School Board did not diagnose as learning disabled until he was in high school. The plaintiff sued for tort damages, including compensatory and punitive damages, even though the family had no out of pocket expenses. Id. at 525. The plaintiff addressed these damages as "monetary damages". Id. at 529. In determining that the damages sought were not available, the Court stated as follows:

> While the Act permitted reimbursement, it did not create a private cause of action for educational malpractice. Id. at 526.
>
> The purpose of these procedural mechanisms is to preserve the right to a free appropriate public education, not to provide a forum for tort-like claims of educational malpractice... Id. at 527.

The Court further indicated that neither the structure of the statute nor the Supreme Court findings allowed damages for compensatory or punitive

damages, pain and suffering, emotional distress, and other consequential damages. Id. at 527. See also, J.S. v. Isle of Wight County School Board, 402 F.3d. 468, 479 (4th Cir. 2005).

Clearly, the problem that the federal courts are attempting to avoid is the allowance of tort-like claims for pain and suffering, emotional distress, and the like in the context of this particular federal act. It is specifically these types of damages that are not "expenses that should have been paid all along", as the majority of damages awarded in civil cases otherwise must be proved with specificity and would be expenses that should have been paid. The use of the word damages (and "monetary damages" in specific) as used in these IDEA cases thus reflects this context.

The type of "damages" referred to in the federal cases is analogous to those routinely sought in insurance claims for bodily or personal injury and property damage. The vast number of liability policies include insuring agreements that cover only personal injury, bodily injury, or property damage. This Policy does not.

The underlying claim for damages was not a tort cause of action, and thus the Policy would not extend coverage if it included a more standard liability policy insuring agreement. That cannot be the case where the

Policy states it "will pay all sums, except as herein limited, on behalf of the Enrolled Covered Party which the Enrolled Covered Party is legally obligated to pay ..." A claim is essentially defined as any claim for money not otherwise excluded. The underlying action was not an injunction action, since it sought only monetary damages, nor was it otherwise excluded.

The trial court determined, *sua sponte*, that this was not the type of claim that insurance would cover and analogized the claim of the School Board to personal injury claims. Transcript at 25-26, Appendix at pp. 616-617. The Court specifically differentiates between "a negligence action which would prompt insurance coverage and a failure to live up to the responsibility of your job requirements." Transcript at 28, Appendix, p. 619. This matter had not been raised in the Commonwealth's brief or argument at trial.

It is clear the court viewed the Policy in this case as a typical liability insurance policy. If that were the case, however, the language of the insuring agreement in the policy should echo that of a standard liability policy. It does not do so.

Exclusionary language must be construed most strongly against the

insurer and the burden is upon the insurer to prove that an exclusion applies. Johnson, 232 Va. at 345, 350 S.E. 2d. at 619; American Reliance Insurance Company, 238 Va. at 547, 385 S.E.2d. at 585. There is no proof that any exclusion would unambiguously apply under the circumstances of this case.

The statement taken in the context stated by the Court, Transcript at 28, is at variance with the Virginia cases cited as examples of the meaning of "monetary damages" under state law. The requirement to pay expenses that should have been paid all along certainly applies in a case for reimbursement of rent. West Square, L.L.C., 275 Va. at 429, 649 S.E.2d. at 700. Damages for the cost of repair of a roof are a reimbursement for the cost to restore the roof to the condition it should have been in the first place. See, Nichols Construction Corporation v. Virginia Machine Tool Company, L.L.C., 276 Va. at 91, 661 S.E.2d. at 472 (Va. 2008).

Requiring a School Board to pay tuition for private instruction when it did not provide an appropriate public alternative certainly falls within the types of damages referred to as "monetary damages" in these cases. Also, there was a significant question at the outset of the underlying case as to whether the School Board would have been obligated. Previous case law

indicated that there was a good possibility that the claim under the IDEA was barred by the statute of limitations. See, Schimmel v. Spillane, 819 F.2d. 477 (4th Cir. 1987); Manning v. Fairfax County School Board, 176 F.3d. 235 (4th Cir. 1999). While the Manning case was decided after the administrative decision, the lower court case was well known to the litigants in the underlying case.

Whether reimbursement for tuition under the IDEA is a "damage" or not for the purposes of the IDEA is largely irrelevant to a consideration under state law as to whether coverage as defined under the Policy is available for the cost the School Board was ordered to pay as a judgment debt. The Policy as drafted and as appropriately interpreted under the law of Virginia should grant that coverage.

II. The Commonwealth Breached Its Duty to Defend Under the Policy

"Only when it appears clearly that 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 Insurance Co., 222 Va. 33, 35, 278 S.E.2d. 803, 804 (1981); Travelers Insurance Co. v. Obenshain, 219 Va. 44, 46, 245 S.E.2d. 247, 249 (1978). Under prevailing

insurance law in Virginia, it should have been evident that the School Board faced a judgment within the ambit of the policy language. Even though the DRM repeatedly informed the School Board that the Plan did not extend coverage, this changes nothing. The rapidity of DRM's issuance of denial letters and the constant shifting of grounds for denial of coverage during the two years of correspondence between the parties indicate that the Commonwealth never gave any serious consideration to the validity of the claim.

As the Commonwealth is liable under the Policy, so are they liable for their breach of the duty to defend. Since the Court never got beyond the denial of the School Board's claim, the duty to defend and the damages sought would be subject to review at retrial after remand.

CONCLUSION

The School Board is entitled to coverage under the Policy and also should be awarded attorney's fees and costs as damages for the Commonwealth's breach of its duty to defend. The School Board requests that this Court remand this case to the Circuit Court of the City of Newport News, with instructions that judgment be entered in favor of the School Board of the City of Newport News and that the Circuit Court conduct

further proceedings to determine the amount of and award of damages to the School Board, and for further relief as this Court deems necessary and proper.

Respectfully Submitted,

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CERTIFICATE

The undersigned certifies as follows:

1. The name and address of the Appellant is:

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5. Three copies of this Brief of Appellant were mailed to opposing counsel at the address referenced on May 22, 2009.

6. Fifteen copies of this Brief of Appellant as well as one electronic copy of both the Brief and Appendix sent as a PDF on a CD were filed in the Office of the Clerk of the Supreme Court of Virginia on May 22, 2009.

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