

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MELISSA G., et al.,	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	
SCHOOL DISTRICT OF	:	
PHILADELPHIA,	:	No. 06-5527
Defendant.	:	

MEMORANDUM AND ORDER

Schiller, J.

January 14, 2008

Plaintiffs Melissa G., Keith G., and Keenan G. bring the current action for attorney’s fees and costs against Defendant, the School District of Philadelphia (“School District”). For the reasons discussed below, Plaintiffs’ attorney shall be awarded \$39,010 in fees and \$328.10 in costs.

I. BACKGROUND

Plaintiffs Melissa G. and Keith G. are the parents of Keenan, a seven-year-old child with autism. (Second Am. Compl. ¶¶ 4-5, 12-13; Answer ¶¶ 4-5, 12-13.) In the Spring of 2006, Melissa and Keith met with School District officials to develop an individualized education plan (“IEP”) for Keenan for the 2006-2007 school year, Keenan’s first year of school.¹ (Second Am. Compl. ¶¶ 16-17; Answer ¶¶ 16-17.) Despite numerous rounds of negotiations, the parties were unable to agree on an appropriate IEP; according to Plaintiffs, the School District’s IEP proposal was “grossly inadequate” to meet Keenan’s special needs. (Second Am. Compl. ¶ 18.) Consequently, Plaintiffs requested a due process hearing. (*Id.* ¶ 21; Answer ¶ 21.)

¹ An IEP is a written statement for a child with disabilities, which includes a description of the child’s academic goals and the services to be provided in furtherance of those goals. *See* 34 C.F.R. § 300.320 (2007); 22 PA. CODE 14.104 (2007).

At the time that Keith and Melissa requested the due process hearing, Keenan was receiving home-based preschool services from Elwyn, Inc. (“Elwyn”), a home services provider contracting with the School District. (Second Am. Compl. ¶ 24; Answer ¶ 24.) During the pendency of the due process action, those home services were discontinued. (Second Am. Compl. ¶ 26; Answer ¶ 26.) In response, Plaintiffs filed a Complaint and request for temporary injunctive relief in the Philadelphia Court of Common Pleas against the School District and Elwyn to reinstate home services while awaiting the outcome of the due process hearing. (Second Am. Compl. ¶ 28; Answer ¶ 28.) As per that court’s Order, which reflected an agreement reached by the parties, Keenan’s home services were resumed. (Pls.’ Resp. in Opp’n to Defs.’ Objections to Pls.’ Pet. for Att’ys Fees [hereinafter Pls.’ Resp.] Ex. B (Nov. 27, 2006 Order).)

On December 19, 2006, and continuing on January 12, 2007, the parties attended a due process hearing. (Second Am. Compl. ¶¶ 30-31; Answer ¶¶ 30-31.) On the second day of the hearing, pursuant to a stipulated order and the agreement of the parties, an IEP was finalized for Keenan to begin school in January 2007. (Second Am. Compl. Ex. A (Stipulated Order).) That IEP reflected largely all of Plaintiffs’ demands. (Second Am. Compl. ¶ 32; Answer ¶ 32.)

Plaintiffs then filed a fee petition as prevailing parties under the Individuals with Disabilities Education Act (“IDEA”) with this Court. (*See* Second Am. Compl. ¶¶ 37-44.) In their petition, and by the various amendments subsequently submitted, Plaintiffs request \$56,750 in fees and \$568.79 in costs. (*Id.* ¶ 42; Pls.’ Resp. Ex. C (Updated Time Sheets); Pls.’ Letter Brief Ex. A (Second Updated Time Sheet).) Defendant contends that both the total hours expended on litigation and the hourly rate charged by Plaintiffs’ attorney are unreasonable and excessive. They respond that Plaintiffs are entitled to a total of \$22,669 in fees and costs.

II. STANDARD OF REVIEW

Section 1415(i)(3)(B) of the IDEA provides: “In any action or proceeding brought under this section, the Court, in its discretion, may award reasonable attorneys’ fees as part of the costs . . . to a prevailing party who is the parent of a child with a disability.” 20 U.S.C. § 1415(i)(3)(B)(i)(I) (2007). Here, Defendant concedes that Plaintiffs were the prevailing parties and, therefore, the Court’s sole inquiry concerns the reasonableness of the requested attorney’s fees and costs.² (Def.’s Objections to Pls.’ Request for Attorney’s Fees [hereinafter Def.’s Objections] at 3).

The party seeking fees bears the burden of showing that the amount sought is reasonable. *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990). To meet this burden, the prevailing party must submit documentation supporting the rates requested and the hours expended. *Id.* (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The party opposing the award of attorney’s fees must identify the portion of the fee request being challenged and state the reason for his challenge; a court may not decrease attorney’s fees *sua sponte*. *Bell v. United Princeton Properties*, 884 F.2d 713, 715, 720 (3d Cir. 1989). Although the fee opponent must make his objections clear, he does

² Defendant states, without explication, that Plaintiffs are the prevailing parties “in the administrative proceeding only.” (Def.’s Objections at 3.) Presumably, therefore, Defendant does not concede that Plaintiffs prevailed for the purposes of the Common Pleas action.

“[P]arties are considered prevailing parties if they succeed on *any significant issue* in litigation which achieves some of the benefit the parties sought when bringing suit.” *J.O. ex rel. C.O. v. Orange Twp. Bd. of Ed.*, 287 F.3d 267, 271 (3d Cir. 2002) (internal citations omitted); *Tx. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (even party not prevailing on all issues may be considered “prevailing party” in fee analysis). Plaintiffs here succeeded on all significant issues in the underlying litigation, including the achievement of interim relief and, ultimately, a favorable IEP. Plaintiffs are, therefore, prevailing parties. *See Chioke v. Slippery Rock Univ. of Pennsylvania*, Civ. A. No. 06-622, 2007 WL 3120097, at *9-10 (W.D. Pa. Oct. 22, 2007) (attorney’s fees awarded for successful preliminary injunction where Plaintiff was ultimately held to be prevailing party); *Barrett v. Westchester Univ. of Pennsylvania*, Civ. A. No. 03-4978, 2006 WL 859714, at *8 (E.D. Pa. Mar. 31, 2006) (same).

not need to point to each entry which he finds objectionable. *Id.* at 720. Rather, it is sufficient that the objecting party has identified categories of work that he finds to be unreasonable. *Schiffer Publ'g, Ltd. v. Chronicle Books, LLC*, Civ. A. No. 03-4962, 2005 WL 1244923, at *8 (E.D. Pa. May 24, 2005). A court has wide discretion to decrease attorney's fees in light of the objections presented, *Rode*, 892 F.2d at 1183, and has a "positive and affirmative function in the fee fixing process." *Loughner v. Univ. of Pittsburgh*, 260 F.3d 173, 178 (3d Cir. 2001).

III. DISCUSSION

In determining reasonable attorney's fees under the IDEA, courts apply the "lodestar" formula, which multiplies the reasonable number of hours worked by an attorney by a reasonable hourly rate for that attorney to arrive at the total fee amount. *See Reid ex rel. Reid v. Sch. Dist. of Phila.*, Civ. A. No. 03-1742, 2005 WL 174847, at *2 (E.D. Pa. Jan. 21, 2005); *see also Washington v. Phila. County Ct. of Common Pleas*, 89 F.3d 1031, 1035 (3d Cir. 1996) ("The lodestar is strongly presumed to yield a reasonable fee.").

A. Reasonable Hourly Rates

In calculating an attorney's reasonable hourly rate, courts look to "the community billing rate charged by attorneys of equivalent skill and experience, performing work of similar complexity." *Washington*, 89 F.3d at 1036 (internal citations omitted); *see also Rode*, 892 F.2d at 1193 (court should compare rates of prevailing party's attorney to rates for similar services by lawyers of comparable skill, experience, and reputation). While an attorney's customary billing rate is an appropriate starting point for calculating fees, proof of the attorney's self-designated rate is not dispositive. *Pub. Interest Research Group of New Jersey, Inc. v. Windall*, 51 F.3d 1179, 1185 (3d

Cir. 1995). Further, courts should “consider the complexity of the litigation and the sophistication of the services rendered” when setting an attorney’s rates. *Wisdom v. Phila. Housing Auth.*, Civ. A. No. 02-8369, 2003 WL 21545123, at *4 (E.D. Pa. July 7, 2003).

Plaintiffs request \$300 per hour based on the general billing rate of their attorney, Mr. David Berney, and his experience as a civil rights attorney.³ Reviewing Mr. Berney’s affidavit, as well as those submitted in support of Mr. Berney’s fee petition, it is clear that Mr. Berney has considerable experience as a civil rights attorney. However, “civil rights cases’ vary greatly in nature and complexity” and, accordingly, command varying rates. *Blanche Road Corp. v. Bensalem Twp.*, Civ. A. No. 89-9040, 1996 U.S. Dist. LEXIS 9052, at *13 (E.D. Pa. June 25, 1996); *see also Becker v. ARCO Chem. Co.*, 15 F. Supp. 2d 621, 629 (E.D. Pa. 1998) (affidavits in support of fee petition insufficient because “affiants failed to take into account the differences among types of civil rights cases”). Here, the affidavits fail to point to anything either novel or complex about the nature of the underlying case that would merit awarding \$300 per hour, which represents the upper end of the prevailing market rates for attorneys with Mr. Berney’s experience.⁴

Furthermore, Mr. Berney has submitted very little upon which this Court can evaluate his

³ Mr. Berney admits that his billing rates actually vary on a cases-by-case basis. (Tr. at 20-22.) Accordingly, less deference will be afforded to that rate as a starting point.

⁴ According to the schedule produced by Community Legal Services (“CLS”), which the Third Circuit has cited approvingly as “a fair reflection of the prevailing market rates in Philadelphia,” the rate for an attorney with fourteen years experience ranges from \$240-\$300 per hour. *Maldonado v. Houstoun*, 256 F.3d 181, 187 (3d Cir. 2001) (internal citations omitted).

Plaintiffs argue that the Court should credit Mr. Berney with additional experience for the time post-law school but prior to admission to the bar. Plaintiffs’ argument notwithstanding, the Court considers an attorney’s admission to the bar the relevant starting point for evaluating his experience. Accordingly, Mr. Berney had fourteen years experience at the time he submitted his fee petition. *See Phillips v. Phila. Housing Auth.*, Civ. A. No. 00-4275, 2005 WL 3488872, at *6 (E.D. Pa. Dec. 20, 2005) (relevant time to calculate rates is time fee petition was submitted).

experience in education law or, more specifically, IDEA litigation. Although he states that his practice includes the field of special education law, Mr. Berney has not cited any education cases in which he has been involved or any favorable results that he has achieved for his clients in this area of the law. *See Becker*, 15 F. Supp. 2d at 631 (reducing hourly rates where attorney failed to list any significant results in litigation). Further, bespeaking Mr. Berney's experience in this area, although this action was a routine IDEA matter, on multiple occasions Mr. Berney consulted with outside attorneys because of their superior experience in education law. (*See Pls.' Resp. Ex. B*).

In accordance with the above discussion, and still taking into consideration that Mr. Berney is an experienced and capable attorney who successfully served his clients, the Court holds that awarding \$280 per hour for Mr. Berney's services is reasonable. *See generally Deptford Twp. Sch. Dist. v. H.B.*, Civ. A. No. 01-784, 2006 WL 891175, *6 (D.N.J. Mar. 31, 2006) (\$300 per hour was "generous hourly fee" in IDEA litigation for attorney with fifteen years *specialized* experience).

B. Reasonable Hours Expended

When calculating the lodestar amount, a court must examine the record to determine whether hours billed are "unreasonable for the work performed." *Washington*, 89 F.3d at 1037. Hours expended are unreasonable, and therefore must be excluded, if they are "excessive, redundant, or otherwise unnecessary," or spent performing tasks which unnecessarily prolong the resolution of a claim. *Rode*, 892 F.2d at 1183; *see also* 20 U.S.C. § 1415(i)(3)(F).

i. The Common Pleas action

Defendant objects to all of the time spent by Mr. Berney pursuing injunctive relief for the continuance of home educational services. Defendant argues that the Hearing Officer who presided over the due process hearing would have had jurisdiction over Plaintiffs' Complaint and, as such,

filing an action in state court was unnecessary.

This Court will not second guess a party's sound litigation strategy when reviewing a petition for attorney's fees. *See Proffitt v. Municipal Auth. of the Borough of Morrisville*, 716 F. Supp. 845, 851 (E.D. Pa 1989). By filing in state court, Mr. Berney achieved immediate results for his clients, thus proving his strategy to be a successful one. Nonetheless, given that the action involved clear and straightforward legal issues, facts with which Mr. Berney was already intimately familiar, and in light of the brevity of the proceedings, which resulted in a court-sanctioned agreement among the parties, the Court will reduce the hours submitted by Mr. Berney by half, from thirty-four to seventeen hours. *See Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583, 596 (3d Cir. 2000) (reducing fees and costs in IDEA litigation "given the nature of the issues involved . . . which are not novel").

ii. Attorney consults

Defendant objects to three hours that Mr. Berney spent on "attorney consults." Mr. Berney responds that the time spent consulting outside legal advisors who specialize in education law was intended to avoid long hours of legal research. Mr. Berney should not be penalized for attempting to work more efficiently by consulting outside counsel. Accordingly, the three hours spent consulting education experts are compensable. *See U.S. ex rel. John Doe I. v. PA Blue Shield*, 54 F. Supp. 2d 410, 415 (M.D. Pa. 1999) (time spent consulting other attorneys and litigation expert recoverable); *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 584 (3d Cir. 1984) (efficiency should be rewarded in attorney's fee analysis).

iii. Excessive hours & prolonged litigation

Defendant objects to an additional 30.8 hours as "excessive or as unnecessarily protracting

the resolution of the administrative due process hearing.”⁵ These objections can be categorized as follows: (1) 8.6 of the total hours spent during the initial stages of litigation reviewing Keenan’s file and school records, researching behavioral plans for children with autism, and creating a due process letter; and (2) 22.2 of the total hours spent preparing for the due process hearing and in furtherance of a possible settlement.

The time spent by Mr. Berney familiarizing himself with his client’s file and drafting a due process letter based on the aforementioned facts and law were excessive. In order to be effective and to adequately represent his clients, a lawyer is expected to be familiar with relevant facts and caselaw. However, upon close review of Mr. Berney’s time sheets, it appears that he spent over twenty-five hours during the initial stages of this action familiarizing himself with background information and drafting a due process letter. The Court finds this amount to be excessive in light of the nature of this case. Accordingly, the Court will reduce Mr. Berney’s submitted time by 8.6 hours.

Similarly, the time spent preparing for the due process hearing, including the time spent in furtherance of settling some or all of the issues to be ruled on at the hearing, was excessive. Plaintiffs’ counsel logged nearly seventy hours on such matters in December 2006 and January 2007, an amount which well exceeds the tasks at hand. This is in stark contrast to length of the hearings, which appears to have been less than nine hours.⁶ *See R.C. v. Bordentown Regional Sch. Dist. Bd*

⁵ In its submission, Defendant lists 44.1 hours as excessive or unnecessarily protracting litigation. However, 13.3 hours objected to represent time spent by Mr. Berney in pursuit of resuming home services. Accordingly, those time entries have already been discussed above.

⁶ Plaintiffs list a total of 9.1 hours attending hearing the two hearings. This total, however, appears to include transportation time and time spent “speaking to opposing counsel, clients and experts afterwards.” (Pl.’s Resp. Ex. B.)

of Educ., Civ. A. No. , 2006 WL 2828418, at *3 (D.N.J. Sept. 29, 2006) (time spent preparing for hearing should be considered relative to length of hearing); *Apple Corps. Ltd. v. Int'l Collectors Soc.*, 25 F. Supp. 2d 480 (D.N.J. 1998) (excessive for partner to spend three times as long to prepare for hearing as to attend it). That the parties were largely in agreement on all of the substantive educational issues, save attorney's fees, after settlement talks but prior to the first due process hearing, only bolsters the conclusion that Mr. Berney's hours exceed those reasonably expected in litigation such as this. (Def.'s Resp. to Pl.'s Request for Att'ys Fees (Def.'s Resp. Ex. A (Rose Aff.) ¶¶ 9, 14.); *see also Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583, 596 (3d Cir. 2000) (reducing fee award where, *inter alia*, case should have been resolved earlier); *Reid*, 2005 WL 174847, at *3 (reducing fees for re-litigating previously settled issues). Accordingly, the Court finds it appropriate to reduce the time spent in preparation of litigation and in furtherance of the prolonged settlement talks by 22.2 hours. *See Barrett*, 2006 WL 859714, at *9.

In accordance with the discussions above regarding the reasonableness of the hours billed, the Court will deduct a total of 47.8 hours from the total time submitted for Mr. Berney's work, 183.3 hours. As such, 135.5 hours spent by Mr. Berney are recoverable in this matter.

iv. Paralegal hours

Defendant objects to 5.7 hours spent by Mr. Berney's paralegal, Renata Strzalka, scanning documents. "[P]urely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them." *Missouri v. Jenkins*, 491 U.S. 274, 288 n.10 (1989); *see also Scheffer v. Experian Info. Solutions, Inc.*, 290 F. Supp. 2d 538, 549 (E.D. Pa. 2003) (clerical work considered part of an attorney's hourly rate as office overhead). As scanning is clearly a clerical task, the total submitted paralegal hours will be reduced by 5.7 hours.

Defendant also argues that 1.7 hours of paralegal work spent updating and reviewing time sheets is unreasonable. The Court agrees. Mr. Berney's paralegal submitted a one page time sheet, the vast majority of which reads "scanning correspondence" or "scanning documents." The hours listed by Ms. Strzalka will be reduced by an additional 1.2 hours.

In accordance with the above discussion, 6.9 hours will be deducted from the hours submitted by Plaintiffs' attorney for his paralegal, leaving 10.7 hours.⁷

C. Costs

Finally, Defendant objects to all of Plaintiffs' declared costs, other than the filing fee for Plaintiffs' Complaint. In addition to the filing fee for the Complaint, Plaintiffs seek costs for postage, courier services, transportation, copying, and the filing fees for the motion for injunctive relief in state court. Costs for courier and postal services are not taxable in the Third Circuit. *James v. Norton*, 176 F. Supp. 2d 385, 400 (E.D. Pa. 2002) (citing *Matter of Penn. Central Transp. Co.*, 630 F.2d 183, 191 (3d Cir. 1980)). Further, with regard to travel costs, "courts in this district have historically rejected taxation of costs of this nature." *Schiffer Publ'g*, 290 F. Supp. 2d 538, 552. Finally, copying costs "are ordinarily considered to be part of an attorney's rate as office overhead." *Id.* at 549. Accordingly, these costs are not recoverable.

Plaintiffs are, however, entitled to \$328.10 in filing fees – \$289.30 for filing of the Complaint and \$38.80 for filing of the preliminary injunction motion. See *Microsoft Corp. v. Gonzalez*, Civ. A. No. 06-4331, 2007 WL 2066363, at *7 (D.N.J. July 13, 2007) (awarding filing fees).

⁷ Defendant also objected to 4.5 hours spent by Mr. Berney's paralegal in furtherance of the Common Pleas action. As discussed above, the Court refuses to wholesale eliminate the hours spent seeking resumption of home services pending the administrative hearing. The Court further holds that the paralegal hours spent on such matters were reasonable.

IV. CONCLUSION

For the reasons stated above, the Court will award attorney's fees for 135.5 hours of work performed by Mr. Berney, at a rate of \$280 per hour, totaling \$37,940. Additionally, the Court will award fees for 10.7 hours of work performed by Mr. Berney's paralegal at a rate of \$100 per hour, totaling \$1,070. Finally, the Court will award \$328.10 in costs. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

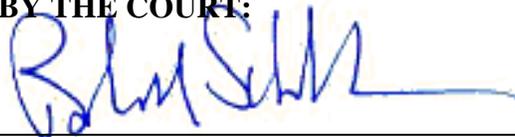
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	:	
SCHOOL DISTRICT OF	:	
PHILADELPHIA,	:	No. 06-5527
Defendant.	:	

ORDER

AND NOW, this 14th day of **January, 2008**, upon consideration of Plaintiffs' Petition for Attorney's Fees and Costs (Document No. 8), Defendant's Objections to Plaintiffs' Request for Attorney's Fees (Document No. 11), Plaintiffs' Response in Opposition to Defendant's Request for Attorney's Fees (Document No. 12), oral argument, the parties supplemental submissions thereon (Document No. 13 & 14), and for the foregoing reasons, it is hereby **ORDERED** that:

1. Judgment is **ENTERED** in favor of Plaintiffs and against Defendant in the amount of \$39,010 in fees and \$328.10 in costs pursuant to 20 U.S.C. § 1415(i)(3)(B)(i)(I).
2. The Clerk of Court is directed to close this case.

BY THE COURT:



Berle M. Schiller, J.