

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

T.F. and F.F., individually : CIVIL ACTION
and on behalf of their son, T.F.:
 :
v. :
 :
NORTH PENN SCHOOL DISTRICT : NO. 98-6645

M E M O R A N D U M

WALDMAN, J.

August 17, 1999

Introduction

This is an action pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1491o, to recover attorney fees incurred in the course of administrative proceedings. The only issues are whether plaintiffs were "prevailing parties" as that term is defined by the IDEA and, if so, to what extent they are entitled to recover fees. The court has jurisdiction pursuant to 20 U.S.C. § 1415(I)(3). A bench trial was conducted on August 9, 1999. The court now sets forth the pertinent findings of fact and conclusions of law.

Findings of Fact

The younger T.F. was born on May 1, 1981 and is presently 18 years of age. He resides with his parents, plaintiffs T.F. and F.F., in North Wales, Pennsylvania. The younger T.F.'s residence is within the jurisdiction of defendant, the North Penn School District. Defendant is a public entity governed by the IDEA. The younger T.F. has now received his high

school diploma and is no longer on defendant's attendance rolls.

The younger T.F. was diagnosed with dyslexia, a reading disability, and dysgraphia, a writing disability. He was eligible for special education services from defendant.

From the time they moved to North Wales in November 1995, T.F.'s parents periodically expressed to defendant their concern about his need for transition services consistent with the IDEA for the time after his sixteenth birthday. The younger T.F. turned sixteen in 1997. Defendant did not provide any transition planning.

In September 1997, plaintiffs filed a state administrative complaint concerning, inter alia, the lack of transition planning. The state found defendant to be in noncompliance with its obligations under the IDEA. Defendant was directed to develop a transition plan for the younger T.F. It did not do so. Defendant was again found to be in noncompliance in February 1998 following a subsequent administrative complaint regarding the lack of transition planning.

In September 1998, defendant produced a 1998-99 individualized education plan (IEP) without notice to or participation by plaintiffs. That plan omitted several accommodations present in previous IEPs developed with plaintiffs' participation. The new plan changed his placement from "resource room" to "itinerant," did not provide for home use

of certain assistive technology devices, eliminated the provision of highlighted material in classroom texts and eliminated review of assignments by a teacher. Plaintiffs objected.

By correspondence of September 14 and September 23, 1998, defendant agreed to revise the younger T.F.'s IEP to incorporate key points of the Wilson methodology with regard to reading instruction. Plaintiffs still objected to the other noted changes in the IEP and the continued failure to provide transition planning services.

On October 6, 1998, plaintiffs requested an IDEA due process hearing. Defendant thereafter advised plaintiffs that a meeting at which transition services planning would be addressed had been scheduled for October 19, 1998. Plaintiffs received notice of this meeting only several days beforehand and were unable to adjust their work schedules to attend. They requested that the meeting be postponed. Defendant agreed.

Defendant nevertheless conducted a meeting on October 19th at which an individualized transition plan was developed in plaintiffs' absence. Plaintiffs remained dissatisfied.

On November 13, 1998, defendant sent plaintiffs a written offer of settlement. Defendant offered to "further define the reading program identified in the IEP" developed without plaintiffs' participation, but otherwise proposed essentially the same IEP to which they had objected.

An IDEA due process hearing was scheduled for November 23, 1998. Dr. Joseph Rosenfeld, a professor of school psychology at Temple University, was the assigned hearing officer. On that date, before Dr. Rosenfeld begin to hear evidence, the parties placed on the record an agreement by which the 1998 IEP was declared "null and void" and the prior IEP, in slightly modified form, was to be used unless a new one was developed by the IEP Team. Dr. Rosenfeld executed a report and order on November 28, 1998 reflecting the terms of this agreement.

Plaintiffs then requested that defendant reimburse them for the attorney fees and costs they had expended. Defendant took the position that plaintiffs were not "prevailing parties" under the IDEA and declined the request for reimbursement.

Defense counsel stipulated and the court thus finds that the hours expended and the \$165 hourly fee charged by plaintiffs' counsel were reasonable given the services performed and prevailing market rates for attorneys of experience, skill and standing comparable to that of Mr. Bennett.

Conclusions of Law

A "child with a disability" who resides in a jurisdiction which accepts federal IDEA funding is entitled to a "free appropriate public education." See 20 U.S.C. § 1412(a)(1).

Local school districts must have in place at the beginning of each school year for each child with a disability in its jurisdiction an "individualized education program" (IEP). See 20 U.S.C. § 1414(d)(2)(A). An IEP is a "written statement for each child with a disability that is developed, reviewed and revised" in accordance with 20 U.S.C. § 1414. It includes a statement of the child's present levels of educational performance; a statement of measurable annual educational goals; a statement of how the child's progress toward those goals will be measured, and how the child's parents will regularly be informed of the towards those goals; an explanation of the extent, if any, to which the child will not be participating with nondisabled children in regular classes; a statement of special education and related services to be provided to the child; and, a statement of the program modifications or supports for school personnel that will be provided for the child. See 20 U.S.C. § 1414(d)(1)(A).

The IEP is to be prepared by an "IEP Team." The team members are to include the child's parents; at least one of the child's regular-education teachers, if any; at least one special education teacher or provider; an appropriate representative of the local educational agency; at the discretion of the parents or agency, other individuals with "knowledge or special expertise

regarding the child"; and, whenever appropriate, the child. See 20 U.S.C. § 1414(d)(1)(B).

For children with disabilities who are 16 years of age or older, the IEP is to include "a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages." See U.S.C. § 1414(d)(1)(A)(vii)(II).

School districts subject to the IDEA are required to provide certain procedural safeguards to ensure that children with disabilities within their jurisdictions receive the free appropriate public education to which they are entitled. See 20 U.S.C. § 1415(a). Parents of a child with a disability are afforded an opportunity "to examine all records relating to such child and to participate in meetings with respect to identification, evaluation and educational placement of the child." See 20 U.S.C. § 1415(b)(1).

Parents also have a right "to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," see 20 U.S.C. § 1415(b)(6), and to be heard in opposition to a child's proposed placement in an "alternative educational setting." See 20 U.S.C. § 1415(k). Parents who file a complaint under 20 U.S.C.

§ 1415(b)(6) or (k) have a right to an impartial due process hearing. See 20 U.S.C. § 1415(f)(1).

Due process hearings under 20 U.S.C. § 1415(f) are conducted by the appropriate state or local educational agency as determined by pertinent state law or the state educational agency. Id. When the due process hearing is conducted by a local educational agency, a parent who is aggrieved by the hearing officer's findings and decision may appeal them to the state educational authority which must make an impartial review and render an independent decision. See 20 U.S.C. § 1415(g). During a due process hearing and any appeal to a state agency, "any party" has a number of procedural rights including the right to be accompanied and advised by counsel and individuals with special knowledge or training with respect to the problems of children with disabilities, the right to present evidence, the right to confront and cross-examine witnesses and the right to compel the attendance of witnesses. See 20 U.S.C. § 1415(h).

In any action brought under 20 U.S.C. § 1415, subject to certain statutory limitations, the court may award reasonable attorney fees and costs to parents who are deemed "prevailing parties." See 20 U.S.C. § 1415(i)(3)(B). Attorney fees, however, "may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the

discretion of the State, for a mediation [pursuant to 20 U.S.C. § 1415(e)] that is conducted prior to the filing of a complaint [under 20 U.S.C. § 1415(b)(6) or (k)]." See 20 U.S.C. § 1415(i)(3)(D)(ii).

A plaintiff is a "prevailing party" under the IDEA if he has received "merits-based relief that 'materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 251 (3d Cir. 1999) (quoting D.R. v. East Brunswick Bd. of Educ., 109 F.3d 896, 902 (3d Cir. 1997)). Litigation, including the initiation of administrative proceedings, may be deemed to bring relief even in the absence of a favorable administrative decree or court judgment through a "catalyst theory," that is, if "the pressure of the lawsuit was a material contributing factor in bringing about extrajudicial relief. Wheeler by Wheeler v. Towanda Area Sch. Dist., 950 F.2d 128, 132 (3d Cir. 1991).

Attorney fee awards must be based on the hours reasonably expended and on prevailing community rates. Multipliers are not allowed. See 20 U.S.C. § 1415(i)(3)(C).

Attorney fees may not be awarded for services performed after a written offer of settlement made more than ten days before an administrative proceedings if such offer is not

accepted within ten days and the parents fail to obtain relief more favorable than that previously offered. See 20 U.S.C. § 1415(i)(3)(D). This limitation does not apply, however, to parents who were "prevailing parties" and who were "substantially justified" in rejecting a settlement offer. See 20 U.S.C. § 1415(i)(3)(E).

Attorney fees are to be reduced when the parent unreasonably protracts final resolution of the controversy; the fee charged unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of comparable skill, reputation and experience; the time spent and services furnished were excessive in view of the nature of the action or proceeding; or, the parent's attorney did not provide the school district with the appropriate information in the due process complaint in accordance with 20 U.S.C. § 1415(b)(7). See 20 U.S.C. § 1415(i)(3)(F). These reductions do not apply, however, when the state or local educational agency has unreasonably protracted the final resolution of the action or proceeding "or there was a violation of this section." See 20 U.S.C. § 1415(i)(3)(G).

A plaintiff may be considered a "prevailing party" even if he does not receive the identical relief he originally demanded, "provided the relief obtained is of the same general type." G.M. ex rel. R.F. v. New Britain Bd. of Educ., 173 F.3d

77, 81 (2d Cir. 1999). The relief need not be judicially ordered. Rather, "voluntary action by the defendant" such as a binding settlement or consent decree, may signify that the plaintiff is the prevailing party, even in the absence of a final judgment." Payne v. Bd. of Educ., Cleveland City Schools, 88 F.3d 392, 397 (6th Cir. 1996). Total victory, particularly when the parties have settled, is not required as it would be inconsistent with the "generous formulation" of the prevailing party standard set forth by the Supreme Court. See G.M., 173 F.3d at 83.

Conversely, nominally favorable settlements or judicial rulings which have "no intrinsic value" and which amount merely to "tactical victories in what turns out to be a losing war" do not entitle a plaintiff to an award of attorney fees. Jodlowski v. Valley View Community Sch. Dist. #365-U, 109 F.3d 1250, 1254 (7th Cir. 1997). "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." Texas State Teachers' Ass'n v. Garland Independent School Dist., 489 U.S. 782, 792-93 (1989); Payne, 88 F.3d at 397. "Success" on the merits which is purely technical or insignificant compared to the relief sought may compel the conclusion that the only reasonable award is zero. Jodlowski,

109 F.3d at 1255; Monticello Sch. Dist. No. 25 v. George L., 102 F.2d 895, 907 (7th Cir. 1996).

Verdict and Judgment

Plaintiffs were "prevailing parties" under the IDEA.

Plaintiffs reasonably believed that defendant was not complying with its obligations to provide transition planning. The state twice found defendant to be in noncompliance. After requesting a due process hearing, plaintiffs secured a binding agreement and order to provide transition planning services. This materially altered the parties' legal relationship.

Defendant's suggestion that plaintiffs were not thereby "prevailing parties" because T.F. never did receive transition planning is rejected. To do otherwise would create a perverse result. Any defendant could deny any plaintiff "prevailing party" status in a fee shifting case by ignoring or delaying implementation of an agreement or of administrative or court orders providing the relief sought. The court doubts that Congress contemplated that once a right to relief is secured it can effectively be negated for fee-shifting purposes by the defiance or dilatoriness of a defendant. Moreover, plaintiffs secured other meaningful relief.

Plaintiffs objected to the omission of certain accommodations in the 1998-99 IEP. After the request for a due process hearing, plaintiffs secured an agreement and order to

declare the offending IEP "null and void" and to utilize a previous acceptable IEP developed with plaintiffs' participation. This success was significant and clearly appears to be causally related to the initiation of administrative proceedings.

Plaintiffs did not unreasonably protract a resolution of the controversy regarding a lack of transition planning and changes in the IEP. Plaintiffs were justified in rejecting defendant's offer of settlement which proposed use of essentially the same IEP defendant had developed without plaintiffs' participation and to which they had objected. Plaintiffs obtained relief more favorable than that offered.

Plaintiffs are entitled to an award of attorney's fees. As plaintiffs acknowledged at trial, costs and attorney fees incurred after August 1, 1999 were not particularized, making it impossible for the court conscientiously to determine the reasonableness of such costs and fees. Plaintiffs are entitled to recover the \$13,332 in attorney fees incurred for 80.8 hours of services at \$165 per hour for which itemized documentation was provided.

Accordingly, judgment will be entered for plaintiffs in this action in the amount of \$13,332.00. An appropriate order will be entered.

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ORDER and JUDGMENT

AND NOW, this day of August, 1999, consistent
with the court's findings of fact, conclusions of law and verdict
in this case as set forth in the accompanying memorandum, **IT IS**
HEREBY ORDERED that **JUDGMENT is ENTERED** in the above action for
the plaintiffs and against the defendant in the amount of
\$13,332.

BY THE COURT:

JAY C. WALDMAN, J.