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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

S. C., by and through her mother and next friend, K.G. Plaintiff, v. Lincoln County School District, Defendant.	Case No. 6:20-cv-02277-MC **PLAINTIFFS' MOTION FOR ATTORNEY FEES AND COSTS** Pursuant to 20 U.S.C. § 1415(i)(3)(B) and Fed. R. Civ. P. 54(d)

L.R. 7-1(a) CERTIFICATE OF COMPLIANCE

In compliance with L.R. 7-1(a), Plaintiff's counsel hereby certifies she conferred in good faith with Defendant's counsel regarding the issues in dispute, but the parties have been unable to reach agreement. Plaintiff has made an offer of settlement and anticipates the parties will endeavor, in good faith, to resolve this matter over the course of the next two weeks. Plaintiff hopes assistance from the

Court will become unnecessary, but at this point the parties do require the assistance of the Court.

MOTION

Plaintiff S.C., through her mother K.G. and counsel herein, respectfully moves this Court for an award of reasonable attorney fees and expenses in this matter in the amount of $619,816.37. Plaintiff makes this motion pursuant to the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(i)(3)(B), and pursuant to Fed. R. Civ. P. 54(d).

This motion is supported by the following, submitted herewith:

1. Plaintiff's Brief in Support of its Motion for Attorney Fees and Costs.
2. Two declarations of lead counsel, Suzanne M. Gall, in Support of Plaintiff's Motion for Attorney Fees and Costs, and exhibits attached thereto: 1) Declaration of Ms. Gall regarding her own time, and 2) Declaration of Ms. Gall regarding time incurred by co-counsel, Alice K. Nelson (deceased).
3. Declaration of co-counsel Andrée Larose, in Support of Plaintiff's Motion for Attorney Fees and Costs, and attached exhibits.
4. Declaration of Seth Nelson, Esq., Nelson law firm, in Support of Plaintiff's Motion for Attorney Fees and Costs.

5. Declaration of Robert E.L. Bonaparte, Esq., in Support of Plaintiff's Motion for Attorney Fees and Costs, and attached exhibits.
6. Declaration of Brenna Legaard, Esq., in Support of Plaintiff's Motion for Attorney Fees and Costs.
7. Declaration of Mark Martin, Esq., in Support of Plaintiff's Motion for Attorney Fees and Costs.
8. Declaration of Dorene Philpot, Esq., in Support of Plaintiff's Motion for Attorney Fees and Costs, and attached exhibit.
9. Declaration of Tal Goldin, Esq., in Support of Plaintiff's Motion for Attorney Fees and Costs.
10. Declaration of Kelly Gutierrez in Support of Plaintiff's Motion for Attorney Fees and Costs, and attached exhibits.

A summary of the fees and costs, showing a breakdown of the number of hours and rates of each attorney and paralegal and showing recoverable costs incurred by each law firm, is attached to this motion as Exhibit A.

In addition, Plaintiff reserves the right to seek recovery for all work performed in this fee petition proceeding, in an amount to be determined and submitted at the appropriate time. Plaintiff also reserves the right to pursue post-judgment interest at the current applicable rate.

For the reasons set forth herein and in supporting documents, Plaintiff respectfully requests this Court enter an order granting Plaintiff's Petition for Attorney Fees and Costs in the amount of $620,093.52, granting fees and costs for work performed in the present action in an amount to be calculated, and granting post-judgment interest as appropriate at the current applicable rate.

DATED this 1st day of February, 2022.

Respectfully Submitted:

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

S. C., by and through her mother and next friend, K.G. Plaintiff, v. Lincoln County School District, Defendant.	Case No. 6:20-cv-02277-MC **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS** Pursuant to 20 U.S.C. § 1415(i)(3)(B) and Fed. R. Civ. P. 54(d)

Plaintiff submits this memorandum in support of her petition for attorney fees and costs pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(i)(3)(B), and Fed. R. Civ. P. 54(d).

An itemization of each attorney's time spent is attached to the Declarations of Suzanne Gall and Andrée Larose, submitted herewith.

ARGUMENT

I. As Prevailing Parent, K.G. Is Entitled to Reasonable Attorney Fees

IDEA incorporates a fee-shifting provision in its procedural protections.

> . . . the court, in its discretion, may award reasonable attorney's fees as part of the costs –
> (I) To a prevailing party who is the parent of a child with a disability.

20 U.S.C. § 1415(i)(3)(B)(I)(2004).

Plaintiff fully prevailed on her claim that Lincoln County School District denied S.C. a free appropriate public education (FAPE), and she obtained the remedy she requested – placement at Latham Center. After Defendant refused to comply, Plaintiff obtained an appellate decision ordering Defendant to implement the placement. *S.C. v. Lincoln Cty. Sch. Dist.,* 16 F.4th 587 (9th Cir. 2021).

A district court has only narrow discretion to deny fees to parents who successfully litigate IDEA claims. *Park v. Anaheim Union High Sch. Dist.,* 464 F.3d 1025, 1034, 1037 (9th Cir. 2006). Denial of attorney fees "ignore[s] not only the letter of the law, but also the spirit and purpose of allowing attorney's fees in cases where parents have been forced to litigate for years to obtain all or even part of what the [IDEA] requires in the first place." *Id.* at 1034.

A fee award to prevailing parents furthers Congress's purpose in enacting IDEA – ensuring all children with disabilities receive FAPE. *See* 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1)(A), (3)(A); *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*,

137 S. Ct. 988, 999-1000 (2017); *Park,* 464 F.3d at 1034. Congress understood that, absent a fee-shifting framework, many families would face nearly insurmountable odds to succeed with meritorious IDEA claims.

II. Lodestar Fee Is Reasonable

IDEA provides the basis for determining a reasonable fee:

> Fees awarded…shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded . . . .

20 U.S.C. § 1415(i)(3)(C).

Fees are determined using the "lodestar" calculation declared in *Hensley v. Eckerhart*, 461 U.S. 424 (1983. *Aquirre v. L.A. Unified Sch. Dist.,* 461 F.3d 1114, 1121 (9th Cir. 2006). The lodestar calculation multiplies a reasonable number of hours by a reasonable hourly rate. *Hensley,* at 433.

Once calculated, "[t]here is a strong presumption that the lodestar figure represents a reasonable fee." *Morales v. City of San Rafael,* 96 F.3d 359, 363 (9th Cir. 1996). Under this approach, many *Kerr*[1] factors previously applied to adjust a

[1] *Kerr* factors determining reasonableness are: (1) time and labor required, (2) novelty and difficulty of questions, (3) skill required to perform legal services properly, (4) preclusion of other employment due to acceptance of case, (5) customary fee, (6) whether fee is fixed or contingent, (7) time limitations imposed, (8) amount involved and results obtained, (9) experience, reputation, and ability of attorneys, (10) "undesirability" of case, (11) nature and length of professional relationship with client, and (12) awards in similar cases. *Kerr v. Screen Guild Extras, Inc.,* 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied,* 425 U.S. 951(1976).

fee upward or downward have been subsumed into the assessment of reasonableness. *Cunningham v. County of Los Angeles*, 879 F.2d 481, 487-488 (9th Cir. 1988).

A. Hourly Rates Are Reasonable

1. Portland Rates Apply

Fees awarded to a prevailing parent are typically 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). But, when local attorneys are "unwilling or unable to perform because they lack the degree of experience, expertise or specialization required," courts look to hourly rates outside the community. *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992). *Wright v. Tehachapi Unified Sch. Dist.,* 743 Fed. Appx. 125, *126 (9th Cir. 2018) (Central District rates applied in Eastern District IDEA case).

Plaintiff was unable to find attorneys in Newport who represent students in special education litigation or who were willing to take action against the local school district. [Decs. Kelly Gutierrez, ¶ 6; Gall, ¶ 39]. Lead counsel is located in Portland; it is reasonable to apply Portland rates.

2. Rates Requested Are Consistent with Oregon Bar Economic Survey and IDEA Cases

The initial benchmark for determining reasonable hourly rates is the Oregon State Bar Economic Survey. *T.B. v. Eugene Sch. Dist.,* 2016 U.S. Dist. LEXIS

95177, *4 (D. Or. July 21, 2016). The most recent survey, published in 2017, relies on data from 2016.

Counsel's requested rates are in line with the 2017 survey for similiarly experienced attorneys, adjusted for inflation.[2] Prominent attorney and fee expert, Robert Bonaparte, reviewed prevailing rates and the skill, reputation, and experience of each attorney, as did Portland attorney Brenna Legaarde. Both conclude counsel's respective rates are reasonable. [Decs. Bonaparte, ¶¶ 11, 14-19; Legaard, ¶ 22-23].

Throughout this litigation, Ms. Gall had over 16 years' experience. [Dec. Gall, ¶ 34]. For Portland attorneys with 16-20 years of experience, inflation adjusted survey rates range from $290 to $579. A $400 hourly rate falls in the middle of this range.

At the time of litigation, Alice Nelson and Andrée Larose had over 30 years of experience, 44 and 38 years respectively. [Decs. Seth Nelson, ¶ 3; Larose, ¶ 2]. For Portland attorneys with over 30 years' experience, inflation adjusted survey rates range from $346 to $704. A $560 hourly rate falls in the middle of this range.

[2] Rates adjusted using Bureau of Labor Statistics Consumer Price Index calculator, start date December 2016 and end date December 2021. https://www.bls.gov/data/inflation_calculator.htm

The requested rates are also consistent with Ninth Circuit IDEA fee awards. *See, e.g., Wright v. Tehachapi Unified Sch. Dist.,* 2019 U.S. App. LEXIS 26765, *1-2 (9th Cir. 2019) (approving $500 rate for attorney with 19 years' relevant experience); *S.L. v. Upland Unified Sch. Dist.,* Nos. 12-55715, 12-56796, 2015 U.S. App. LEXIS 18756 (9th Cir. 2015) (approving $525 rate for attorney with 19 years' IDEA experience).

3. Delayed Payment Warrants Award at Current Rates

Special education attorneys representing students on a contingency basis, as counsel did here,[3] risk never being paid for their work. When they prevail, they frequently must wait years to be compensated. [Decs. Goldin, ¶ 25; Dorene Philpot, ¶¶ 13, 21-25]. Yet, compensation received years later "is not equivalent to the same dollar amount received promptly as the legal services are performed." *Missouri v. Jenkins,* 491 U.S. 274, 283-84 (1989).

It is well-established that this Court may award current, inflation-adjusted rates rather than rates applicable at the time services were rendered. "In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." *Pennsylvania v. Delaware Valley*

[3] Initial retainer was quickly depleted. Thereafter, she represented S.C. on contingency. Neither Ms. Larose nor Ms. Nelson received any compensation. Additionally, counsel paid all expenses. [Decs. Gall, ¶ 16; Larose, ¶¶ 31].

Citizens' Council, 483 U.S. 711, 716 (1987) (internal citations omitted). Such payment is "not inconsistent with the typical fee-shifting statute." *Id.*

A fee award at current rates is not a "bonus" disallowed by IDEA. *See*, *Missouri*, 491 U.S. at 282-283 (Payment at current rates is not "fee augmentation"). Rather, it is "part of a reasonable attorney's fee." *Id*.

4. Multiple *Kerr* Factors Support Reasonableness of Rates

IDEA is a unique area of the law, in which few attorneys choose to practice. The Ninth Circuit recognizes it is a "complex web of federal and state statutes and regulations." *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993). Attorneys must navigate this complex legal terrain within extremely compressed timelines. *See*, 34 C.F.R. § 300.515. [Decs. Philpot, ¶ 14-17, 23; Martin, ¶ 15-18, 21; Larose, ¶¶ 18-21; Gall ¶ 42].

Attorneys must be knowledgeable about a wide range of disabilities and accurately interpret sensitive and complicated educational, psychological, medical, and other assessment data. [Decs. Goldin, ¶ 23; Philpot, ¶¶ 14-16; Martin, ¶ 17; Bonaparte, ¶¶ 25(a)-(c); Larose, ¶¶ 18-20]. The complexity and intensity of special education cases frequently precludes attorneys from accepting other employment. For over a year, Ms. Gall has turned away most potential new clients because of the demands of this case. [Dec. Gall, ¶ 41].

There is a high risk of loss, as the determination of what is "appropriate" for any given child can be complicated and almost always requires expert testimony. It can be arduous for parents to successfully argue against a school's placement recommendation, as ALJs frequently give deference to school officials.

Even when parents prevail, there is no large contingency recovery. [Dec. Goldin, ¶ 25]. Instead, special education practitioners recover hourly pay, while risking reduction of recovery for a myriad of reasons.

These factors, combined, render special education cases "undesirable" to many. [Decs. Goldin, ¶¶ 23-26; Larose, ¶¶ 22-26; Philpot, ¶¶ 9, 13-18; Bonaparte, ¶ 26; Legaarde, ¶¶ 13-16].

In fact, there is a significant shortage of qualified lawyers to represent students with disabilities. [Dec. Legaarde, ¶¶ 11-13; Martin, ¶ 22-24; Philpot, ¶¶ 13, 18; Larose, ¶ 22]. "[T]he unmet legal needs in this arena are prodigious." Elisa Hyman, Dean Rivkin & Stephen Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education,* 20 American Univ. Journal of Gender, Social Policy & the Law 1: 107-162, at 111 (2011) *available at* https://digitalcommons.wcl.american.edu/jgspl/vol20/iss1/3/.

This paucity of legal resources disproportionately impacts low-income children, who are not reaping educational benefits on par with their wealthier peers. *Id.* at 109-113. It is in the public interest to increase the availability of legal

resources for children with disabilities, which can be achieved more readily when prevailing attorneys know they will be fairly compensated for their work.

Rates requested here are reasonable when considering the complexity, accelerated timelines, skills required, preclusion of other employment, economic risks, undesirability of this case, and the severe shortage of qualified special education attorneys. *See*, *Kerr*, 526 F.2d at 70.

B. Number of Hours Expended Is Reasonable

The time spent representing S.C. was reasonable, as demonstrated by the record and attested to by Plaintiff's experts. [Decs. Bonaparte, ¶¶ 11(d), 20-23, 25(a), 27; Legaard, ¶¶ 24-25; Martin, ¶¶ 40-42]. The excellent results obtained show that the time counsel devoted was worthwhile.

Time and labor was extensive for several reasons. First, special education proceedings are both factually and legally complex. Second, Defendant's actions increased the time required to successfully enforce S.C.'s rights. Third, there were multiple proceedings (administrative, district court, and appellate).

1. Time and Labor Invested Was Substantial and Warranted

Time and labor expended by counsel was necessary, as attested to by counsel and Plaintiff's experts. [Decs. Bonaparte, ¶ 11(d), 25(a); Legaard ¶ 24; Martin, ¶ 40-42; Gall, ¶¶ 50-55; Larose ¶ 38].

The factual and legal complexity of this case justifies the time spent in addition to supporting the reasonableness of rates. (See Section II.A). The case's complexity is evidenced, in part, by the sheer volume of factual evidence spanning several years of S.C.'s education submitted at the hearing, either in the 200 exhibits admitted or through testimony of 20 witnesses, 14 of whom were experts, and the ALJ's comprehensive 70-page decision. [Decs. Bonaparte, ¶ 25(a); Martin, ¶¶ 28-31; Gall, ¶¶ 19, 50].

2. Defendant's Tactics Compelled Attorneys to Expend Substantial Time in Multiple Forums to Achieve a Just Result

Starting with the due process hearing request, this case commanded a large amount of time. Defendant contended Plaintiff's 62-page complaint with over 200 paragraphs of factual allegations was insufficient, so counsel was required to create a chronology detailing every aspect of the asserted claims ("who, what, when, where, and why"), resulting in an 88-page amended request. [Decs. Bonaparte, ¶ 25(a); Martin, ¶ 19-20]. In part, this was because Oregon ALJs interpret 20 U.S.C § 1415(b)(7)(A)(ii) and its corresponding state regulation, OAR 581-015-2345(2),

as requiring substantially more extensive and detailed allegations than federal law requires.[4] [Decs. Martin, ¶ 19-20; Gall, ¶ 51; Bonaparte ¶ 25(a)].

As the case proceeded, Defendant engaged in dilatory tactics that unnecessarily increased the time required. For example, Defendant failed to file its response to S.C.'s exhaustive complaint within the statutory timeframe and did so only after counsel expended efforts urging compliance. [Dec. Gall, ¶ 52]. Then, Defendant submitted only a two-sentence blanket denial. *Id*. Defendant's perfunctory response compelled counsel to devote time and effort ascertaining the underlying facts and basis of Defendant's denials. [Dec. Gall, ¶¶ 52-53; Dec. Bonaparte, ¶ 25(a)]. Defendant provided nothing other than objections to propounded discovery until counsel filed a motion to compel. [Decs. Martin ¶ 26; Gall, ¶ 53].

While administrative proceedings were pending, Defendant unilaterally changed S.C.'s placement into a more restrictive setting, contrary to the placement required by her IEP, violating 20 U.S.C. §§ 1414(e), 1415(j). Counsel prepared a "stay put" motion, but after negotiations, Defendant restored S.C. to her placement. [Dec. Gall, ¶55].

[4] IDEA requires only: 1) child's name, address, school; 2) description of the nature of the problem, including facts relating to such problem; and 3) "a proposed resolution of the problem to the extent known and available . . . at the time." 20 U.S.C. § 1415(b)(7)(A)(ii).

Defendant's refusal to comply with the ALJ's placement order forced Plaintiff to seek enforcement in district court. For special education practitioners, the two-phased order changing S.C.'s educational placement presented a fairly straightforward issue. IDEA is clear that when an ALJ orders the parent's requested placement, that becomes the child's current educational placement. 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(d). There was no legal basis for Defendant's refusal. Defendant's argument to this Court deliberately obfuscated the admittedly complex procedures of IDEA to persuade the Court that S.C. was required to pursue additional administrative procedures before receiving the remedy already ordered. Even if additional proceedings are needed, placement at Latham must be provided and maintained until final resolution. *S.C.,* 16 F.4th at 593-94.

Defendant's disregard of appellate rules also increased counsel's time. For example, Defendant unilaterally supplemented the appellate record, violating Fed. R. App. P. 10. Counsel spent time preparing and filing an objection. [Gall, ¶ 56].

Defendant's petition for rehearing *en banc* was frivolous and interposed only as a delay tactic. Defendant contended this was a case of "exceptional importance" because the panel's decision violated IDEA's least restrictive environment requirement. In other words, Defendant argued the merits of a final administrative

order it did not appeal, then had the temerity to contend it was a question of such "exceptional importance" that it required the attention of the full Court.

3. Plaintiff Obtained Excellent Results

Plaintiff obtained excellent results in what Defendant concedes is a case of exceptional importance, enabling S.C. to finally receive the education and placement she desperately needed. [Dec. Gutierrez, ¶ 15]. This success did not come easily. "This was an outstanding result in a complex, difficult case that had a high risk to plaintiff." [Dec. Bonaparte, ¶ 25(e)].

The decision was a systemic victory as well. The Ninth Circuit established, for the first time, that a parent is a "party aggrieved" by a school's failure to either appeal or comply with a final administrative order and may seek judicial enforcement of the order pursuant to 20 U.S.C. § 1415(i)(2)(A). *S.C.*, 16 F.4th at 591.

Finally, counsel's judgment about the time needed to succeed is not insignificant.

> By and large, the court should defer to the winning lawyer's professional judgment as to how much time [s]he was required to spend on the case; after all, [s]he won, and might not have, had [s]he been more of a slacker.

Moreno v. City of Sacramento, 534 F 3d 1106, 1112 (9th Cir. 2008).

III. Defendant Unreasonably Protracted Final Resolution

Under IDEA's plain language, a district court cannot reduce a prevailing parent's fee award when "the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section." 20 U.S.C. § 1415(i)(3)(G); *Cobb County Sch. Dist. v. D.B.*, 670 Fed. Appx. 684 (11th Cir. 2016).

Defendant unreasonably protracted final resolution of this case for all the reasons described in Section II.B.2. But, most significantly, Defendant's refusal to make contractual and financial arrangements with Latham promptly following the Ninth Circuit's October 18, 2021 decision, despite pleas from K.G. and counsel, and its filing of a frivolous petition for rehearing *en banc,* perpetuated this litigation another 1½ months. [Dec. Gall, ¶ 25-29; Gutierrez, ¶ 13-16]. Defendant "unreasonably protracted the final resolution of this action," warranting a full fee award under 20 U.S.C. § 1415(i)(3)(G).

Defendant's tactics also perpetuated the injustice of disparate enforcement of IDEA, in which families without means cannot afford to secure an appropriate education then obtain reimbursement. *See, e.g.*, *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 273 (3rd Cir. 2014) (IDEA remedies should not depend on parents' ability to front costs); *Reid ex rel. Reid v. D.C.*, 401 F.3d 516, 522-23 (D.C. Cir.

2005) (conditioning FAPE on capacity to front costs is "manifestly incompatible with IDEA's purpose of ensuring that *all* children [receive] FAPE").

S.C. was at the mercy of Defendant, who deprived her of FAPE for an entire year following the final administrative decision. Defendant refused to place her at Latham as ordered and, during the time S.C. was forced to remain in public school, Defendant failed to implement total food security school-wide or provide an "IEP which addresses all of the inadequacies identified in this order." [Decs. Gutierrez, ¶ 10; Gall, ¶¶ 22, 54].

Defendant's actions increased Plaintiff's attorney fees and, tragically, caused S.C. substantial harm. [Decs. Gall, ¶¶ 51-56; Gutierrez, ¶ 11-13].

CONCLUSION

For the foregoing reasons, Plaintiff requests her fee petition be granted in full.

DATED this 1st day of February, 2022.

Respectfully Submitted:

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CERTIFICATE OF COMPLIANCE

This Response complies with the applicable word-count limitation under LR 7-2(b) because it contains 2,995 words, including headings, footnotes, and quotations but excluding the caption, table of contents, table of cases and authorities, and any certificates of counsel.

Dated: February 1, 2022.

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