

**PLAINTIFFS ARE ENTITLED TO REASONABLE
COUNSEL FEES AND COSTS IN ACCORDANCE
WITH 20 U.S.C. § 1415 (i) (3) (B).**

Under 20 U.S.C. § 1415 (i) (3) (b), reasonable attorney's fees can be awarded to the parents or guardian of a handicapped child or youth who is the prevailing party. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Court defined a prevailing party as one who "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley*, 461 U.S. at 433 To prevail under this standard, the party bringing the suit must demonstrate "a change in the legal relationship between the parties as a result of the litigation, or, in other words, that the lawsuit was a 'catalytic, necessary or substantial factor in obtaining relief.'" *Holmes v. Sobel*, 18 IDELR 53, 54 (W.D.N.Y. 1991) citing *Gerena-Valentin v. Koch*, 739 F. 2d. 755, 758-59 (2nd Cir. 1984) In order to prevail, a party need not obtain a judicial decision. The language of the Individuals with Disabilities Education Act (IDEA), and its legislative history, make it clear that the Court has authority to award attorney's fees to parents who are successful in either administrative proceedings or judicial actions, and that parents who are successful in administrative proceedings may apply to the Court for attorney's fees. See *Burpee v. Manchester School District*, 661 F. Supp. 731 (D.N.H. 1987) In fact, the Third Circuit in *Baumgartner v. Harrisburg Housing Authority*, 21 F. 3d 541 (3d. Cir. April 7, 1994) held that Plaintiffs, to be eligible for reimbursement of reasonable attorney's fees and costs, do not even have to obtain a judgment, enter into a consent decree, or even obtain a formal settlement so long as they prove that the suit accomplished its objective. See *E.M., Individually, and as Guardians ad litem of L.M. v. Millville Board of Education*, 849 F. Supp. 312 (D.N.J. 1994) footnote #3 citing *Baumgartner, Supra*. In the case at bar, a formal settlement was incorporated into a final judgment of the Administrative Law Judge.

**PLAINTIFFS ARE THE PREVAILING PARTY
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**SIGNIFICANT ISSUE IN LITIGATION WHICH HAS
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THE CROSS-PETITION FOR DUE PROCESS.**

The Board's initial filing for relief before the Office of Administrative Law was its application for emergency relief, which was supported by the Certification of the Director of Student Personnel Services, Sharon Toriello. Paragraph 23 of the Certification (EXHIBIT B) crystallizes the Board's position, to wit: an order was sought declaring that the Board was offering a free and appropriate program to D.C., and to have D.C. immediately placed out of district at the Park Lakes School for the remainder of the 1999-00 school year over parental objection. Opposing pleadings were filed by Plaintiff, and on the return date, March 30, 2000, after a conference with the Administrative Law Judge assigned to this matter (Honorable Thomas E. Clancy), the Board withdrew its application for emergency relief and agreed to file a formal petition for due process. Thus, the end result of the initial filing on behalf of the Board was entirely favorable to Plaintiffs, and their son, D.C., was allowed to remain in the public school setting.

The second pleading filed by the Board was its Verified Petition dated April 11, 2000 (EXHIBIT G). This due process petition specifically set forth what the Board's position was at the commencement of the due process hearing. In no uncertain terms, the Board made it absolutely clear that it could no longer provide D.C. with an appropriate program in district. Not only did the petition allege that "D.C.'s current program does not adequately address his need for social development, prevocational planning, behavioral and daily living/life skills or recreational activities ...", but most significantly alleged that "The CST does not believe that an appropriate in-district program can be developed despite the multiple program variations and accommodations which have been implemented, D.C.'s current program is not meeting his educational needs." This statement that an appropriate in-district program can not be developed is significant, particularly in view of the Board's obligation to provide D.C. with an education in the least restrictive environment.

Plaintiff's response to the suggestion that an appropriate program could not be developed for D.C. in district was set forth at page 10 of EXHIBIT H, the Cross-Petition for Due Process. Reference is specifically made to the Congressional preference for inclusion which is embodied in *N.J.A.C. 6A:14-4.2*, which is set forth verbatim at page 10 of EXHIBIT H. This provision of the New Jersey Administrative Code is based upon *20 U.S.C. § 1412 (a) (5)*, which is captioned "Least Restrictive Environment". That requirement states:

"A state is eligible for assistance under this chapter for a fiscal year if the state demonstrates to the satisfaction of the Secretary that the state has in effect policies and procedures to ensure that it meets each of the following conditions: ...

(5) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

The 3rd Circuit has commented that: "As numerous courts have recognized, this provision sets forth a 'strong Congressional preference' for integrating children with disabilities in regular classrooms." *Oberti v. Board of Education*, 995 F.2d 1204, 1213 (3d Cir. 1993). The federal regulations further explain the least restrictive environment mandate by prohibiting separate schooling or removal from the regular educational environment only in cases where the severity of the disabling condition requires same. *C.F.R.300.550* states in part:

"(b) Each public agency shall ensure: (1) to the maximum extent appropriate, handicapped children ... are educated with children who are not handicapped; and (2) that special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicapped is such

that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

The Board's position in its Petition for Due Process was that the nature and severity of D.C.'s handicap was such that education in a public school could not be achieved satisfactorily. This Petition for Due Process filed by the Board was dated April 10, 2000.

The Cross-Petition was filed on April 27, 2000 (EXHIBIT H), and alleges in part that Plaintiffs " ... were never told [before Carol Amato's resignation] that their son could not be served or adequately educated within the district." (EXHIBIT H, paragraph 11). Plaintiffs' position in their Cross-Petition for Due Process was that although D.C.'s current program was lacking, he ought not be removed from his public school placement. In no uncertain terms Plaintiffs noted that despite the lack of an appropriate program, D.C. was still receiving some benefit from his placement, which could be greatly expanded to become a free, appropriate public education if only the Board would perform its job consistent with law (EXHIBIT H, paragraph 12). Voluminous examples of notes written by D.C.'s aide, an employee of the Board, showed involvement in the school program, significant educational benefit, and supported Plaintiffs' position that their son should not be removed from a public school setting (EXHIBIT H, paragraph 12, set forth at pages 11-14).

The matter was conferenced over a several-day period before the Administrative Law Judge assigned to hear the case, and those efforts resulted in a Stipulation of Settlement that was incorporated into a final order of the Court. The Stipulation of Settlement is attached to Plaintiffs' Complaint as EXHIBIT A, and acknowledges in the preamble that the parties have resolved their differences resulting in the Board withdrawing its Petition for Due Process, and Plaintiffs withdrawing its Cross-Petition for Due Process. The parties further agreed that D.C.'s program and placement will be governed by an agreed-to IEP, which is attached hereto as EXHIBIT J. The IEP calls for continued placement within the Livingston Public School District. Paragraph 4 of the

Stipulation of Settlement states that: "Although it is Petitioners'/Respondent's position that the annexed IEP is appropriate and meets the standards set forth in the Individuals with Disabilities Education Act and corresponding New Jersey statutes and regulations, the Child Study Team continues to believe that an out-of-district placement would better serve D.C.'s unique needs." The Stipulation of Settlement is dated June 17, 2000. Therefore, in the space of approximately eight weeks, the Board went from a position that it could not possibly develop a program in district to a determination that, in fact, it could and did develop an appropriate in-district placement. Paragraph 15 of Plaintiffs' Cross-Petition (EXHIBIT H) notes that: "For this child, D.C.'s best interests will be served by continuing him in his current school, and providing him with an appropriate program and related services such that his education would offer him the opportunity for a meaningful education and significant learning." This is exactly what came to pass, and on the primary threshold issue of school placement, Plaintiffs prevailed.

Plaintiffs first request for relief was a determination that the district's proposed IEP was inappropriate. The second request for relief was for a determination that the appropriate placement in the least restrictive environment for D.C. was in his home school with appropriate supports and services. Paragraphs 3 and 4 of the relief requested sought the development of a program containing the LINKS TO LANGUAGE methodology, while also enabling D.C. to enjoy non-academic activities "with his non-disabled peers, such as gym, lunch, music, recess, art, assemblies, field trips, and the like." (EXHIBIT H, page 17, paragraph). Paragraph 5 of the relief requested on behalf of Plaintiffs sought reformation of the proposed IEP in order to comply with the requirements of New Jersey law, and, finally, a determination that D.C. was entitled to an extended school year, which would continue his 10-month program into the summer (EXHIBIT H, page 17, paragraphs 5 and 6). A letter written by Board counsel to Plaintiffs' counsel dated June 9, 2000 (EXHIBIT I) summarizes some of the IEP changes that were agreed to as a result of the settlement. That letter states in part as follows:

- "1. The IEP has been revised at Part B-3 to reflect the establishment of baseline data in September 2000.
2. All objectives contained in the IEP (Part A-4 through Part A-10) are objectively measurable consistent with the New Jersey Administrative Code.
3. Pam Payne has been contacted and will be preparing the goals and objectives in the area of communication.
4. As set forth on Part B-1, the related service of individual speech therapy will be administered by Pam Payne for up to four (4) hours per week.

If the IEP is acceptable, we will affix a copy to the Stipulation of Settlement when we receive and return same to your office."

The parties agreed that Pam Payne would prepare the goals and objectives in the area of communication (D.C.'s most significant disability), and recognition of her prior work with D.C. is reflected on page 4 of the agreed-to IEP (EXHIBIT J) under "Language and Communication Needs. The parties also agreed that Pam Payne would continue her involvement, at considerable Board expense, and be responsible for implementing her program for up to four hours each week, double the prior amount of time. The IEP further contains a statement of least restrictive environment and its rationale on the 13th page, which states as follows:

"The program and services offered in this IEP provide [D.C.] with a low student-teacher ratio, the opportunity for close monitoring and immediate feedback, individual pacing of instruction throughout the day, and a high degree of structure and supervision. Additionally, [D.C.'s] special needs for a classroom aide, multi-grade curriculum, social skills training, reinforced instruction, and structuring of work assignments can be accomplished in this setting. This placement, therefore, is reasonably designed and calculated to confer educational benefit to [D.C.]."

The Child Study Team recommended an out of district placement for [D.C.] as the least restrictive environment. This in-district placement is the result of a settlement agreement through the Office of Administrative Law."

The 14th page of EXHIBIT J states that:

"Extended school year is deemed appropriate to prevent skill regression. Student will be provided with an aide at the district's summer special education program to work on reinforcing learned materials as per his IEP and will continue to receive speech and language services as per the IEP."

As set forth above, the Board had initially agreed to implement the LINKS TO LANGUAGE program and hired a speech therapist to provide that instruction in district.

The 15th page of EXHIBIT J states:

"Child Study Team and teachers will meet for a staffing with specials teachers, lunch time aide and others involved in [D.C.'s] program to ensure consistency in the delivery of services and to facilitate effective communication with [D.C.] in a manner consistent with, but not limited to, that used in school since January 2000 and the goals and objectives contained herein.

Every effort will be made to engage [D.C.] in verbal interaction in a manner consistent with, but not limited to, that used in school since January 2000 and the goals and objectives contained herein.

As part of the public school, [D.C.] will attend assemblies and specials. We will adapt content of more difficult specials to make them more meaningful to [D.C.]. Every effort will be made so that [D.C.] does not 'zone out' or become frustrated.

Goals and objectives in the are of Communication shall be prepared by Pamela Payne.

All goals and objectives contained on pages A4 to A10 of this document are objectively measurable consistent with N.J. Administrative Code."

D.C.'s program, therefore, was made appropriate, objectively measurable, and consistent with his prior program, utilizing the services of Pam Payne, who at Board expense instructs D.C. using the LINKS TO LANGUAGE methodology.

A comparison of the parties' positions prior to the litigation, and a careful scrutiny of the Stipulation of Settlement leads to the conclusion that Plaintiffs' have prevailed on significant threshold issues, and as a result have become the prevailing party in this matter.

Hensley, Supra, suggests that a mathematical approach in comparing the total number of issues in the case with those actually prevailed upon provides little aid in determining what is a reasonable fee considering all the circumstances. Footnote 11. While the extent of Plaintiffs' success is certainly a factor in determining the proper amount of attorney's fees, *Hensley* noted at page 435 that:

"Instead, the District Court should focus on the significance of the overall relief obtained by the Plaintiff in relationship to the hours reasonably expended on the litigation."

In Footnote 9, the *Hensley* Court reiterated the fact that the District Court may also consider certain other factors that were set forth in *Johnson v. Georgia v. Highway Express, Inc.*, 488 F.2d 714, 717-719 (CA5 1974). In the *Johnson* matter, the Court noted that there are twelve factors which impact upon the amount of the fee. These factors are set forth at length in Footnote 3 of the *Hensley* decision and include:

"(1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases."

In the case at bar, all these factors would suggest complete and total reimbursement of attorney's fees and costs.

As a result of this litigation, Plaintiffs have been vindicated on every issue relative to the inappropriateness of D.C.'s program, and providing D.C. with the opportunity to

remain in a public school program and enjoy his education in the least restrictive environment. Looking at the totality of this case, D.C. has won a significant victory.

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Plaintiffs prevailed on the issues of reimbursement of tuition and related services attributable to C.D.'s placement at the Grove School, the Court finding that for nineteen months Defendant Board of Education failed to provide C.D. with a free, appropriate public education, and for obtaining a Court award of nineteen months of compensatory education. There can be no doubt but that the due process lawsuit was a " ... catalytic, necessary and substantial factor in obtaining relief." Further, should this Honorable Court award Plaintiffs some or all of the relief requested, they need to be considered prevailing parties also in this Superior Court action.

As set forth above, Plaintiffs were represented by a lay advocate and as such are not entitled to reimbursement of attorney's fees as there were no attorney's fees for that part of the case. They did, however, incur expert witness fees in the amount of \$2,500.00, which represented fees paid to Dr. Tancer for her testimony. Although demand has been made upon Defendant for reimbursement of same, that has not been forthcoming. A detailed Certification of Services is attached hereto as EXHIBIT C.

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