

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

RENA C., Individually and on Behalf of A.D.	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
COLONIAL SCHOOL DISTRICT	:	No. 15-1914

MEMORANDUM OPINION

Savage, J.

March 5, 2020

This is the second time we consider Rena’s motion for attorney’s fees in this action brought under the Individuals with Disabilities Education Act (“IDEA”) for the sole purpose of obtaining attorney’s fees and costs. In our original ruling, we limited fees to services performed prior to the expiration of Colonial School District’s ten-day offer,¹ awarding fees in an amount substantially less than what Rena had requested. On appeal, the Third Circuit held that Rena had been substantially justified in rejecting Colonial’s offer because it did not include attorney’s fees, but also held that she did not obtain more favorable substantive relief than had been offered. In this context, we must determine a reasonable attorney’s fee for the services performed in pursuing attorney’s fees both before and after the ten-day offer.

We conclude that the hourly rate that Rena agreed to pay and her attorney agreed to accept, which falls within the range of rates prevailing in the community, rather than the higher rate he now requests, is the reasonable hourly rate for determining the lodestar.

¹ The ten-day offer was made pursuant to 20 U.S.C. § 1415. As we explained in our December 20, 2016 Memorandum Opinion, the ten-day offer provision aims to motivate the parties to resolve the dispute early for the disabled student’s benefit. See December 20, 2016 Mem. Op. at 3 (ECF No. 29); *Rena C. v. Colonial School Dist.*, 221 F. Supp. 3d 634, 636 (E.D. Pa. 2016).

After deducting excessive and duplicative time, we must further reduce time spent pursuing issues upon which Rena did not prevail.²

Procedural History³

On August 14, 2015, Rena and Colonial filed cross-motions for summary judgment.⁴ We granted Rena's motion and granted in part Colonial's motion.⁵ In our Memorandum Opinion dated December 20, 2016, we found that Rena had not been substantially justified in rejecting Colonial's valid ten-day offer made pursuant to 20 U.S.C. § 1415. *Rena C. v. Colonial Sch. Dist.*, 221 F. Supp. 3d 634, 646 (E.D. Pa. 2016). Consequently, we allowed costs and attorney's fees only for work performed before September 28, 2014, the date the ten-day offer expired. *Id.* at 652.

Attorney David Berney and paralegal Jonathan Kruzic were the only ones to work on Rena's case before September 28, 2014. *Id.* at n.82. Colonial did not challenge Berney's time for work performed before September 28, 2014. *Id.* at 650. It did contest his hourly rate. After considering both parties' submissions and arguments, we reduced Berney's requested hourly rate. *Id.* at 646-49. We held that \$385, the rate Berney had originally agreed to charge Rena plus two annual increases of five percent, was reasonable. *Id.* at 649. We denied Colonial's counterclaim for attorney's fees. *Id.* at 650.

² In her motion, Rena sought \$234,775.30 in fees and \$1,205.34 in costs for the time period beginning at the inception of this litigation through appeal and remand. Rena has supplemented her request for attorney's fees in the amount of \$6,766.70 for additional post-motion practice, for a total of \$241,542.00 in attorney's fees and \$1,205.34 in costs. See Appendix A.

³ Only the facts pertaining to the issue of attorney's fees and costs are recited here. The factual and procedural history is more thoroughly set out in the previous Memorandum Opinion. See December 20, 2016 Mem. Op.; *Rena C.*, 221 F. Supp. 3d 634.

⁴ Pl.'s Mot. for Summ. J. on Def.'s Counterclaim (ECF No. 12); Def.'s Mot. for Summ. J. (ECF No. 13); Pl.'s Mot. for Summ. J. (ECF No. 15).

⁵ December 20, 2016 Orders (ECF Nos. 30, 31 and 32).

Rena appealed the denial of fees and costs incurred after the ten-day offer had expired.⁶ Colonial did not appeal the denial of its counterclaim. The Third Circuit held that Rena did not receive more favorable relief than what she had been offered, but she was nonetheless substantially justified in rejecting the ten-day offer because it did not include attorney's fees. *Rena C. v. Colonial Sch. Dist.*, 890 F.3d 404, 411 (3d Cir. 2018). Accordingly, it held that Rena is entitled to attorney's fees and costs incurred after the ten-day offer expired. *Id.* at 420. After the Supreme Court denied Colonial's petition for certiorari,⁷ Rena filed a second request for attorney's fees and costs, adding time spent on work on appeal.⁸

Analysis

Determining the amount of a reasonable attorney's fee requires a two-part analysis. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Maldonado v. Houstoun*, 256 F.3d 181, 184 (3d Cir. 2001). We must determine the reasonableness of the time spent and fix a reasonable hourly rate. *Maldonado*, 256 F.3d at 184. Once these two numbers are established, they are multiplied to yield the lodestar, which is presumed to be a reasonable fee. *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990).

A request cannot be reduced based on factors not raised by the adverse party. *Id.* (quoting *Bell v. United Princeton Props.*, 884 F.2d 713, 720 (3d Cir. 1989)). Objections must be specific. See *United States v. Eleven Vehicles, Their Equipment & Accessories*, 200 F.3d 203, 211-12 (3d Cir. 2000). Nevertheless, once the adverse party specifically

⁶ Pl.'s Not. of App. (ECF No. 33).

⁷ *Colonial School Dist. v. Rena C.*, 139 S. Ct. 244 (2018).

⁸ Pl.'s Mot. for Atty's Fees (ECF No. 45).

objects to a fee request, we have considerable discretion to “adjust the fee award in light of those objections.” *Rode*, 892 F.2d at 1183 (citations omitted).

Hourly Rate

In her first request for attorney’s fees and costs, Rena submitted time spent by attorneys David Berney, Vanita Kalra, and Kevin Golembiewski and paralegal Jonathan Kruzic. Rena requested hourly rates of \$495 for Berney, \$325 for Kalra, \$200 for Golembiewski and \$100 for Kruzic. Because Berney and Kruzic were the only ones who performed work before the ten-day offer letter expired, we considered their rates and hours in ruling on that request.

Considering his tenure and experience in the special education field, the declarations, the quality of the work product, the fee agreements, his judicially approved rates in other cases, and the time spent performing routine tasks as revealing his level of proficiency, we concluded that \$385 was a reasonable hourly rate for Berney.⁹

In her present request, Rena submits time for Berney, Kalra, Golembiewski, Kruzic and attorney Morgen Black-Smith. Rena requests an hourly rate of \$487 for Berney, \$350 for Kalra, \$300 for Black-Smith, \$263 for Golembiewski and \$100 for Kruzic.¹⁰ Colonial only challenges the rates for Berney and Golembiewski.¹¹ Colonial asserts that hourly rates of \$400 for Berney and \$255 for Golembiewski are reasonable.¹²

⁹ The hourly rate is fixed at the time the fee petition is filed, not when the services were performed. *Lanni v. New Jersey*, 259 F.3d 146, 149 (3d Cir. 2001). The purpose of this rule is to simplify the calculation of fee awards and compensate prevailing parties for any delay in reimbursement. *See id.* at 150; *Ryan P. ex rel. Christine P. v. Sch. Dist. of Phila.*, No. 07-2903, 2008 WL 724604, at *5-6 (E.D. Pa. Mar. 18, 2008).

¹⁰ Pl.’s Mot. for Atty’s Fees at 9.

¹¹ Def.’s Resp. to Mot. for Atty’s Fees at 4-5 (ECF No. 46).

¹² *Id.* at 5, 10.

In determining a reasonable hourly rate, the starting point “is the attorney’s usual billing rate, but this is not dispositive.” *Pub. Interest Research Grp. of New Jersey, Inc. v. Windall*, 51 F.3d 1179, 1185 (3d Cir. 1995). We also compare the attorney’s rates to the market rates in the community for similar services by lawyers of “reasonably comparable skill, experience, and reputation.” *Loughner v. Univ. of Pittsburgh*, 260 F.3d 173, 180 (3d Cir. 2001) (quoting *Rode*, 892 F.2d at 1183). The IDEA specifically provides that fees “shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished.” 20 U.S.C. § 1415(i)(3)(C). Thus, if it does not exceed the prevailing market rate charged in the community, the requested rate is the allowable rate.

In the first request, Berney based his \$495 hourly rate on the Community Legal Services (“CLS”) fee schedule, the Adjusted Laffey Matrix, law magazine billing surveys, attorney declarations and rates fixed by district courts in Pennsylvania. *Rena C.*, 221 F. Supp. 3d at 647-48. We declined to consider the CLS schedule and the Adjusted Laffey Matrix because they do not consider attorneys’ relevant experience in the field of special education. We gave the surveys little consideration because they did not account for experience, practice area or geographic location. We disregarded the attorney declarations that relied on the CLS schedule and surveys, and those that justified higher rates based on contingency risks. We disregarded the rates fixed by district courts in Pennsylvania because none of the cases involved special education matters and did not account for relevant experience in the field. We also noted that courts have scrutinized and reduced Berney’s fee petitions in the past.¹³

¹³ See, e.g., *M.M. & E.M. v. Sch. Dist. of Phila.*, 142 F. Supp. 3d 396, 407 (E.D. Pa. 2015) (reducing Berney’s rate to \$385); *Laura P. v. Haverford Sch. Dist.*, No. 07-5395, 2009 WL 1651286, at *5, *8 (E.D.

Rena submits additional evidence in support of Berney's requested hourly rate of \$487. In addition to the CLS fee schedule and three of the same attorney declarations, she offers two more attorney declarations; Colonial's attorneys' timesheets; several of Berney's redacted fee agreements, invoices and proofs of payment for other clients; the CLS fee schedule; recent fee awards to Berney in IDEA cases; and fee awards to attorneys with similar experience. We will not consider the CLS schedule, which we previously found inappropriate for fixing hourly rates in IDEA cases. *Id.* at 647. We shall disregard one of the attorneys' declarations because it relies on the CLS schedule. The remaining three make sweeping statements about a reasonable hourly rate without identifying any specific rates charged by other special education attorneys.

Colonial presents a countervailing affidavit based on detailed billing reports submitted to its counsel's firm between September 1, 2018 and August 31, 2019 for special education matters in the Eastern District of Pennsylvania.¹⁴ Berney argues that these billing reports and charts omit the rates of multiple high-billing local education attorneys, include inaccuracies, rely on speculation, disproportionately weigh years of experience in special litigation law over general litigation and fail to account for counsel's skill.¹⁵ We disagree. These reports and charts identify local attorneys with varying amounts of experience and skill, some with hourly rates as high as \$525.¹⁶ Although we

Pa. June 12, 2009), *abrogated on other grounds by Steven I. v. Cent. Bucks Sch. Dist.*, 618 F.3d 411, 412 (3d Cir. 2010) (reducing Berney's rate to \$285 and noting that "Berney conceded little, unreasonably requesting fees and costs for clearly unsuccessful portions of his case and for unreimbursable items, in a manner characteristic of the contentious spirit with which he has handled this matter.")

¹⁴ Def.'s Resp. to Mot. for Atty's Fees at Exh. 1 (ECF No. 46).

¹⁵ Pl.'s Reply to Def.'s Resp. at 7-8 (ECF No. 49).

¹⁶ Def.'s Resp. at Exh. 1.

agree that general litigation affords many opportunities to develop relevant and transferable skills to the field of special education, we do not agree that Colonial's matrix overstates the importance of specialized experience. Expertise in the field is critical for working efficiently and strategically. Prolonged litigation and a disproportionate amount of time billed to otherwise straightforward matters are common among attorneys who possess general litigation experience but lack experience in the specific field. Considering the billing reports as well as the combined years chart and matrix generated from the billing reports, we conclude a reasonable hourly rate for Berney is between \$400 and \$450.

Berney argues that four recent IDEA fee decisions demonstrate that his requested fee of \$487 is reasonable. In *Ida D. v. Rivera*, the court allowed a \$495 rate for Berney as accurately reflecting the prevailing market rates in Philadelphia. No. 17-5272, 2019 WL 2615481, at *8 (E.D. Pa. June 26, 2019). In *Jada H. v. Rivera*, the court awarded Berney a rate of \$478. No. 18-487, 2019 WL 2387929, at *2 (E.D. Pa. June 6, 2019). Berney argues that his requested rate of \$487 reflects the average of the rates set by *Ida D.* and *Jada H.* Colonial argues that these two cases support the view that rates depend on the evidence and the issues presented. It also claims that the school districts did not make a meaningful argument addressing the issue of reasonable rates. In reply, Berney cites two more cases where he was awarded an hourly rate of \$495. See *LeJeune, G. v. Khepera Charter Sch.*, No. 17-4965, 2019 WL 4674382, at *5 (E.D. Pa. Sept. 24, 2019); *Joan P.B. v. Khepera Charter Sch.*, No. 18-885, 2019 WL 4735536, at *4 (E.D. Pa. Sept. 26, 2019).

None of these cases are binding. We agree with Colonial that the school districts

did not appear to mount a substantial challenge to the requested rates in *Ida D.* and *Jada H.*¹⁷ The defendants in *LeJeune, G.* and *Joan P.B.* also failed to present compelling arguments for a reduction.¹⁸ None of the defendants appear to have submitted any countervailing attorney declarations to support their arguments that the requested rates were unreasonable. Furthermore, there is no indication in any of these cases that Berney retroactively increased his rate before filing the fee petition, as he did in this case. *Rena C.*, 221 F. Supp. 3d at 646-47.

Berney offers three fee agreements, three invoices and three payments from four different clients to support his declaration that his customary billing rate is \$495 and that his clients actually pay this fee. Of the three fee agreements, only one appears to involve representing a student in a due process hearing. However, this fee agreement lacked any invoice or client payment to support the claimed rate. The other fee agreements and invoices fail to disclose what services Berney provided in exchange for the payments.

Berney cites three IDEA decisions where he contends the attorneys possessed comparable experience. In *Rayna P. v. Campus Community School*, the court awarded a rate of \$495 to one attorney with 29 years of litigation experience, seven of which were in education law, and one with 20 years of education law experience. 390 F. Supp. 3d

¹⁷ For example, in *Ida D.*, the defendant argued that Berney's hourly rate was unreasonable compared to the rate he charged in fee agreements in the past, without considering the firm's change in fee structure or the passage of time. 2019 WL 2615481, at *8. The defendant also argued that its financial distress should be considered when fixing the hourly rate, whereas Third Circuit precedent focuses on the parent's financial condition in determining whether they could pay attorney's fees. *Id.* at *7. In *Jada H.*, the defendant only argued that Berney's rate was unreasonable because his rates increased without justification between 2015 and 2016. 2019 WL 2387929, at *2.

¹⁸ For example, the school districts do not dispute that the requested rates are the usual billing rates for fee-paying clients and instead presented unavailing arguments about the rates' increase over time, in contravention of established Third Circuit case law. *LeJeune, G.*, 2019 WL 4674382, at *4-5; *Joan P.B.*, 2019 WL 4735536, at *3-4.

556, 566-67 (D. Del. 2019). In *School District of Philadelphia v. Kirsch*, the court awarded a rate of \$475 to an attorney with 27 years of experience. No. 14-4910, 2017 WL 131808, at *6 (E.D. Pa. Jan. 11, 2017). In *I.W. v. School District of Philadelphia*, the court awarded a rate of \$600 to an attorney with 27 years of experience. No. 14-3141, 2016 WL 147148, at *10 (E.D. Pa. Jan. 13, 2016).

These cases are distinguishable. In *Rayna P.* and in *Kirsch*, the courts relied almost exclusively on the CLS fee schedule, which we have determined is not appropriate in IDEA cases. 390 F. Supp. 3d at 566-67; 2017 WL 131808, at *6. In *I.W.*, the attorney had 27 years of experience as a special education litigator, which is significantly more experience than Berney. 2016 WL 147148, at *9 (“Attorney Kerr . . . has focused exclusively on special education law on behalf of children with disabilities for the entirety of that [27-year] period.”).

Colonial challenges the extent of Berney’s special education experience. It argues that he was not a “regular” in the special education field until 2010. He had his earliest hearing officer decisions in special education cases in 2007. Colonial also points out that the majority of his special education-related cases focus on fee petitions. Colonial claims that of the 64 results for Berney in its Westlaw search, only eight were substantive education cases, and 16 were exclusively fee petitions. The remaining results either did not relate to education, were cases in which Berney submitted affidavits for others or were only orders.

As we stated in our previous opinion, Berney’s litigating a multiplicity of fee petitions does not translate into a testament to his expertise and success. *Rena C.*, 221 F. Supp. 3d at 649. We examined other courts’ scrutiny of his fee petitions, reductions in

his requested fees and criticisms of his skill and litigation practices. *Id.* We found that Berney's conduct in this case was similarly contentious and needlessly difficult. *Id.* We stated "[h]ad we found that Rena . . . was substantially justified in rejecting the offer, we would still have reduced Berney's fee for unnecessarily prolonging the litigation and persisting in making baseless arguments regarding the validity of Colonial's offer." *Id.* at 650. The reasons we reduced Berney's rate have not changed.

When Berney undertook to represent Rena, he entered into a fee agreement setting his hourly rate at \$350. *Id.* at 646. The agreement provided for a fixed percent annual increase. *Id.* We assume at that time Berney was charging Rena his customary rate which he fixed based on the prevailing market. Colonial should not have to pay more than Rena would have to pay.

After the IDEA proceeding ended and after this action was filed, Rena signed a second fee agreement, which dramatically increased Berney's hourly billing rate to \$495, representing an increase of 41 percent. *Id.* Not only did Berney significantly increase his hourly rate, he did so retroactively. What is concerning is Berney had Rena sign the second fee agreement one week before he filed his motion for attorney's fees. *Id.* at 646-47. Apparently, this is not the first time he has submitted a second fee agreement increasing his hourly rate retroactively in connection with a request for an award of attorney's fees. See *M.M. & E.M.*, 142 F. Supp. 3d at 404–06. The timing of the second agreement suggests it was intended to significantly boost the hourly rate for purposes of filing an action for attorney's fees.

Why would Rena sign an agreement significantly increasing attorney's fees? At that point, a consent order giving her the requested relief had been entered. The only

issue remaining was the amount of attorney's fees Colonial would have to pay Berney. One may perceive this retroactive increase as an award to Berney for a successful result. In other words, it is a belated bonus. To the extent the fees are influenced by the contingent nature of the case, they must be disregarded. The IDEA does not permit an adjustment for contingency. The statute provides, "[n]o bonus or multiplier may be used in calculating the fees awarded under this subsection." 20 U.S.C. § 1415(i)(3)(C). See also *City of Burlington v. Dague*, 505 U.S. 557, 565 (1992).

Considering our previous analysis and Berney's additional evidence, we shall award him the same base rate of \$350 with annual increases of five percent, bringing his hourly rate to \$437.50. This hourly rate is the rate set forth in the fee agreement Berney initially signed with Rena. *Venegas v. Mitchell*, 495 U.S. 82, 88 (1990) ("We have therefore accepted, at least implicitly, that statutory awards of fees can coexist with private fee arrangements.").

Rena supports her request of an hourly rate of \$263 for Golembiewski with the CLS fee schedule, three attorney declarations, several recent Berney IDEA fee awards, the firm's customary billing rates and IDEA fee awards to attorneys with comparable experience. Golembiewski was awarded an hourly rate of \$255 in *Ida D.* and \$270 in *Jada H., LeJeune, G. and Joan P.B.* 2019 WL 2615481, at *7; 2019 WL 2387929, at *4; 2019 WL 4674382, at *9, n.24; 2019 WL 4735536, at *7, n.17. None of these cases involved real challenges to the requested rates. As for the fee agreements and proofs of payment, only one invoice and payment, and one fee agreement unattached to actual payment supports the agreed \$270 fee for Golembiewski.¹⁹ Rena offers one comparable case,

¹⁹ In another of the fee agreements provided, the rate for Berney is included but the rest of the paragraph, presumably containing the other attorneys' rates, is redacted.

Rayna P., in which the court awarded an attorney with six to seven years of special education experience and one year of clerking an hourly rate of \$350, relying almost exclusively on the CLS schedule. 390 F. Supp. 3d at 566-67. Golembiewski has four years of special education experience and clerked for two years.

Colonial offers little evidence to challenge Golembiewski's requested rate. Indeed, according to Colonial's own billing reports, combined years chart and matrix, his requested rate of \$263 is within the appropriate range for his level of experience. Therefore, we conclude that an hourly rate of \$263 for Golembiewski is reasonable. See Appendix B for a summary of the reasonable hourly rates.

Time Recorded

In an IDEA case, the amount of attorney's fees must be reduced when the time and the services performed "were excessive considering the nature of the action or proceeding." 20 U.S.C. § 1415(i)(3)(F)(iii). We can reduce an attorney's hours only if (1) "they are excessive, redundant, or otherwise unnecessary;" (2) they were "spent litigating claims on which the party did not succeed;" or (3) "the fee petition inadequately documents the[m]." See *Rode*, 892 F.2d at 1183. A fee petition should include fairly detailed information for time devoted to various activities. *Id.* at 1190. Although "it is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted," a fee petition must be specific enough to determine if the hours claimed are unreasonable for the work performed. *Id.* (citations omitted).

Rena claims the Berney firm already voluntarily deducted 67.9 hours that could be considered excessive, redundant or unnecessary, including reducing time that Colonial objected to during the initial fee petition proceedings. She points out that Berney billed 10

percent less time than Colonial's counsel even though they bore the burden of proof, they did not bill any time for unsuccessful claims and they sufficiently documented their time.

Colonial counters that the comparison between its counsel's time and the Berney firm's time does not account for the different representational interests, as well as the fact that its counsel's hourly rate of \$170 is significantly lower. Colonial argues an across-the-board reduction is warranted because Rena achieved only limited success through her litigation following the ten-day offer letter. Colonial generally objects to time entries for Berney, Kalra and Black-Smith that reference administrative tasks, demonstrate excessive or unnecessary conferencing between attorneys, or contain block billing where time cannot be attributed to tasks. Regarding Berney's timesheet specifically, Colonial objects to vague descriptions of communications with witnesses, experts, the client and opposing counsel, time spent revising briefs and other writings, time dedicated to a Right to Know Law request for Colonial's counsel's timesheets following the parties' Third Circuit oral argument, and any other entries that do not appear reasonable or relevant for the case.²⁰ Colonial also argues that Berney has entered an inordinate amount of time for case conferencing given his claims of expertise in the special education field. Colonial questions why Berney spent more than 200 hours preparing for the due process hearing when a full hearing never took place and the only relevant matter to review was a single Individualized Education Program. Colonial claims that Berney spent a lot of time addressing attorney's fees after settling all of the substantive educational issues, prolonging the litigation. Regarding Kalra's and Black-Smith's timesheets, Colonial

²⁰ These entries include time entered for strategy meetings with experts, reviewing advisory notes to the Federal Rules, legal research reviewing cases, conference calls with experts, preparing amicus brief requests, legal research on the fee petition and reviewing emails for case strategy.

objects to time entered on discernible discrete tasks for which Rena did not prevail.²¹ Colonial does not challenge the time entries for Golembiewski.

In reply, Rena argues that the time spent on the Right to Know Law request is recoverable because courts have found time comparisons useful when determining the plaintiff's lodestar.²² She argues Colonial has not met its burden of showing that an across-the-board reduction is appropriate. She claims that Colonial has waived objections to many of the time entries going back to 2014 because it raised no objections to these entries in the initial proceedings. She asserts that Colonial's objections have not accounted for entries the Berney firm already voluntarily deducted or reduced. She argues that courts have found the descriptions Berney provided for many of his entries sufficient for purposes of recovering fees. Rena asserts that the time spent collaborating was important for this case because it presented novel legal questions. She argues the record does not show that Berney unreasonably protracted the litigation. She claims the record shows that she had legitimate concerns about Colonial's settlement offers, she communicated her concerns and she worked with Colonial to resolve them, namely, the issues of pendency and attorney's fees.

²¹ These issues include research into 24 Pa. Stat. § 5-508, section 504 of the Rehabilitation Act and the Americans with Disabilities Act, the validity of the settlement offer, the Third Circuit's pendency holding and whether Rena obtained more favorable relief than what was offered.

²² Rena cites *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia* to assert that Colonial's counsel's time is relevant. This case did not involve special education or recovering attorney's fees under IDEA. In considering the plaintiff's first request for attorney's fees, the court asked for the defendants' billing records to compare the time each side spent on the case. No. 89-2737, 1997 WL 277339, at *4 (E.D. Pa. May 20, 1997). The defendants failed to provide their records. *Id.* The court stated that the defendants should have known based on its previous request that it would find such records important. *Id.* Here, we did not request to examine Colonial's timesheets because we do not find them relevant to our inquiry.

We agree with Colonial that a comparison between the hours billed by Colonial's counsel and the Berney firm is not helpful. As we noted in our previous opinion, Rena and her counsel unnecessarily protracted this litigation. *Rena C.*, 221 F. Supp. 3d at 646. Rena's pursuit of attorney's fees and pendency caused Colonial's counsel to spend more time. We are not scrutinizing Colonial's counsel's time entries to determine the reasonableness of time spent. We are tasked to determine whether the time billed by the Berney firm is reasonable. Because Colonial's counsel's time is not helpful to this inquiry, we shall eliminate the 1.3 hours spent on the Right to Know Law requests.

Rena argues Colonial has waived its objections to certain time entries for Berney and Kalra between June 26, 2014 and August 14, 2015 because Colonial did not object to these entries during the initial proceedings. Rena cites no authority to support this position. We recognize that Colonial's motivations may have changed as the litigation proceeded through appeal and remand. Colonial may not have raised objections to these time entries initially because the submitted time and resulting lodestar at the summary judgment stage was significantly less than it is now. Rena sought \$116,810.50 in attorney's fees in the initial proceedings.²³ She now seeks more than double that amount.

Colonial clearly and adequately raises objections to these time entries in its response. Rena had adequate opportunity to respond to these objections. She has not explained how she is prejudiced by Colonial raising these objections at this time. Therefore, we shall consider the objections. See *Cruz v. Comm'r of Soc. Sec.*, 437 F. App'x 67, 70, n.1 (3d Cir. 2011) ("The Commissioner was not required to raise these objections [to the hourly rate and direct payment to plaintiff's attorney] in his initial

²³ Pl.'s Mot. for Summ. J. at 23.

opposition to the fee petition, especially given that they were made prior to Cruz's filing of a supplemental fee petition. Thus, we conclude that the Commissioner did not waive either of these objections.").

We disagree that many of Berney's entries recording email correspondence with Rena, opposing counsel and experts are impermissibly vague. These entries include descriptions like "email to client," "t/c with client" and "email to Karl Romberger, Esq."²⁴ These entries are mainly 0.1 or 0.2 hours each.²⁵ Courts in this District have held that such descriptions are sufficiently specific for the purposes of a fee petition. See, e.g., *Shanea S. v. Sch. Dist. of Phila.*, Civ. No. 12-1056, 2014 WL 2586940, at *5 (E.D. Pa. June 10, 2014) (finding descriptions such as "t/s with client" and "ltr to client" sufficiently specific); *Elizabeth S. v. Sch. Dist. of Phila.*, No. 11-1570, 2012 WL 2469547, at *2 (E.D. Pa. June 28, 2012) (finding "t/c with client," "letter to client" and "email to expert" sufficiently specific). "[S]pecificity [in documenting the hours claimed] should only be required to the extent necessary for the district court to determine if the hours claimed are unreasonable for the work performed." *Washington v. Phila. Cty. Court of Common Pleas*, 89 F.3d 1031, 1037 (3d Cir. 1996). Here, Berney's entries on these tasks are sufficiently specific to determine that the hours were reasonable.

Several of the entries use block billing. Block billing is a common time-saving practice that will be upheld if there is a reasonable correlation between the various activities listed in a block and the time spent completing those tasks. *U.S. v. NCH Corp.*, No. 05-881, 2010 WL 3703756, at *4 (D.N.J. Sept. 10, 2010) (citations omitted); *Schlier*

²⁴ *Id.*

²⁵ *Id.*

v. Rice, 2009 WL 5182164, at *6 (M.D. Pa. Dec. 22, 2009). However, it is not the ideal time-keeping method and lawyers who use it do so at their “own peril.” *Estate of Schultz v. Potter*, No. 05–1169, 2010 WL 883710, at *7, n.14 (W.D. Pa. Mar. 5, 2010). See also *Simring v. Rutgers*, 634 F. App’x 853, 859 (3d Cir. 2015) (“Block billing makes it more difficult for courts to review hours expended because we do not know how many hours a lawyer spent on a discrete task.”). If a block entry is confusing or makes it difficult to allocate reasonable time to a specific task, “the blame lies on the party seeking fees because they were in the best position to mitigate any confusion.” *NCH Corp.*, 2010 WL 3703756 at *5. In this case, we examine the block entry and approve time reasonably correlated to permissible tasks. *Id.*

Rena has already voluntarily deducted time from several entries, some by more than 50 percent. Yet, many block-billed entries remain for which no time was reduced. Consequently, for those entries, we cannot determine how much of the total time is allocable to each activity. Because these entries include some reimbursable tasks, we will not delete the entire time. Instead, we shall “split the difference between the parties.” *Id.* at *6. Thus, out of the 94.2 hours of block-billing for which no time was already deducted, we shall allow 47.1 hours.

Colonial objects to 3.9 hours the attorneys entered for administrative-type tasks, such as “reviewing and organizing email communications” and “reviewing email from Anne Robbins, Psy.D. re final bill.”²⁶ As the Third Circuit has stated, “[w]e have cautioned on a number of occasions that when a lawyer spends time on tasks that are easily delegable to non-professional assistance, legal service rates are not applicable.”

²⁶ *Id.* at Exh. 3.

Halderman by Halderman v. Pennhurst State Sch. & Hosp., 49 F.3d 939, 942 (3d Cir. 1995). Because we find that these tasks could have been easily delegated to a paralegal or secretary, we will eliminate this time.

Colonial objects to 34.9 hours entered for interoffice communications and communications with the referring attorney. Colonial explicitly excluded from its objections time spent directing junior associates and preparing Berney for oral argument.²⁷ Although interoffice communications are important for coordinating and delegating work responsibilities, the amount of time recorded is excessive. So is the amount of time and frequency of communications with the referring attorney. Therefore, we will reduce this time by 17.45 hours.

Upon review of the time entries that appear duplicative or concern updating timesheets, we shall deduct 0.5 hours for entries that are identical in date, description and amount of time that do not otherwise explain how they are different.²⁸ We shall also deduct 0.2 hours for one entry on August 14, 2015 in Kalra's timesheet that concerns reviewing a timesheet without further explanation for why it is relevant for the case.²⁹

Summarizing the time analysis thus far, Rena's requested award of fees is based on 593.4 hours spent. We have deducted 86.55 hours as duplicative and excessive, adjusting the total hours to 506.85 hours. See Appendix C.

²⁷ Def.'s Resp. at 18. Colonial carves these time entries out of their objection because it is "mindful that as lead attorney, Mr. Berney needs to communicate directions to junior attorneys and so excludes reasonable time for doing so. Likewise, conferencing time related to preparing Mr. Berney for oral argument is not included." *Id.*

²⁸ *Id.*

²⁹ *Id.*

Having deducted excessive and duplicative time does not end the analysis. Because Rena achieved only partial success and pressed claims that were not at issue, we must consider two additional principles governing the awarding of attorney's fees.

The first principle is a judicially created one. The Supreme Court has instructed that "[t]he extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney fees." *Hensley*, 461 U.S. at 440. Accordingly, "[a] reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Id.*

The second is a statutory rule found in the IDEA itself. A parent may not receive attorney's fees "for services performed subsequent to the time of a written offer of settlement" if the relief obtained was not more favorable than the offer. *Id.* at 413. After the expiration of the ten-day offer, Rena's attorneys spent a significant amount of time pursuing several issues. Rena prevailed on one – entitlement to attorney's fees. She did not prevail on the rest. Consequently, applying these two principles requires us to reduce the time spent on those issues on which Rena did not prevail or had been included in Colonial's ten-day offer.

Colonial asks us to strike time entries for issues on which Rena did not prevail, specifically her contentions about the validity of Colonial's settlement offer and the recovery of expert and attorney's fees under section 504 of the Rehabilitation Act and the Americans with Disabilities Act. In our previous opinion, we held that Colonial's ten-day offer was valid and that Rena could not circumvent the IDEA's restriction on expert fees by merely pleading violations under section 504. *Rena C.*, 221 F. Supp. 3d at 651. Although Rena did not appeal our ruling on expert fees, she continued to challenge the

validity of the offer. On appeal, as she did in the district court, she argued that the offer was invalid because it lacked the school board's approval. The Third Circuit disagreed, finding that the offer was valid because "[n]either Pennsylvania law nor the IDEA . . . required Colonial to secure school board approval prior to extending a ten-day offer of settlement under 20 U.S.C. § 1415." *Rena C.*, 890 F.3d at 413. Therefore, the 16.1 hours spent on the issues of expert fees and the validity of the offer are not compensable.

Rena unnecessarily protracted the due process proceeding and her attorneys spent a significant amount of time continuing to litigate pendency after Colonial had offered it. Rena claims she made multiple efforts to resolve the issue of pendency after the ten-day offer had expired on September 28, 2014. She asserts that she discussed settlement with Colonial in late September and throughout October, November and December 2014, as reflected in her timesheets. She argues that Colonial's "refusal to offer fees or pendency was a sticking point that prevented resolution."³⁰ She claims they were able to overcome this obstacle and agree to a consent order in March 2015 that included pendency and fees. But, her current argument about pursuing pendency ignores the Third Circuit's conclusion that pendency was not an issue because it had been included in the ten-day offer.

Though the Third Circuit held that Rena was substantially justified in rejecting Colonial's ten-day offer because it did not include attorney's fees, it found that she did not receive more favorable relief in the final order than what she had been initially offered. *Rena C.*, 890 F.3d at 417. The substance of the offer and the stipulated consent order were the same. *Id.* at 638. The Third Circuit held that pendency was included in Colonial's

³⁰ Pl.'s Reply at 2-3 (ECF No. 49).

ten-day offer. *Id.* Her arguments focusing on this issue consumed a substantial amount of time in the due process proceedings and on appeal.

A parent may not receive attorney's fees "for services performed subsequent to the time of a written offer of settlement" if the relief obtained was not more favorable than the offer. *Id.* at 413. The Third Circuit, finding that "the relief ultimately obtained by Rena C. was not more favorable than the settlement offer," concluded that the 20 U.S.C. § 1415(i)(3)(D)(i) bar applied. *Id.*

The Third Circuit specifically found that the ten-day offer included one-on-one instruction and pendency – two issues Rena continued to litigate through the administrative process and this action. Thus, the time spent litigating those issues is not compensable and only the time pursuing attorney's fees is.

Rena does not allocate time for services performed pursuing attorney's fees and time spent on the issues on which she did not prevail. Despite efforts to do so from a review of the time records, we cannot ascribe the time related to each. Nor did Rena or Colonial. Therefore, assuming Berney spent at least the same amount of time on the issues related to Rena's child's interest as he did on his fees, we shall apply the block-billing approach and split the difference.

Conclusion

In sum, after fixing David Berney's hourly rate at \$437.50, reducing the number of hours billed³¹ and reducing the time spent in pursuing issues on which Rena did not

³¹ We note that Berney has claimed an additional 5.2 hours and Golembiewski has claimed an additional 16.1 hours for their work on their reply brief. Having reviewed Berney's additional timesheet based on the objections Colonial raised to Berney's initial timesheet, and noting that Berney has voluntarily deducted 4.3 hours from the total, we find that this time is reasonable. Because Colonial did not challenge Golembiewski's initial timesheet, we shall presume Colonial does not raise any objections to it.

prevail, we award attorney's fees in the amount of \$95,581.96. See Appendix D for the calculation of the fee. Rena is also entitled to \$1,205.34 for recoverable costs. Therefore, we conclude that she is entitled to a total award of \$96,787.30.

Appendix A: The Requested Fee

	<i>Requested Rate</i>	<i>Time Entered</i>	<i>Requested Fee</i>
Berney	\$487	347.6	\$169,281.2
Kalra	\$350	56.6	\$19,810.00
Black-Smith	\$300	93.0	\$27,900.00
Golembiewski	\$263	91.6	\$24,090.80
Kruzic	\$100	4.6	\$460.00
Total	--	593.4	\$241,542.00

Appendix B: Reasonable Rate

	<i>Requested Rate</i>	<i>Reasonable Rate</i>
Berney	\$487	\$437.50
Kalra	\$350	\$350
Black-Smith	\$300	\$300
Golembiewski	\$263	\$263
Kruzic	\$100	\$100

Appendix C: Adjustments to Time

	<i>Time Entered</i>	<i>Adjustments</i>	<i>Adjusted Time Entered</i>	<i>Adjusted Time Entered After Further 50% Reduction</i>
Berney	347.6	46.65	300.95	150.475
Kalra	56.6	15.85	40.75	20.375
Black-Smith	93.0	24.05	68.95	34.475
Golembiewski	91.6	0	91.6	45.8
Kruzic	4.6	0	4.6	2.3
Total	593.4	86.55	506.85	253.425

Appendix D: The Reasonable Fee

	<i>Reasonable Rate</i>	<i>Reasonable Time Entered</i>	<i>Reasonable Fee</i>
Berney	\$437.50	150.475	\$65,832.8125
Kalra	\$350	20.375	\$7,131.25
Black-Smith	\$300	34.475	\$10,342.50
Golembiewski	\$263	45.8	\$12,045.40
Kruzic	\$100	2.3	\$230.00
Total	--	253.425	\$95,581.96

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

RENA C., Individually and on Behalf of A.D.	:	CIVIL ACTION
	:	
v.	:	
	:	
COLONIAL SCHOOL DISTRICT	:	NO. 15-1914

ORDER

NOW, this 5th day of March, 2020, upon consideration of Plaintiff's Motion for Attorney's Fees and Costs (Document No. 45), the defendant's response, and the plaintiff's reply, it is **ORDERED** that the motion is **GRANTED**.

IT IS FURTHER ORDERED that the plaintiff is **AWARDED** attorney's fees in the amount of \$95,581.96 and costs in the amount of \$1,205.34, for a total award of \$96,787.30.

/s/ TIMOTHY J. SAVAGE J.