United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	John A. Nordberg	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	06 C 0302	**DATE**	3/2/2007
CASE TITLE	Eric A. *et al.* vs. Board of Education of the City of Chicago, District 299		

DOCKET ENTRY TEXT

Plaintiff's motion for summary judgment is granted in part and denied in part. [20] Plaintiff is awarded $26,718.21 in fees and costs, which represents 75% of the $35,624.28 amount he requested.

■[For further details see text below.] Docketing to mail notices.

STATEMENT

Before the court are cross motions for summary judgment filed by plaintiff Eric A, who is represented by attorney Michael A. O'Connor, and by defendant Board of Education of the City of Chicago, District 299 (the "Board"). At issue is whether plaintiff Eric A. should recover $35,624.28 in attorneys' fees and costs under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(i)(3) relating to the effort to get more special education services for Eric who at this time was a rising eighth grader. (The other plaintiffs have settled their claims for fees.) Counsel for both sides are experienced in these cases and have adequately set forth the general legal framework. The facts are also largely undisputed. Therefore, we will only set forth the facts necessary to explain this ruling.

Facts. The following facts are taken from the parties' statement of facts and are undisputed. In 2001, Eric was determined eligible for special education services to address a learning disability and speech language difficulties. In 2003 and 2004, the school developed an Individualized Education Plan ("IEP") for Eric. Following the 2004 IEP meeting, Eric's parents arranged for counseling for Eric to address lack of self confidence and social skills and that counselor referred the parents to Dr. Rosen, a pediatric neuropsychologist. In spring 2005, Dr. Rosen evaluated Eric over several days and found that, although Eric was functioning overall within the average range of intellectual ability, he had some significant problems in "receptive and expressive language, word retrieval, oral expression and pragmatic skills." Eric's parents then retained attorney O'Connor who, on April 25, 2005, requested an impartial due process hearing pursuant to the IDEA. Plaintiff requested that the Board: (a) provide a copy of relevant school records; (b) pay for placement at a private therapeutic day school such as Cove School in Northbrook, Illinois; (c) pay for the neuropsychological evaluation by Dr. Rosen; (d) provide accelerated and intensive assistive technology support; and (e) convene an IEP meeting to implement relief. In June 2005, the Board filed a motion to compel an IEP meeting. The motion was granted by the hearing officer. The IEP meeting took place on August 15, 2005, and the school developed a "new significantly altered IEP, in large part in response to Dr. Rosen's report and evaluation." The IEP required, among other things, an assistive technology assessment.

STATEMENT

On August 16, 2005, a four day due process hearing was held before an independent hearing officer appointed by the Illinois State Board of Education. On September 16, 2005, the hearing officer issued a 10-page "Decision & Order." That order, which this Court has reviewed carefully, contains many observations and findings. But the highlights are as follows. First, the officer refused to order placement in the private day school, finding that the "last minute IEP meeting held on August 15, 2005 . . . is comprehensive." Second, the officer found that "inadequacies in the previous IEP's in question merit compensatory services." Third, the office did not find that Eric was denied a free and appropriate education. Fourth, the officer ordered the Board to pay for the cost of Dr. Rosen's evaluation and ordered the IEP team to convene a meeting within 15 days to discuss compensatory services including the use of assistive technology. That meeting was held on September 28th and the parties agreed in that meeting that Eric would receive textbooks on tape or compact discs, educational software for use at home, counseling, and after school tutoring. The Board now challenges the request for fees, raising specific and general objections.

Specific Objections. The Board objects to the reasonableness of several specific fees such as fees for a paralegal who attended the hearing, travel costs, photocopying expenses, certain time entries for attorney O'Connor that are allegedly improper "block billing," and fees for attending the IEP meeting on August 15th. These objections altogether amount to only a relatively small portion of the overall fee being sought. After reviewing these arguments, we find that they have no merit. Several of them have been resolved through the course of the briefing. For example, the Board objected in its opening brief that the photocopying expenses were not sufficiently described or documented so that the Board could determine whether these expenses were reasonable and necessary. In his response brief, plaintiff responded by providing further documentation and a line-by-line explanation of each expense, a response which has now satisfied the Board. The Board also wisely dropped its objections to plaintiff's use of a paralegal at the four-day hearing given that the Board used *two attorneys*. We are not persuaded that the two "block billing" entries are improper because these entries really focus each on one activity. *See* Pl. Resp. at 10 (further explanation). As for the fees for attending the August 15th IEP meeting, the Board says they are not recoverable because the meeting was not held as the result of an order of the hearing officer. *See* 20 U.S.C. § 1415(i)(3)(D)(ii). Plaintiff responds that the hearing officer did enter an order in response to the Board's motion to compel in June 2005. Defendant seems to regard this order as insufficient but we are not clear why and defendant has not provided any cases to support its argument. Therefore, this objection is not fully developed and is denied.

General Objections. The primary focus in the briefs is on the Board's two general objections, both of which are variations on the same theme that plaintiff failed to achieve his major objective and thus his fees should be greatly reduced if not denied entirely. The Board first argues that plaintiff has not shown that he is a "prevailing party" and therefore cannot recover any fees. The Board next argues that, even if he is a prevailing party, this Court should exercise its discretion to reduce that award by 75% to account for the lack of success. Both arguments rest on the Board's view that plaintiff's recovery was *de minimis* largely because he was denied the request for placement in the private school. More specifically, the Board analyzes the issues in terms of the four requests that plaintiff made at the hearing (for the cost of private school, payment for Dr. Rosen, assistive technology, and to convene an IEP meeting to implement the above) and claims that he achieved only one of the four (payment for Dr. Rosen). Hence, he should recover 25% of the requested fees. We address each of these arguments below.

1. Was Plaintiff A Prevailing Party? The parties agree that, to be a prevailing party, plaintiff "must obtain at least *some relief* on the merits of his claim." *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (emphasis added). And there is no real question here that plaintiff obtained some relief; the only question is whether it was enough to meet this standard. As the Supreme Court has indicated, the prevailing party inquiry "does not turn on the magnitude of the relief obtained." *Id.* at 114; *see also T.D. v. LaGrange School Dist. No. 102*, 349 F.3d 469, 479 (7th Cir. 2003) (explaining that the prevailing party standard is a "generous" one: "while T.D. did not succeed on every issue at the due process hearing, he did prevail on certain significant issues and achieved at least some of the benefit he sought"). Based on these cases, as well as the others cited

STATEMENT

in the briefs, we find that plaintiff did achieve enough success to meet this generous standard. He received payment for Dr. Rosen's evaluation and the officer ordered the parties to meet and discuss the assistive technology, which in turn led to the provision of software, special textbooks, and counseling. He also achieved other changes through the August 15th meeting, which was held after he initiated the due process hearing. This constitutes "some" of the benefits he sought. *Id.* The Board relies heavily on the Seventh Circuit's decision in *Monticello School Dist. No. 25 v. George L*, 102 F.3d 895 (7th Cir. 1996). In that case, the district court denied *all* fees because it believed that the plaintiff, even though achieving some changes in the student's program, nonetheless only brought about *de minimis* changes. In affirming that ruling, the Seventh Circuit stated that it was a "close question" whether the district court should have denied all fees but concluded that, in light of the abuse of discretion standard, it could not overturn that ruling. *Id.* at 908. Given this deferential standard of review, the *Monticello* case thus provides only limited guidance here. *See also Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 551 (7th Cir. 1999) ("the views of the district court are given great deference").

2. Should We Reduce The Fees For Partial Success? A finding that plaintiff is a prevailing party does not end the inquiry into the degree of plaintiff's success because the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) specifically stated that a district court may reduce the lodestar amount (reasonable hours times reasonable rate) to account for lack of success. At issue here is whether we should make a reduction and, if so, how much. As noted above, the Board argues that we should award only 25% to account for success on only one out of four of the requested items of relief. Plaintiff responds by arguing that he achieved three out of four of his objectives and that he has thus achieved a "substantial" victory, which in turns means that he should get the full award. To support this theory, plaintiff cites to two district court cases -- one from this district and one from Ohio -- in which the court refused to reduce the requested award even though the plaintiff failed to achieve some of his objectives. *See Gross v. Perrysburg Exempted Village School Dist.*, 306 F.Supp.2d 726, 732 (N.D. Ohio 2004) ("Where they have gained much that they sought, parents should not be decreed to have failed because their grasp did not match their reach."); *Poynor v. Community Unit School District # 300*, 1999 WL 1101566 (N.D. Ill. Nov. 30, 1999) (J. Gettleman). Plaintiff also objects to the general approach of reducing fees by a percentage amount. Relying on a phrase in Judge Gettleman's decision in *Poynor*, plaintiff states that a percentage reduction would be "a mindless application of mathematics to a qualitative inquiry." *Id.* at *1. To support this same theory, plaintiff also relies on the following passage from the Supreme Court's decision in *Hensley*:

> Where the plaintiff has failed prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

461 U.S. at 440. Plaintiff's theory thus seems to be that, although he did not prevail on his request for placement in a private school, this request was intertwined with his other claims and he achieved significant overall success.

In assessing these arguments, we must first address the dispute over whether plaintiff achieved success on one out of four claims, as the Board maintains, or on three out of four, as plaintiff argues. The Board places much weight on the fact that the hearing officer did not specifically order the school to provide assistive technology but merely ordered the parties to meet on the issue. However, given that the school did later provide this technology as a result of being ordered to meet and discuss the issue, we find that this is close enough. In sum, on this point, we find that plaintiff's arguments are more convincing.

STATEMENT

Based on the assumption that plaintiff did prevail on three of his four requests, we must assess plaintiff's argument that a 75% victory is substantial enough that he should get *all* of his fees. We are not persuaded by this argument. Neither *Hensley* nor *Farrar* provide clear authority for this approach. In fact, both decisions indicate that a court clearly has the discretion to reduce fees for partial success. In *Farrar*, the Supreme Court specifically stated that a district court should compare the "amount of damages *awarded* as compared to the amount *sought*." 506 U.S. at 114 (emphasis added) (quoting *Riverside v. Rivera*, 477 U.S. 561, 585 1986)). Although the passage from *Hensley* quoted above might be read to provide indirect support for plaintiff's argument, it contains the qualification that the unsuccessful issue must not be distinct from the successful ones. Here, the request for placement in the private school was distinct in many respects from the other requests in that it would have resulted in a significantly different approach, a new school taking control over everything, whereas all the other issues were smaller in scope and amount and related to maintaining an ongoing relationship with plaintiff's current school. Those are two different approaches and thus suggest that the private school request was distinct in some respects. As for the two district court cases plaintiff relies upon, they also do not provide strong support for his argument. This is because, in both cases, the attorneys seeking fees made an effort in their fee petition to first subtract out those fees related to the unsuccessful requests. In *Gross*, the Ohio district court explicitly stated that plaintiff's counsel has "a duty to make a good faith effort to exclude from a fee request hours that were spent working on an unsuccessful claim." 306 F.Supp.2d at 740, 741 ("counsel has made an effort to expunge fees associated with plaintiff's request for a transfer to the alternative school"). Similarly, in *Poynor*, the plaintiffs' attorney also reduced his fee to account for the losing claim. Specifically, counsel incurred $102,408.75 in fees but only requested $63,712.75 because he subtracted out the amount representing the losing claim. 1999 WL 1101566, *1. Judge Gettleman stated that counsel's reduction of fees to reflect time spent only on "successful claims" was "a welcome and professional effort to be realistic about fee requests under the IDEA." *Id.* at * 2. In contrast here, plaintiff's counsel has made no such effort.

Proceeding then on the conclusion that the fees should be reduced to account for the failure to achieve success on the private school placement issue, we must decide by how much. One approach would be to follow the Board's recommendation but rather than subtracting 75% from the award, to only subtract 25%. Plaintiff, however, has stated that a percentage reduction is a "mindless" application of mathematics. But the only other alternative we can envision would be to look at specific time entries and determine from them what portion was spent on the unsuccessful request In reviewing counsel's time sheets, however, there is not enough information to make such a determination. And counsel has not come forward with any explanation even though he could have done so just as he did when the Board raised objections to his attempt to recover certain photocopying expenses. Because counsel has elected not to come forward with any further explanation and because the Supreme Court has admonished that "[a] request for attorney's fees should not result in a second major litigation," *see Hensley*, 461 U.S. at 437, we find that a 25% reduction to account for the failure to achieve one out of the four requested items is a reasonable and fair result. We note that, in *Poynor*, which is the case that contains the quotation plaintiff cited about the "mindless application of mathematics," Judge Gettleman went on to consider whether plaintiff's request in that case for $27,903.50 in fees associated with the fee petition itself was a reasonable amount and decided with very little analysis that the amount should be cut by 50%. 1999 WL 11101566 at *2. In other words, he employed the same percentage reduction method that plaintiff suggests is inappropriate.