E.W. ex rel. B.W., Plaintiffs v. Millville Bd. of Educ., Defendants
U.S. District Court, New Jersey
96-cv-3959
February 24, 1997

Joseph H. Rodriguez, U.S.D.J.

Counsel for Parents: Staci J. Greenwald, Sussan and Greenwald, Spotswood, NJ.

Counsel for District: Keith Smith, McAllister, Hyberg & White.

This matter is before the court on motion of plaintiffs, E.W. and C.W., for an order of summary judgment pursuant to Fed.R.Civ.P. 56. The court, having considered the submissions of the parties, and for the reasons set forth below, grants plaintiffs' motion for summary judgment and awards attorney's fees and costs in the amount of $8,082.25.

Background

B.W. is a twelve-year-old student in one of defendant Millville Board of Education's ("MBE") public schools. As early as first grade, he experienced difficulty in school, and was later diagnosed with symptoms of Attention Deficit Hyperactivity Disorder. *See* Williams Certif. at Ex. A, B. Therefore, on March 22, 1995, plaintiffs E.W. and C.W., his parents, requested that B.W. be referred to the Child Study Team ("CST").

On June 19, 1995, the CST performed an educational evaluation of B.W. Although he received well below average test results, the CST, on July 24, 1995, determined that B.W. was "working within his potential" and thus declared him ineligible for special education services. Williams Certif. at Ex. E. Dissatisfied with the CST results, E.W. and C.W., on September 11, 1995, requested a reconsideration of the decision. On September 19, 1995, this request was denied and MBE requested a due process hearing "so that the [CST] c[ould] show their evaluation was appropriate." Williams Certif. at Ex. G (Letter from Dr. Richard A. Shain to Barbara Gantwerk (Sept. 19, 1995) at 1) . However, MBE noted that the case "may be appropriate for mediation." *Id.*

Pursuant to this request, a mediation conference was held on December 4, 1995, at which, according to plaintiffs, both parties maintained their previous positions with respect to B.W.'s classification. However, at the conclusion of the conference, the plaintiffs withdrew their request for independent evaluations, with the parties agreeing that plaintiffs would obtain individual evaluations and that MBE would conduct additional testing. *Id.* at Ex. H. After reviewing the independent evaluations and the results of the additional MBE testing, the CST, on February 9, 1996, determined that B.W. was, in fact, eligible for special education services. *Id.* at Ex. K; *see id.* at Ex. I, J. An appropriate individualized education program ("IEP") was prepared, classifying B.W. as being perceptually impaired. After making revisions at the request of plaintiffs' counsel, the final IEP was agreed to by the parties. *See id.*, at Ex. L-Q.

On August 19, 1996, plaintiffs instituted the present action, seeking recovery for the attorney's fees and costs incurred in declaring B.W. eligible for special services. Soon thereafter, on January 17, 1997, plaintiffs filed a motion for summary judgment, claiming that, pursuant to the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.,* fees and costs in the amount of $8,115.25 are recoverable as a matter of law. MBE, in opposition, claims that plaintiffs are not entitled to recovery of fees and costs because, since there was ultimately no dispute between the parties, plaintiffs could not be considered "prevailing parties" within the meaning of the IDEA. In the alternative, MBE argues that if fees and costs are recoverable, they should be reduced. This motion is presently before the court.

Discussion

A. Summary Judgment Standard

The entry of summary judgment is appropriate only when "there is no genuine issue of material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). Whether a fact is indeed "material" is determined by the controlling substantive law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). If a disputed fact exists that under the controlling substantive law might affect the outcome of the suit, then entry of summary judgment is precluded. *Id.*

B. Recovery of Fees and Costs Under the IDEA

1. Prevailing Party Analysis

Pursuant to the IDEA, "[i]n any action or proceeding brought under [the act], the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a

disability who is the prevailing party." 20 U.S.C. § 1415(e)(4)(B). "The standard for determining whether a party has prevailed [under the IDEA] is well-settled. A prevailing party must succeed on 'any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" ***Wheeler by Wheeler v. Towanda Area Sch. Dist.,*** **950 F.2d 128, 131 (3d Cir. 1991) (quoting** ***Hensley v. Eckerhart,*** **461 U.S. 424, 434 (1983)). In accordance with this standard, courts in this circuit apply a two part test: (1) whether plaintiffs achieved relief, and (2) whether there is a causal connection between the litigation and the relief from the defendant.** ***Id.***

The first prong---whether the parents achieved relief on any of their claims---"involves a commonsense comparison between the relief sought and obtained." ***Jones v. Kittatinny Regional High Sch. Bd. of Educ.*** **1992 WL 693831 at 3 (D.N.J. 1992). As long as the plaintiffs achieve some of the benefit sought, they can be a prevailing party for the purpose of a fee award under the IDEA.** ***Wheeler,*** **950 F.2d at 131;** ***NAACP v. Wilmington Med. Ctr., Inc.,*** **689 F.2d 1161, 1166 (3d Cir. 1982),** ***cert. denied,*** **460 U.S. 1052 (1983).**

The present action takes root in plaintiff's request for a CST evaluation of B.W. to classify him as eligible for special services. On February 9, 1996, after mediation, B.W. obtained that classification. Therefore, the first prong has been satisfied.

With respect to the second prong, "[l]itigation is casually related to the relief obtained if it was a material contributing factor in bringing about the events that resulted in obtaining the desired relief." ***Wheeler,*** **950 F.2d at 132 (citing** ***Institutionalized Juveniles v. Secretary of Pub. Welfare,*** **758 F.2d 897, 916 (3d Cir. 1985)). Litigation is a material contributing factor if, as a result, the defendants are legally compelled to afford the relief sought.** ***Id.*** **In the alternative, causation can be established if, short of a final order in the action, the pressure of suit was a material contributing factor in bringing about relief.** ***Id.*** **(citing** ***Institutionalized Juveniles,*** **758 F.2d at 917). In either event, the suit "need not be the sole cause of relief."** ***Id.***

In this case, although no due process hearing or civil action was filed to challenge the CST determination, the threat of litigation by plaintiffs---by hiring an attorney after challenging the appropriateness of the CST's original classification---was a material contributing factor in bringing about the desired relief. Absent this action, B.W. would likely not have been classified as eligible for special education services by the CST. ***See*** **Williams Certif. at Ex. G ("The [CST] feels their evaluation was appropriate and conducted in an appropriate manner."). Thus, contrary to MBE's unsupported assertions, the second prong of the**

test is met---clearly, settlement during mediation and prior to a due process hearing is a sufficient basis for recovery of attorney's fees under the IDEA. *See, e.g., E.M. v. Millville Bd. of Educ.,* 849 F.Supp. 312, 314-15 (D.N.J. 1994) ("Most courts, including those in this district, permit parents who prevail through settlement to recover attorney's fees, even if an administrative hearing was never held.").

As a result, plaintiffs have established that they are "prevailing parties" entitled to attorney's fees within the meaning of 20 U.S.C. § 1415(e)(4)(B).

2. Fee and Cost Analysis
a. Reasonableness of Fees and Costs

Under the IDEA, "fees awarded [to a prevailing party under § 1415(e)(4)(B)] 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(e)(4)(C). However, the court retains discretion to reduce the amount of fees awarded if the hourly rate claimed is deemed excessive. *Id.* § 1415(e)(4)(F); *Field v. Haddonfield Bd. of Educ.,* 769 F.Supp. 1313, 1322 (D.N.J. 1991). Accordingly, we must determine whether the fees and costs requested by plaintiffs in their accompanying affidavits are reasonable.

MBE argues that the rates sought by plaintiffs' counsel are excessive. Particularly, they argue that because plaintiffs contracted with counsel for the discounted rate of $175 per hour, recovery of higher hourly rates for services is improper. In *Egg Harbor Township Board of Education v. S.O.,* 19 IDELR 15 (D.N.J. Aug. 19, 1992) (Civ. A. No. 90-1043), the late Honorable John F. Gerry was faced with the same factual scenario. Noting that "the purpose of the fee shifting provision of the IDEA is 'to place parents on an equal footing with school districts in terms of their ability to . . . litigate children's rights as they are protected under the Act,'" and rejecting any distinction between private counsel and public interest groups with respect to public interest law, Judge Gerry held that the attorney's full hourly fee, not the reduced fee charged, was recoverable if reasonable. We concur with the logic and reasoning behind this conclusion. Accordingly, plaintiffs are not limited in recovery to the reduced $175 per hour rate charged by counsel. Whether counsel's full rate is recoverable, however, depends upon whether the rates are reasonable.

With respect to the reasonableness of the hourly rates sought, cases within this district, in fact, within this vicinage, which have considered this issue support the conclusion that the $190 per hour rate requested in this case is not excessive. *See K.A.L. v. Salem Bd. Of Educ.,* 1994 WL

327160 (D.N.J. Jun. 21, 1994) (allowing an award of $235 per hour); *see also Bernardsville Bd. of Educ., v. J.H.,* 42 F.3d 149, 160 (3d Cir. 1994) (affirming Judge Fisher's holding that a $235 per hour rate was not excessive "in light of comparable prevailing rates"). Although MBE, in support of its contention, cites several cases from other jurisdictions to support a reasonable rate of $150 per hour, the IDEA allows awards of attorneys fees "based on rates prevailing in the community in which the action or proceeding arose. . . . " 20 U.S.C. § 1415(e)(4)(C). They cite no authority, nor provide any evidence, which indicates that the $190 rate was not comparable to the rate received by others in New Jersey for comparable work. Therefore, the cases cited by MBE are inapposite.

Plaintiffs' counsel, in her affidavit, indicates that she has been practicing law since 1992. During that time, she has exclusively handled issues relating to special education and the IDEA. Greenwald Certif. at ¶ 4. She is a certified teacher of the handicapped, lecturing on a regular basis about special education matters. *Id.* at ¶ 3, 6. Accordingly, we find that the $190 per hour rate sought by plaintiffs' counsel in this case is not excessive. However, plaintiffs have provided no support for the reasonableness of the $265 per hour rate charged by their other counsel, Theodore A. Sussan, Esq. Sussan, in the past, has been awarded a fee of $235 per hour. *See Bernardsville Bd. of Educ. v. J.H.,* 42 F.3d 149, 160 (3d Cir. 1994); *K.A.L. v. Salem Bd. of Educ.,* 1994 WL 327160 (D.N.J. Jun. 21, 1994). Therefore, in the absence of support of the higher rate, plaintiffs are awarded $235 per hour for the 1.1 hours Sussan billed in this case.

MBE also argues that plaintiffs should not be reimbursed for attorney's fees relating to attendance of the IEP conference and revision of the IEP because, by that time, there was no dispute between the parties. However, once again, MBE provides the court with no legal support for this proposition. To the contrary, in view of the record, and the importance of a properly prepared IEP in the context of special education services, recovery of these fees is reasonable. Nothing offered by MBE persuades us otherwise.

Finally, MBE argues that plaintiffs' should not recover the expert fees incurred in obtaining the independent evaluations agreed upon at the December 4, 1995 mediation, as it was the results of additional CST testing, not these reports, which led to the reclassification of B.W. as being perceptually impaired. However, as described above, it was plaintiffs cumulative efforts, including obtaining these reports, which led to B.W.'s reclassification by MBE. As plaintiff notes, this subsequent testing revealed results similar to those available to the CST in making its initial determination. In addition, although MBE states that the independent evaluations obtained by plaintiffs were not

used in classifying B.W. as being perceptually impaired, these reports were at their disposal and appear to have been utilized, in some form, in preparing the IEP. As a result, these costs are recoverable.

Conclusion

For the foregoing reasons:

IT IS ORDERED on this 24th day of February, 1997, that the motion of plaintiffs, E.W. and C.W., for an order of summary judgment pursuant to Fed.R.Civ.P. 56 is GRANTED. Plaintiffs are awarded the sum of $8,082.25 in attorneys fees and costs pursuant to 20 U.S.C. § 1415(e)(4).