

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

CHRISTOPHER P., a Student in the : CIVIL ACTION  
Upper Merion School District, by and :  
through his Parents and Next Friends, :  
RICHARD P. AND LINDA P. :  
v. :  
UPPER MERION AREA SCHOOL DISTRICT : NO. 99-402

**MEMORANDUM AND ORDER**

BECHTLE, J. January , 2000

Presently before the court is plaintiff Christopher P.'s, a student in the Upper Merion School District ("Christopher P."), by and through his Parents and Next Friends, Richard P. and Linda P. (collectively "Plaintiffs") motion for summary judgment and defendant Upper Merion Area School District's ("School District") response thereto. For the reasons set forth below, said motion will be denied.

**I. BACKGROUND**

Christopher P. is a special education student with disabilities who resides with his parents in Montgomery County, Pennsylvania, in the Upper Merion Area School District. (Pls.' Mem. of Law in Support of Mot. for Summ. J. at 1.) Plaintiffs' motion for summary judgment seeks an award of attorneys' fees. Plaintiffs contend that they obtained alternative educational placement for Christopher P. through litigation rather than through a normal evaluation process with the School District.

(Pls.' Mot. for Summ. J. at 2.)

In April 1996, Christopher P. first received special education services and an initial Individual Education Program ("IEP") was approved by his parents. (Def.'s Mem. of Law in Opp. to Pls.' Mot. for Summ. J. (Red. Version) at 1.) Subsequent IEP meetings reviewed the appropriateness of Christopher P.'s placement. (Def.'s Mem. of Law in Opp. to Pls.' Mot. for Summ. J. (Red. Version) at Ex. A.) As a result, modified IEPs were prepared. Id.

After a June 9, 1997 IEP meeting, an IEP was prepared which provided that Christopher P. would receive learning support services twice a week and counseling once a week at the Upper Merion Middle School. (Def.'s Mem. of Law in Opp. to Pls.' Mot. for Summ. J. (Red. Version) at 2-3.) The June 9, 1997 IEP had a duration up to June 9, 1998. Id. at 2. Christopher P.'s parents accepted this placement for the 1997-1998 school year. Id. at 3. However, in December 1997, both the School District and Plaintiffs were concerned that Christopher P. was having substantial difficulty maintaining appropriate behavior in class. Id. On December 2, 1997, an IEP meeting was held to review Christopher P.'s current IEP. Id. An IEP increasing Christopher P.'s learning support services from twice a week to three times a week was issued and accepted by Plaintiffs on the same date. Id. Also on December 2, 1997, a meeting was scheduled for December

22, 1997 so that Plaintiffs and the School District could discuss concerns and plan for future programming. Id. On December 21, 1997, and before the December 22 meeting could take place, Plaintiffs, through counsel, demanded a special education due process hearing pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1401 et seq. (Pls.' Mem. of Law in Support of Mot. for Summ. J. at 2.) The due process hearing was demanded so that "an appropriate educational placement that address[ed]" Christopher P.'s needs could be determined. Id. at Ex. 2. Plaintiffs proposed resolution in the form of "placement . . . in a highly structured program of small group instruction, with a full-time Instructional Aide . . . ." Id.

A special education due process hearing was scheduled for February 6, 1998. Id. at Ex. 3. However, the due process hearing was continued to accommodate meetings that were held in February and March 1998 in an effort to discuss and modify Christopher P.'s Comprehensive Evaluation Report ("CER").<sup>1</sup> (Id. at 2-3; Def.'s Mem. of Law in Opp. to Pls.' Mot. for Summ. J. (Red. Version) at 7.) In February 1998, a behavior modification

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<sup>1</sup> A new CER for Christopher P. was compiled and issued by the School District on March 18, 1998. (Def.'s Mem. of Law in Opp. to Pls.' Mot. for Summ. J. (Red. Version) at 5; Pls.' Mem. of Law in Support of Mot. for Summ. J. at 2-3.) The CER was the result of the evaluation process that took place from late December 1997 through the date of the report. (Def.'s Mem. of Law in Opp. to Pls.' Mot. for Summ. J. (Red. Version) at 5.)

plan was prepared by the School District and was accepted by Plaintiffs. (Def.'s Mem. of Law in Opp. to Pls.' Mot. for Summ. J. (Red. Version) at 4.) In March 1998, an occupational therapy evaluation was conducted and a second behavior modification plan to be implemented by the School District was accepted by Plaintiffs. Id. Thereafter, IEP meetings were held in March and April 1998. (Pls.' Mem. of Law in Support of Mot. for Summ. J. at 3.) A new IEP was prepared and a Notice of Recommended Assignment ("NORA") was issued and approved by Plaintiffs on May 7, 1998. (Id.; Def.'s Mem. of Law in Opp. to Pls.' Mot. for Summ. J. (Red. Version) at 5 & Ex. D.) In accepting the NORA, Plaintiffs did not request a due process hearing, pre-hearing conference or mediation. Id.

At the conclusion of the March and April 1998 IEP meetings, the School District and Plaintiffs also agreed to explore alternative placements for Christopher P. outside the School District for the 1998-1999 school year. (Pls.' Mem. of Law in Support of Mot. for Summ. J. at 3; Def.'s Mem. of Law in Opp. to Pls.' Mot. for Summ. J. (Red. Version) at 5.) The School District presented options to the Plaintiffs, including placement in the Upper Merion School District, placement in another school district or placement at an approved private school.<sup>2</sup> (Def.'s

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<sup>2</sup> "Approved" schools are those which have been approved by the State Department of Education for providing special education services. (Def.'s Mem. of Law in Opp. to Pls.' Mot.

Mem. of Law in Opp. to Pls.' Mot. for Summ. J. (Red. Version) at 6.) Plaintiffs considered the various educational placements, and in May 1998, informed the School District that they were considering Hilltop Preparatory School ("Hilltop"), a non-approved private school. Id. at 6 & Ex. F. On July 1, 1998, Christopher P. was accepted at Hilltop. Id. at 7 & Ex. G. On July 7, 1998, Plaintiffs sent a letter advising the School District that they had determined that Hilltop was the most appropriate educational facility. (Id. at 7 & Ex. E; Pls.' Mem. of Law in Support of Mot. for Summ. J. at 4.) On July 9, 1998, an IEP meeting was held and the School District issued a Notice of Recommended Assignment ("NORA") for full-time placement at Hilltop. (Pls.' Mem. of Law in Support of Mot. for Summ. J. at 7.) Thus, all parties agreed to alternative placement of Christopher P. prior to the due process hearing which was scheduled to be held on July 13, 1998. (Pls.' Supp. Aff. in Support of Pls.' Mot. for Summ. J. at Ex. 1.)

Plaintiffs contend that they achieved alternative educational placement because they were represented by counsel, rather than through a normal evaluative process with the School District. (Pls.' Mot. for Summ. J. at 2.) Consequently,

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for Summ. J. (Red. Version) at 6-7.) By law, the School District is required to determine that placement in a least restrictive setting, such as placement in a public school or an approved private school, are inappropriate prior to considering placement in a non-approved private school. Id.

Plaintiffs assert that they are entitled to an award of attorneys' fees.

## **II. LEGAL STANDARD**

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Id. In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (citation omitted).

## **III. DISCUSSION**

The issue before the court is whether Plaintiffs are entitled to an award of attorneys' fees pursuant to the IDEA.

The IDEA provides that "[i]n any action or proceeding brought under this section, the court in its discretion, may award reasonable attorneys' fees as part of the cost to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B).

The Third Circuit has set forth standards to apply in determining whether a party is "prevailing" in an IDEA case. Wheeler v. Towanda Area Sch. Dist., 950 F.2d 128, 131 (3d Cir. 1991). Under the two-part test in Wheeler, the court must determine: (1) whether the relief requested was achieved and (2) whether there was a causal connection between the litigation and obtaining relief from the defendant. Id.

Without analyzing the nature of the relief sought to determine whether it was obtained under part one of the test, the court concludes that there is a genuine dispute of material fact as to whether there was a causal connection as required under part two. In Wheeler, the court stated:

"Litigation is causally related to the relief obtained if it was a materially contributing factor in bringing about the events that resulted in obtaining the desired relief . . . . Litigation can be a material contributing factor if it changed the legal relationship of the parties such that defendants were legally compelled to grant relief."

Id. at 132 (citation omitted). Here, Plaintiffs concede that they "never had to venture into the IDEA Due Process appeal process" to attain the relief sought. (Pls.' Mem. of Law in

Support of Mot. for Summ. J. at 9.) Based on the evidence presented, Plaintiffs may have achieved alternative educational placement as a normal part of the re-evaluation and IEP process rather than because they were represented by counsel. Viewing the record under the standard required, the evidence shows that the School District's behavior appears to have remained constant at all times towards Plaintiffs. A genuine issue of material fact remains as Plaintiffs have failed to prove a causal connection between the litigation and the relief obtained. Accordingly, Plaintiffs' motion for summary judgment will be denied.

#### **IV. CONCLUSION**

For the reasons set forth above, the court will deny Plaintiff's motion for summary judgment.

An appropriate Order follows.

