Best's Insurance Law Podcast

# Attorneys Outline Exhaustion Defense and its Impact on Insurers - Episode #103

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**Hosted by:** John Czuba, Managing Editor
**Guest Attorneys:** Eric Harrison & Caitlin Lundquist of Methfessel & Werbel
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**John Czuba:** I'm John Czuba, Managing Editor of *Best's Directory of Recommended Insurance Attorneys*. We're pleased to have with us today, attorneys Eric Harrison and Caitlin Lundquist from the law firm of Methfessel & Werbel in Edison, New Jersey.

Eric serves as practice manager for the firm. He manages the firm's employment and civil rights litigation department. He specializes in the defense of civil rights, employment, special education, insurance coverage, and general liability litigation.

Caitlin Lundquist is a member of the firm's employment and civil rights practice group. Her practice is concentrated in the areas of employment law, education law, public entity law, discrimination and civil rights. We're very pleased to have you both with us today.

**Eric Harrison:** Thank you.

**Caitlin Lundquist:** Thank you.

**John:** Today's podcast discusses the exhaustion defense to claims under the Individuals with Disabilities in Education Act. Caitlin, we'll start with you. Why is it important for attorneys practicing in this area to be familiar with the recent case law relating to the exhaustion defense?

**Caitlin:** Thanks for having us on the podcast today. Very happy to be here. I would say that as attorneys practicing in the areas of special education, disability discrimination, and civil rights in general, we need to be aware of the recent cases on exhaustion. Because the failure to exhaust administrative remedies is actually a jurisdictional defense that needs to be raised in the very early stages of litigation, ideally by way of motion to dismiss, and move an answer.

In order to make sure that you are asserting a failure to exhaust defense in every case where it might be applicable, you need to be familiar with the various court decisions that have recently come out.

Explaining that, under the federal Individuals with Disabilities in Education Act, or the IDEA, that plaintiffs are required to exhaust their administrative remedies prior to filing suit in either federal or state court if the IDEA statute could be capable of providing relief that would address the plaintiff's alleged injury, even if they're seeking relief that unquestionably cannot be obtained under the IDEA.

Attorneys who practice in this area should really take the time to review the decisions that have been issued over the last several years to insure they have a good understanding of how the courts treat the failure to exhaust defense. Especially because it's typically going to factor into your litigation strategies very early on in the process. Usually immediately after the complaint's been filed, and you're assessing the merits of filing a motion to dismiss.

**John:** What would you say is the most critical point of law articulated by the recent decisions on the exhaustion defense with respect to IDEA, and disability discrimination claims?

**Caitlin:** To expand a little bit more upon some of the points we just discussed, the most important takeaways from the recent cases that I've discussed exhaustion is that plaintiffs can completely omit any mention of the IDEA statute from their complaint. They can actually forego an IDEA claim entirely whether it's in an attempt to avoid the exhaustion requirements purposely, or for any other reason.

The courts will still require them to exhaust their administrative remedies if the individual with disabilities in the education act is capable of providing some type of relief that could address the harm that's being alleged by the plaintiff.

The courts have actually taken this approach even when the plaintiff is seeking some form of monetary damages such as compensatory damages which are not available under the IDEA.

Just as an example, if the complaint alleges that the plaintiff has suffered a denial of, or a reduction in appropriate special education services. Or that a school district has even failed to properly identify a child as needing special education, the IDEA statue authorizes release for that type of harm in the form of compensatory education among various other types of remedies.

Even if the plaintiffs say that they don't want that type of relief. That said they're only demanding monetary damages, and they claim that's why they need to be in court, and they're not filing petition with the agency. Recently, the courts have responded to that by holding that the IDEA prohibits plaintiffs from trying to, essentially, repack into their claims in order to circumvent the exhaustion requirements.

That they must first pursue claims that could be addressed by the IDEA by filing a petition for due process in the administrative agency. Now, the specifics of that procedure are going to vary by state.

In New Jersey, we have the Office of Special Education within the New Jersey Department of Education which will receive a due process petition. Eventually, they'll likely transmit it to the Office of Administrative Law, or the OAL we call it if it can't be resolved through mediation, or if it's not dismissed early on for failing to meet basic pleading requirements.

**John:** Now, for defense attorneys, what are the advantages of having a motion to dismiss granted based on the plaintiff's failure to exhaust administrative remedies?

**Caitlin:** In terms of advantages you'll have, if the motion to dismiss is granted. In New Jersey, the plaintiff will be required to, as I said, file a petition for due process with the office of special education, which will then ask the parties so that they want to participate in the mediation conference that's conducted by a mediator from the state agency.

Or alternatively, the parties can hold their own resolution sessions in an effort to try to come to an early settlement. If that's not successful in resolving the case, the office of Special Education will transmit it to the OAL on a pretty short time frame.

Then the OAL which is comprised of various administrative law judges, or ALJs who have specialized technical experience in many different areas of administrative law, one of which is special education, the OAL will take jurisdiction at that time.

The ALJs who provide over the special education cases are really very familiar with the recent developments in this area both legally, and educationally. For that reason, they're often going to be better equipped to handle the due processing, and reach a well-reasoned and supportive final decision that would then be subject to appeal in federal court.

The ALJs are also often going to be able to use their expertise in special education, and with students with disabilities to assist the parties in facilitating a reasonable settlement agreement if that's a possibility depending on the case.

The whole administrative process also moves fairly quickly compared to litigation that's filed in state or federal court, usually within a period of a few months, as opposed to the years of discovery that you might have if you were in court.

You get the specialized expertise of the ALJs who have a lot of experience in this somewhat niche area of the law. Then you also get the benefits of the more expeditious administrative process in the office of special education, the OAL. That process builds in some opportunities for early settlements while also moving the case along pretty quickly in a matter of months as opposed to years.

Finally, another concern is that having a motion to dismiss granted will often decrease both parties attorney's fees. Because often administrative law will have a much more limited discovery process as opposed to being in state or federal courts. As a result, counsel fees on both sides are often going to be substantially lower than they would be if you were in court.

In light of the fact that the IDEA, the fee setting statute, the lack of a prolonged discovery process can reduce litigation costs for a defendant both in terms of their own attorney's fees, as well as the plaintiff's fees that it could be responsible for if it's not successful in the due process hearing.

**John:** What kinds of arguments would you anticipate from plaintiffs in opposing an exhaustion defense, and how would you recommend that defense counsel respond to those?

**Caitlin:** Typically, plaintiffs may claim that they satisfy one of the exceptions to the exhaustion requirements such as that the office of the administrative law is incapable of granting them relief, or that pursuing their administrative remedies would be futile.

The other exceptions are that all the issues and disputes are purely legal rather than factual, or that acquiring exhaustion would cause severe or reparable harm. Because state and federal courts tend to move more slowly than the administrative process, the severe, or reparable harm argument, usually, it can be challenged.

By pointing out that if the court requires the plaintiff to exhaust his administrative remedies as required under the individuals with disabilities and education act, the alleged harm will be remedied much more quickly than if the parties are required to remain in court.

Also, usually the severe or reparable harms being alleged is going to speculative, and not necessarily based on any facts, but instead, based on our arguments regarding what's appropriate for the child educationally.

That is, of course, an issue that an ALJ is required to rule on after a full due process hearing in the ALO. If the issues really are purely legal, it's true that there would be no point in holding a hearing, but an ALJ can handle this by deciding a motion for a summary decision. Which is like a summary disposition filed in court.

The plaintiff would then have the right to appeal the outcome of the motion by filing a complaint in federal court.

Usually, there is going to be a dispute though as to whether a student has received the free inappropriate public education as required by the IDEA, which is a factual issue. If that's the case, then the issues cannot be purely legal.

If the issues are purely legal though, the courts will tell the exhaustion will not be required, so defense counsel should be making every effort to argue that the issues are not limited to pure legal questions.

Futility arguments and the arguments that the OAL cannot grant release are similar. In response to these arguments, defense counsel can usually demonstrate that the OAL is, in fact, capable of granting appropriate relief under the IDEA that would sufficiently address the alleged harm.

You can also, again, argue that the plaintiff is simply speculating as to whether an ALJ will be likely to grant a request relief after holding a full due process hearing, and applying a legal standard to the facts. As opposed to being able to establish that, and the ALJs incapable of granting relief, or that pursuing administrative remedies will be futile.

A defense counsel should emphasize that plaintiffs can get around the exhaustion requirements simply by claiming that the administrative process wouldn't be able to achieve all of the relief they're seeking such as monetary damages, compensatory damages. Or that it would take too long to complete the due process, or anything of that nature.

Then making these arguments, defense counsel should also rely on the recent case loss stating that plaintiff must exhaust the administrative remedies if the IDEA is, in any way, capable of providing relief that would remedy the harm that they allege was caused by the defendant.

**John:** Thank you very much, Caitlin.

**Caitlin:** Thank you.

**John:** Eric, what are the risk management implications of this issue?

**Eric:** There are different forms of coverage that are implicated, and triggered by different types of claims. The types of insurance policies, if an insured is lucky enough to have them, to respond to a due process petition challenging an individual as allegation plan, typically, is a more limited form of coverage than what you get defending your typical civil rights case.

The most important thing from the perspective of the insured, and risk management generally, is to make sure you have coverage which would take care of, not only the type of relief thought, but also the causes of action pled.

For example, if somebody goes straight to federal court under the Rehabilitation Act looking for damages, and other equitable relief, some of which he or she could get under the IDEA, you're going to want to make a motion to throw it out for failure to exhaust administrative remedies if they're still within time to pursue their administrative remedies, and they do file a new due process petition.

You want to make sure that there's coverage for that, because if there isn't, you could be winning a battle to lose the war, and racking up a massive defense bill on a form of claim that isn't covered. Sometimes, it might be better to just fight it out in federal court, or state court, and let the clock run down on what would have been an opportunity to file the action below.

Basically, your business administrator is going to want to have his or her finger on the pulse of all the various coverages available. Be sure to submit to all the carriers who could be potentially involved, so you don't have any type of late notification defenses from the insurers.

**John:** Eric, what do insurers and policy holders need to do when confronting an exhaustion defense?

**Eric:** When you're looking at a potential exhaustion defense, you want to know the entire history of the case between the student, and the students' family, and the school district that you're dealing with. You want to know about prior claims, because very frequently, these claims made on behalf of students include a list of grievances that go back many years.

There may be prior policies triggered, there may be different policies triggered, and you want to make sure that all of the conditions for reporting claims under these policies are being satisfied. If you're lucky enough to have two or more carriers involved, you want to get them all to the table quickly to come up with a game plan to maximize your defenses in whatever form you're going to end up in.

Whether it's in the federal or state court where it started out, or if it's in, what we would have in Jersey, would be the Office of Administrative Law, or before a hearing officer in another case. If there's coverage for that, you want it in place, and you want to make sure that your client is going to be fully defended, and indemnified to the maximum extent of those policies.

You'd hate to hang all your hopes on one policy then to succeed with an exhaustion defense, to find yourself before a new tribunal with a carrier saying, "Wait a minute. We don't defend claims there," and it's too late for you to notify the carrier that provides coverage for that type of claim because you've known about this for six months, and you didn't let them know.

The most important thing when you've got a civil rights claim that might have some educational implications, and a potential exhaustion defenses, get all your policies together. Make sure all the carriers are getting noticed, and make sure that your plan of attack is tailored to the types of coverage available to make sure that you're not going to be fighting your way into a court where you have no coverage for the claim.

**John:** Eric and Caitlin, thank you both for joining us today.

**Eric:** Thank you, John.

**Caitlin:** Thank you.

Thanks for joining us today Eric and Caitlin. You've just listened to attorneys Eric Harrison and Caitlin Lundquist from the law firm of Methfessel & Werbel in Edison, New Jersey. Special thanks to our Producer Brian Cohen. And thank you all for joining us for the Insurance Law Podcast. To subscribe to this audio program visit podcast.insuranceattorneysearch.com, or go to on-line directories such as I-Tunes or Google or Yahoo's Podcast Directory. If you have any suggestions for a future topic regarding an insurance law case or issue, please e-mail us at lawpodcast@ambest.com.