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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

S.C., by her mother and next friend, K.G., **Plaintiff**, v. **LINCOLN COUNTY SCHOOL DISTRICT,** **Defendant**.	Civil No. 6:20-cv-02277-MC **RESPONSE TO PLAINTIFF'S MOTION FOR ATTORNEY FEES**

I. INTRODUCTION

Plaintiff seeks over $600,000 in attorneys fees in connection with this case pursuant to the Individuals with Disabilities Education Act ("IDEA"). This request, however, merits substantial reduction given that the amount of time and hourly attorney rate is excessive and unreasonable, seeks reimbursement for time spent before this court where plaintiff was not the prevailing party, and cites numerous factors alleging unreasonable delay by the District that are either factually inaccurate or disingenuous.

II. ANALYSIS

A. Burden of Proof

The U.S. Supreme Court decision in *Hensley v Eckerhart*, 103 LRP 26151, 461 U.S. 424 (1983), that puts the burden on the party seeking attorney's fees to show that the requested fees were appropriate. Additionally, the party seeking fees is required to submit billing time records in a manner that would allow a reviewing court to tell what time was spent on successful claims and what time was spent on unsuccessful claims. The Court stated, "Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise "billing judgment" with respect to hours worked * * * and *should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims*." (emphasis added). As set forth below, plaintiff has failed to meet her burden of proving that her requested fees were reasonable, both in the amount of time spent and the hourly rate requested.

B. The Vast Majority of Plaintiff's Billing Invoices, Especially at the Due Process Level, Are Too Vague to Allow the Court to Distinguish Time Spent on Successful Versus Unsuccessful Claims

In her brief, plaintiff contends that she "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." (Memorandum in Support of Plaintiff's Motion for Attorney Fees and Costs (hereinafter "Memorandum") at 2.) Student ignores the fact, however, that she failed to obtain or abandoned significant claims for relief at hearing. Specifically, in her June 20, 2020 amended due process complaint, plaintiff sought--in addition to placement at Latham Center--comprehensive evaluations, staff training, that the District

develop an appropriate IEP through an IEP meeting, compensatory education to the student for alleged denials of FAPE, training for District staff, expanded specially designed instruction services as well as a distinct claim under Section 504 of the Rehabilitation Act for discrimination, emotional distress requiring treatment and hospitalization, and related damages. (Amended Complaint at 79-83, 84-87 attached as Exhibit 1 to Declaration of Nancy J. Hungerford in Support of Response to Plaintiff's Motion for Attorney Fees ("Hungerford Decl").)

At hearing, the sole remedy awarded by the ALJ was placement at Latham Center. (Final Order at 67-68 (attached to plaintiff's original federal complaint and request for TRO.) The ALJ then concluded that

> "Because this order provides for the residential placement requested it is unnecessary to address Parent's request for orders regarding comprehensive evaluations of Student, IEP meetings with necessary experts to produce an appropriate IEPs, and training for District staff. At hearing, the parties were specifically asked to address remedies in the closing briefs. In her closing brief, Parent addressed the remedies of residential placement, Section 504 damages, and attorney fees and costs. In addition, there were no details presented to establish what exactly instructional time Student missed and why he/she missed it. Thus it appears that Parent may have intended to withdraw her request for compensatory education. However, to the extent that Parent is still requesting compensatory education, Parent has not presented sufficient evidence to support the request." (Final Order at 67.)
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> Moreover, with regard to Student's Section 504 claims, the ALJ concluded that
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> "Parent requested Section 504 damages due to the District's conduct during the period at issue. Section 504 damages are denied due to Parent's failure to establish that the District acted with deliberate indifference as addressed above." (Final Order at 67.)

Thus, while the plaintiff obtained one of the remedies sought at hearing and while the ALJ concluded that some other remedies were unnecessary given the placement at Latham Center such as evaluations and staff training, the ALJ nonetheless concluded that plaintiff had either failed to prove other significant claims such as her Section 504 claims or that she had either

abandoned or failed to provide sufficient evidence to support significant remedies such as compensatory education. Thus, while plaintiff obtained partial relief at hearing, she was unsuccessful in obtaining other significant claims and remedies sought in her complaint.

Here, the vast majority of plaintiff's counsel's billing statement are general in nature and do not provide this court with enough specificity to determine which work was spent on successful versus unsuccessful claims. (See, e.g., Ex C to Gall Decl at 26 using terms such as "discuss facts and issues with upcoming hearing * * *" and "discuss hearing strategy"; Ex B to Gall Decl at 2 , billing information for attorney Nelson containing entries such as "[m]ultiple phone calls w Gall re upcoming hearing * * *.")

Where fee statements are vague or only general in nature, courts have denied all attorneys' fees where the claimant has failed to submit adequate documentation in support of the attorney's fees petition. *See, e.g., Mason v. Kaagan*, 18 IDELR 732 (D. Vt. 1992). Similarly, another court refused to award the full amount of fees the parents sought when a large portion of the deduction stemmed from vague descriptions of the legal work performed. *Ryan P. v. Sch. Dist. of Philadelphia*, 49 IDELR 280 (E.D. Pa. 2008). For example, the attorneys billed a combined 2.4 hours for tasks such as "review of file materials" and "interoffice conferences." *Id.* Because the entries did not describe whether the activities related to discovery, hearing preparations, or other legal tasks, the court could not find them compensable. *Id.*

Additionally, a court may reduce a fee award in an IDEA action if the attorneys fail to list each task individually in their billing records. *See, e.g., L.J. v. Audubon Bd. of Educ*., 52 IDELR 127 (D.N.J. 2009) ("a District Court is justified in reducing the reasonable number of hours if the attorney's time records are 'sloppy and imprecise' and fail to document adequately how he or she utilized large blocks of time"), aff'd, 54 IDELR 145 (3d Cir. 2010). *See also D.B. v. Gloucester*

Twp. Sch. Dist., 61 IDELR 23 (D.N.J. 2013) (reducing the fee awards, in part, because the billing records were fraught with vague entries such as "review of documents" and "various follow-ups"). Because the overwhelming majority of plaintiff's fee statements are general in nature and do not allow this court to ascertain what work was spent on successful versus unsuccessful claims, these fees should be denied.

C. Even if the It Could Overlook the Vagueness of Plaintiff's Billing Statements, the Court Should Apply a Degree of Success Analysis to Plaintiff's Counsel's Work at the Due Process Level

As set forth immediately above, while the Student obtained one of the remedies sought at hearing and while the ALJ concluded that some other remedies were no longer necessary, the ALJ nonetheless concluded that Student had either failed to prove other significant claims such as her Section 504 claims or that she had either abandoned or failed to provide sufficient evidence to support requested remedies such as compensatory education.

A major factor in determining the amount of reasonable attorneys' fees in IDEA cases is the degree of success of the party bringing the due process claims. *Aguirre v. Los Angeles Unified School District*, 461 F3d 1114, 1118 (9th Cir 2006) (holding that most critical factor in awarding fees is the degree of success obtained and that a plaintiff may not recover fees for unsuccessful claims). Applying this success-based analysis in the actual calculation of fees, multiple courts have applied a percentage approach, i.e., obtaining a ratio of the issues in which the plaintiff was successful versus those where he was not. *See, e.g.*, *P. ex rel. Mr. P. v. Newington Bd. of Educ.*, 512 F Supp 2d 89, 114 (D Conn 2007) (in IDEA appeal, 40 percent reduction in fees and costs warranted where parent prevailed in only three of five issues at administrative hearing); *see also Harris v. McCarthy*, 790 F2d 753, 759 (9th Cir 1986) (reduction of fees by 88.5 percent, reflecting number and extent of claims on which plaintiffs failed to

prevail); *see also Wikol ex rel. Wikol v. Birmingham Public Schools Bd. of Educ.*, 360 F3d 604, 612 (6th Cir 2004); *Thompson v. Gomez*, 45 F3d 1365, 1366-67 (9th Cir 1995); *Trimper v. City of Norfolk, Virginia*, 58 F3d 68, 77 (4th Cir), *cert den* 516 US 997 (1995).

Because plaintiff and the District spent substantial time either presenting or preparing to respond to these claims that were ultimately proven meritless or simply abandoned by plaintiff, the court should reduce the fees spent by plaintiff's counsel by at least 50 percent based on the fact that plaintiff brought only two claims, one pursuant to IDEA and one pursuant Section 504 and that the ALJ not only found that plaintiff had failed to prove the Section 504 claims but also declined to grant plaintiff multiple, significant remedies even under plaintiff's IDEA claim.

D. The Amount of Time Expended By Plaintiff's Multiple Legal Counsel At Due Process Is Unreasonable and Merits Reduction

As an initial matter, the total time spent by plaintiff's three attorneys is unreasonable. Attorney Suzanne Gall's assertion of her expertise in special education law undermines her argument that it was necessary for her to associate with co-counsel Alice Nelson. This stands in marked contrast to the fact that District counsel did not duplicate any representation services, as attorney Nancy Hungerford conducted the due process hearing, oral arguments before federal district court and U.S. Court of Appeals without assistance of co-counsel. (Hungerford Decl ¶ 29.)

The number of hours charged by the three attorneys was also excessive. No contemporaneous billing was apparently kept by Ms. Nelson, who unfortunately died in April, 2021. Ms. Gall's reconstruction of hours she presumes Ms. Nelson worked on the case is apparently lacking in any foundation of any time sheets or records kept by Ms. Nelson. Hours have been charged for Ms. Nelson's listening in on direct and cross-examination conducted by

Ms. Gall, who was present during Ms. Nelson's direct and cross-examination of other witnesses. Thus, plaintiff has double-billed for attorney time during much of the hearing. As District counsel, Nancy Hungerford conducted all parts of the hearing herself, including prepping of witnesses, direct and cross-examination. District counsel Richard Cohn-Lee's work has been on separate matters, including legal research, drafting legal documents and portions of briefs. (Hungerford Decl ¶ 29.)

In fact, the unreasonableness of these charges submitted for District payment is reflected in the fact that they are *more than four times* the amount charged by the District's counsel for the same work. The three attorneys for plaintiff claim a total of 1362.7 hours at a total cost (including paralegal fees) of $617, 423.40 – more than 2-1/2 as many hours as the District's counsel, and more than 4.4 times the cost. (*Id.* ¶ 31; *see generally* plaintiff billing invoices.)

In total, the two attorneys from the Hungerford Law Firm representing the District did all of the work, including research, preparation for the due process hearing, the post-hearing brief, and research, briefing and presentation in both the Federal District Court and before the Ninth Circuit in a total of 507.7 hours at a total cost of $139,468.25, as verified by the firm's billing to the District (Hungerford Decl ¶ 30; Ehxs 2, 3 and 4.) These hours were recorded contemporaneously and billed and paid by the District in the following month. (*Id.*)

Relatedly, the hourly rates sought by plaintiff are not justified when counsel for the District billed work at $270 to 295 per hour and required only 507.71 hours for both attorneys, whereas Gall billed 1004.60 hours, Nelson billed 153.3 hours, and attorney LaRose billed 204.8 hours for the same case. (*See* Hungerford Decl ¶ 12; *see generally* Plaintiff's Supporting Billing Statements.)

Oregon school districts do not have access to insurance coverage for costs of special education litigation. The consortium insuring Oregon school districts ("PACE") provides maximum possible reimbursement of $25,000 per case, which does not even cover cost of the hearing officer and court reporter. The attorney fee award must be paid with public funds that are not reimbursed by the District's insurance (which offers only a $25,000 per case reimbursement) and plaintiff's attorneys' fees will have to be paid with general fund tax dollars. In addition, under Oregon law the District is required to pay the cost of the ALJ's services and the court reporter and transcript, which together amounted to more than $50,000. The total requested by plaintiff's attorneys plus those associated hearing costs would subtract from the District's general fund almost $700,000 – more than $150 for each student enrolled in the District. (Hungerford Decl ¶ 28.)

The Hungerford Law Firm purposely keeps its rates at the low end of the scale of Portland-area attorneys because it does represent public schools, which are consistently underfunded for the student body and the tasks they are charged with. It is reasonable that opposing counsel who represent students should charge no greater rates and certainly not bill more than 4 times what the District's counsel billed for the same work. Given these factors and the reasons stated above, it is within this Court's discretion to reduce plaintiff's request for over $600,000 to a more reasonable amount aligned with what District counsel expended in this matter for the same work, $139,000.

E. None of Plaintiff's Legal Fees at the District Court level Are Compensable Because She Did Not Prevail Before This Court

A review of plaintiff's counsels' supporting affidavits and billing statements show that plaintiff is seeking an award of fees for work before this court in connection with her request for

a TRO and enforcement of the ALJ's order. (*See*, e.g., Ex D – Federal Invoice, attached to Amended Affidavit for Fees). However, these fees are not compensable.

In *Van Duyn v. Baker School Dist. 5J*, 502 F3d 811 (2007), the parents of a special education student identified under the IDEA appealed an adverse ruling to federal district court, which affirmed the ALJ's order. The student then appealed to the Ninth Circuit, which the reversed in part the findings and conclusions of the federal district court. Student's legal counsel then sought attorneys' fees not only for work at the due process level and Ninth Circuit, but also for work at the court level.

The Ninth Circuit Court of Appeals flatly rejected this request, noting that the plaintiffs could only recover reasonable fees for time spent on the administrative hearing, not at the district court level. Specifically, the Ninth Circuit reasoned that "Van Duyn is entitled to reasonable attorney's fees *for the administrative hearing* to the extent he partially prevailed in that proceeding * * *." *Van Duyn v. Baker School Dist. 5J*, 502 F3d 811, 825 (2007) (emphasis added). The Ninth Circuit, in contrast, emphasized that "Van Duyn was not the prevailing party at the district court level because that court affirmed the ALJ's decision in its entirety and refused to grant him any additional relief." *Id.*

As in *Van* Duyn and as this court is aware, student not only failed to obtain any additional relief before it, but this court specifically ruled against student on the critical issue of the enforcement of the ALJ's order. Accordingly, student did not prevail at the district court level and is therefore not entitled to fees for work expended before this court.

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F. Plaintiff's Arguments Regarding Delay Are Inaccurate and Disingenuous

Finally, plaintiff argues that the District engaged in dilatory tactics that required her counsel to expend substantial time in multiple forums and that such conduct merits a full award of her requested fees. None of these actions, however, amount to dilatory tactics supporting an award of fees:

- that student counsel had to submit an amended due process complaint because the first complaint lacked the required sufficiency under IDEA due process standards. On its face, this does not demonstrate District counsel's "tactics" but the failure of student's counsel to meet the sufficiency standards for due process complaints under the IDEA;

- that the District engaged in "dilatory tactics" such as not filing its answer to the complaint within the statutory timeline and by initially filing a short, blanket denial that required student counsel to file discovery requests and a motion to compel. Plaintiff, however, ignores the reality that District counsel had a good faith belief that it's initial response to the complaint was adequate given that the IDEA does not contain a sufficiency provision similar to that of due process complaints that applies with equal force to a school district's response statement. *See* OAR 581-015-2345(2)(a) (containing no pleading requirements for district responses to due process complaints). Moreover, to the extent that plaintiff is arguing that the need to file discovery requests--as the District also had to do at the due process level--amounts to evidence of dilatory tactics, this would impermissibly broaden the definition of delay to nearly all forms of litigation where parties have good faith faith disagreements regarding the scope of responsive pleadings and discovery;

• that the District unilaterally changed student's placement into a more restrictive setting, contrary to the student's "stay put" placement during the due process proceedings. Plaintiff, however, mischaracterizes this issue. The reality is that the parent requested the student to be placed full-time in the special education program after a lunchroom incident, and shortly thereafter all school-based programs were suspended in March of 2020 due to COVID. (Hungerford Decl ¶ 20.); The District provided placement that included regular education classes when the IEP team met and drafted the next IEP for fall, 202, when the student was enrolled in Spanish, then later art and choir. Specifically, the parent requested in January of 2020 that the Student be kept in the Special Education room and no longer to eat lunch with regular education students after a disrobing issue in the lunchroom. This request was granted but the student was in this more restrictive setting only late January through early March, when the school shut down for COVID. And the reality was that plaintiff did not file her initial due process complaint until May 20, 2020. Then, in the fall of 2020, when the student was parentally placed in a separate facility operating under contract to the State Developmentally Disabilities program, the parent wanted S.C. to participate (virtually, as all classes were being conducted at that time) in a regular education class – Spanish. The District (which was conducting the educational program remotely for S.C.) agreed and placed her in a Spanish class enrolling regular education students, and modifying the instruction so that it did not include any terms associated with food. Later on, the student was enrolled in regular education art class (spring of 2020, when in-person instruction resumed), and regular education choir class (at Newport High School in fall of 2021). (*Id.*)

• that plaintiff was required to seek enforcement of the due process order in federal district court. Again, as discussed above, plaintiff impermissibly characterizes good faith

disputes regarding applicable law and facts as undue delay or as somehow done in bad faith. Yet, the reality that this court agreed with the District's interpretation of the ALJ's order and applicable law is prima facie evidence that the District's position was made in good faith and was reasonable and frivolous or for the purposes of delay;

• that in the Ninth Circuit proceedings the District unilaterally supplemented the appellate record, violating FRAP 10 and that plaintiff's counsel was required to file an objection. However, the District has reviewed the record and has found no rulings by the Ninth Circuit that the District had violated FRAP 10, and given that the federal district court had accepted similar updated information, there was no indication that the court system considered this to be a violation. The updated information submitted by the District was done in good faith to assist the court which was potentially useful in determining whether the conditions set by the Due Process hearing officer had been met;

• that the District's petition for rehearing en banc before the Ninth Circuit was frivolous and only for the purposes of delay because the District contended that it was a case of "exceptional importance" but that the District did not appeal that ALJ decision. (Memorandum at 10-13.) Again, as an initial matter, Student attempts to characterize fully permissible rights to appeal or for reconsideration as dilatory tactics. Moreover, The District did in fact appeal the ALJ decision in federal court but withdrew that appeal as unnecessary once this court agreed with the District's interpretation of the ALJ's remedy and order. Moreover, after the Ninth Circuit Court of Appeals reversed the District Court, a request for en banc determination was appropriate: The issue of placement of a student in the most restrictive environment is of exceptional importance because it contradicts the essence of IDEA – that all students have a right

to be educated in the least restrictive environment where their special education needs can be met.

Plaintiff's final contention regarding undue delay – that the District unreasonably delayed entering into a contract with Latham -- is disingenuous: The District did not refuse to enter into a contract with Latham promptly, but rather any delay was due to plaintiff's insistence that the term of the contract be for a full year, a term which ran contrary to the express language and obvious intent of the Ninth Circuit panel in its ruling: that the contract not be written for a year, as argued by plaintiff's counsel, but rather only until the District could provide a placement that met the ALJ's specification of total food security. *S.C. v. Lincoln County School District*, 79 IDELR 241 at 6 n 3 ((9th Cir Oct 18, 2021) ("[T]o the extent that S.C. asks for placement at Latham Center for one year as compensatory education, such an order is not warranted under the terms of the ALJ order. * * * S.C. * * * cannot argue against the district court's effective rewriting of the ALJ order and then ask this Court to rewrite a different part of that ALJ order to award a new remedy, one that the ALJ explicitly rejected." (Hungerford Decl ¶ 26.) The reality is that the District reached out to Latham Center promptly to begin the discussions regarding the contract. Plaintiff's counsel and Latham, however, took the position that District was required to fund the placement for an entire year, which ran in direct contravention of the Ninth Circuit's ruling. The District negotiated in good faith with Latham to develop contract language that allowed for student's attendance but for a term and duration that did not run afoul of the Ninth Circuit's ruling. Moreover, the District approved enrollment of student and her transportation to Latham for entrance on Dec. 8, 2020. (*Id.*) However, Latham Centers had an outbreak of COVID-19 and could not admit a new student at that time. Ultimately, S.C. was allowed to enter

Latham on Dec. 29, 2021, but her education there was delayed as she herself contracted COVID and had to isolate. (*Id.*)

III. CONCLUSION

For the reasons above, this court should categorically exclude fees expended before this court, and should substantially reduce plaintiff's request for fees at the due process and Ninth Circuit levels given the unreasonableness of the hourly rate requested as well as the excessive amount of time spent by multiple attorneys. Given the various deficits in plaintiff's fee petition, the Court should award plaintiff's attorneys collectively no more than the $139,000 billed by District counsel for the same work.

DATED: February 23, 2022.

__s/ Nancy J. Hungerford_____
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **RESPONSE TO PLAINTIFF'S MOTION FOR ATTORNEY FEES** on the following named person on the date indicated below by:

[ ] mailing with postage prepaid;

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