

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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JAMES DOE, an infant, by his next friend,
WILLIAM HAWKES, on behalf of himself and
all persons similarly situated,

U.S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Plaintiffs,

DECISION AND
ORDER

v.

91-CV-6209L

THE BOARD OF EDUCATION OF THE GATES/CHILI
CENTRAL SCHOOL DISTRICT and DR. WILLIAM
DADEY, in his official capacity as
Superintendent of Schools of the
Gates/Chili Central School District,

RECORDED
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Defendants.

NATIONAL JUDICIAL CONFERENCE
FOR LEGAL EDUCATION

This action was commenced on May 29, 1991, by James Doe on behalf of himself
and all others similarly situated, pursuant to 42 U.S.C. § 1983 and the Rehabilitation Act of
1973, 29 U.S.C. § 794. In August 1993, the parties entered into a stipulation, which was
subsequently ordered by the court, which settled and dismissed all claims in the case except

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plaintiffs' request for attorney's fees and costs. The parties' attempts to settle that issue proved fruitless, and plaintiffs have now moved for an award of attorney's fees.

BACKGROUND

When the suit was commenced, plaintiff was a student in the Gates-Chili Central School District ("the District"). Plaintiff challenged the District's refusal to allow him to play football because of a physical impairment. Although both plaintiff's physician and his legal guardian, the Monroe County Department of Social Services, had given their consent to play football, defendants would not allow him to play unless he followed the procedures of N.Y. Ed. L. § 3208-a. That statute provides that a student who has been excluded from participating in an athletic program because of a physical impairment can challenge the exclusion by bringing a special proceeding in a state court, supported by the affidavits of at least two physicians. The statute also provides that when a student obtains a court order directing that the student be allowed to participate in an athletic program, the school district will not be liable for any injury sustained by the student while the student is participating in that program.

The class-action complaint¹ sought a declaration that § 3208-a was unconstitutional and that defendants' actions violated plaintiffs' rights under 29 U.S.C. § 794. Plaintiffs also sought an order enjoining defendants from excluding from athletic programs physically

¹Because the parties agreed to settle the case on a classwide basis, plaintiffs never moved to certify the class.

impaired students who had their parents' and treating physician's permission to participate. Plaintiffs further requested an award of compensatory damages, plus attorney's fees and costs.

Plaintiff's attorneys in this case are the Monroe County Legal Assistance Corporation ("MCLAC"). This litigation was not the first time that MCLAC had dealt with some of the issues in this case. MCLAC had previously represented a similarly situated plaintiff in another case in this District, Johnny Doe v. Board of Ed. of the Greece Central Sch. Dist., 86-CV-376T. In that action, which was commenced in 1986, the plaintiff challenged his exclusion from participating in contact sports because he was blind in one eye. The plaintiff claimed that § 3208-a was unconstitutional, and that the defendants had violated his rights under the Constitution, the Rehabilitation Act, and the Education For All Handicapped Children Act, 20 U.S.C. § 1401 et seq. On April 27, 1988, District (now Chief) Judge Michael A. Telesca granted the plaintiff's motion for summary judgment on the plaintiff's claim that the defendants had violated his rights under the Rehabilitation Act.

In the present case, Jaya Connors, Esq., a MCLAC staff attorney, advised the District's attorney of the Johnny Doe case by letter dated May 3, 1991, and enclosed a copy of Judge Telesca's decision. See Reply Declaration of Elizabeth L. Schneider (Item 26), Ex. A. When it became apparent that the District's position was unchanged, plaintiffs brought this action.

Soon after the complaint was filed, in June 1991, the parties entered into a stipulation allowing James Doe to participate in all school athletic activities during the pendency of the

action. After several months of discovery, the parties began negotiating a settlement of the entire case.

Much of the time spent in these negotiations was devoted to devising a new District policy governing participation in athletics by students with physical impairments. Elizabeth L. Schneider, Esq., who represented plaintiffs in these negotiations, asserts that she has not charged any of the time she spent in this phase of the case from October 31, 1991 until April 5, 1993 as part of the attorney fee request. She states that she did this because she hoped that the new policy might serve as a model that would be adopted statewide, and she did not expect the District to bear the cost of her time spent in pursuit of this larger goal. Schneider Aff. (Item 23) ¶ 52.

In Spring 1993, the attorney who had represented defendants up until that point, moved out of the area, and the case was transferred to another attorney with the same firm. Plaintiffs contend that this switch resulted in many previously agreed-upon matters being renegotiated, and therefore Schneider informed defendants' new attorney that she would begin charging for her time. Plaintiffs claim reimbursement for 13.5 hours of time negotiating a new policy after April 5, 1993, until the final settlement.

Eventually a new policy was drafted that was acceptable to both sides. Under this policy, physically impaired students, with their parents' and treating physician's consent, may participate in athletics like any other student. There will also be no distinction between impaired and non-impaired students for purposes of the District's liability. Parents who disagree with any District action taken pursuant to the policy can request an impartial hearing.

Once the policy was finalized, the parties negotiated a settlement of James Doe's damages. Eventually they settled this aspect of the case for \$6500.

All of these agreements were embodied in the stipulation that was entered into in August 1993. As stated, that stipulation left the matter of attorney's fees unresolved.

Plaintiffs now move for a total of \$37,008.20 in attorney's fees and costs pursuant to 42 U.S.C. § 1988 and 29 U.S.C. § 794a(b). This fee request is allocated among four attorneys: Jaya Connors (87 hours at \$100 per hour); Elizabeth Schneider (133.7 hours at \$185 per hour); Susan Silverstein (7.8 hours at \$150 per hour); and Kathryn Smolarek (25.2 hours at \$90 per hour). The request includes \$12,210 in fees connected with this motion.

Defendants do not contest plaintiffs' entitlement to some award of fees, but they contend that the amount requested is excessive and unreasonable. Defendants suggest that an \$8000 award would be more appropriate.

DISCUSSION

Under both 42 U.S.C. § 1988 and 29 U.S.C. § 794a(b), "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." These provisions have been given an identical construction. Child v. Spillane, 866 F.2d 691, 692 n. 1 (4th Cir. 1989)

Under the principles announced in Hensley v. Eckerhart, 461 U.S. 424 (1983), which apply to any case for which Congress has authorized the payment of attorney fees to a prevailing party, id. at 433 n.7, a prevailing party is one who "succeed[s] on any significant

issue in litigation which achieves some of the benefit the parties sought in bringing suit." Id. at 433. A plaintiff who wins relief through settlement may be deemed a prevailing party. Koster v. Perales, 903 F.2d 131, 134 (2d Cir. 1990).

The Court of Appeals for the Second Circuit has adopted the lodestar method for calculating attorney fees. The lodestar figure is simply arrived at by multiplying the number of hours spent by the attorney by the prevailing community rate for "similar services by lawyers of reasonably comparable skill, experience and reputation." Chambless v. Masters, Mates & Pilots Pension Plan, 885 F.2d 1053, 1058-59 (2d Cir. 1989), cert. denied, 496 U.S. 905 (1990). Plaintiff bears the burden of proving both the number of hours worked and the reasonableness of the rate charged. See Hensley, 461 U.S. at 433.

Defendants do not dispute that under these principles, plaintiffs are prevailing parties in this case. Nor do they object to the hourly rates claimed. They do object to the total amount sought, however, for two principal reasons.

First, defendants argue that plaintiffs are entitled only to fees related to relief which could have been obtained in the form of an enforceable judgment against defendants. Defendants contend that the court could have awarded damages to James Doe, and enjoined defendants from violating plaintiffs' rights, but that the court could not have ordered defendants to adopt any particular policy regarding physically impaired students. Therefore, they argue, plaintiffs should not receive fees incurred in negotiating the new District policy.

Second, defendants contend that plaintiffs' attorneys have not exercised prudent billing judgment. Defendants contend that they informed plaintiffs' counsel on October 9, 1991, that they wished to settle the case. Thereafter, defense counsel billed 63.5 hours, while

plaintiff's counsel billed 113.1 hours. Defendants argue that the time billed by plaintiffs' counsel was unreasonable given plaintiffs' counsel's experience in this area, particularly in the Johnny Doe case. Defendants further contend that much of the time claimed by plaintiffs was duplicative, and amounted to training time for junior attorneys in MCLAC.

After reviewing the papers submitted by both sides, I am not convinced by defendants' arguments. I believe that plaintiffs' request is reasonable and that it should be granted in full.

A number of considerations support this conclusion. First, this case was commenced four years ago. Well over half of that time has been spent trying to settle the case. After reviewing the proceedings in the case and plaintiffs' counsel's time records, I find no indication that plaintiffs or their counsel dragged the case out at any point. They appear to have acted in good faith, and many of the reasons that the case has remained open this long were matters outside their control, such as the need to renegotiate certain matters when a new attorney took over as defense counsel. Given the duration of the case and the number of issues involved, it is not surprising that plaintiffs' counsel spent considerable time on it.

It is true that in an application for fees under a fee-shifting statute, "[c]ounsel for the prevailing party must exercise 'billing judgment'; that is, he must act as he would under the ethical and market restraints that constrain a private sector attorney's behavior in billing his own clients." Lunday v. City of Albany, 42 F.3d 131, 133 (2d Cir. 1994) (quoting Hensley, 461 U.S. at 434). I believe that plaintiffs' counsel has exercised the proper billing judgment here.

In particular, many portions of plaintiffs' fee request are substantially reduced from the hours entered in their time records. For example, in the investigation-and-complaint phase of the case, plaintiffs have requested compensation for 36.7 hours of time by Jaya Connors, and 6.1 hours by Elizabeth Schneider, compared to the 58.2 hours and 9.7 hours respectively recorded by them. On the discovery phase, those same two attorneys' times have been reduced from 29.5 to 23.6 hours, and from 43.9 to 35.1 hours, respectively. In addition, a significant portion of Schneider's time, over 60 hours, has been excluded from plaintiffs' fee request because it was expended during the period from October 1991 to April 1993 when the parties were negotiating the new District policy.

Many of these reductions were also made to reflect possible duplication of effort by plaintiffs' attorneys. To a great extent, these reductions undercut defendants' contention that plaintiffs are seeking double compensation for having more than one attorney work on the case. Moreover, there is nothing inherently unreasonable or inefficient about having more than one attorney work on a case. In some situations, it may even be more efficient than using one attorney. See Pro-Choice Network of Western New York v. Project Rescue Western New York, 848 F.Supp. 400, 405 (W.D.N.Y. 1994) (prevailing party was entitled to compensation for all hours cited by both its attorneys); Wrozek v. City of Chicago, 739 F.Supp. 400, 403 (N.D.Ill. 1990) (use of more than one attorney may result in more efficient allocation of work). Certainly it is not an unusual practice among private law firms, especially large ones.

It should also be noted that much of the time claimed here, especially by Elizabeth Schneider, can be attributed to defendants' actions and the positions they took during this

litigation. For instance, the District persisted in refusing to change its policy even though it was aware of the Johnny Doe decision in which this court had declared another district's policy under § 3208-a to be in violation of the Rehabilitation Act. Had the District changed its policy in response to Johnny Doe, plaintiffs might never have brought this action in the first place.

A substantial portion of the time sought to be compensated was devoted to discovery disputes. Here, too, much of this can be attributed to defendants' actions. Defendants moved to quash plaintiffs' subpoena duces tecum which sought production of certain school records. The matter was briefed and argued before Magistrate Judge Kenneth R. Fisher, who denied the motion to quash. The hours devoted to this dispute would not have been expended had defendants complied with the subpoena to begin with.

In addition, plaintiffs' attorneys have had to spend a considerable amount of time on this fee application. It was clear when the substantive issues were settled that plaintiffs were prevailing parties in the litigation. Defendants therefore knew that plaintiffs would likely be awarded some attorney's fees. As defendants themselves state on page 5 of their Memorandum of Law, "[t]here has never been any question about plaintiff's status as a prevailing party." Since, "[i]n the ordinary course, prevailing parties are entitled to fees for preparing an application under section 1988," New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983), defendants ran the risk that their opposition to plaintiffs' request would result in an increase in the number of hours for which plaintiffs would be compensated. In my view, the time spent by plaintiffs on the instant application was reasonably expended, and therefore that time is compensable.

Furthermore, the result that plaintiffs achieved is significant. Plaintiffs obtained nearly everything they sought in their complaint short of an actual declaration that § 3208-a is unconstitutional. Moreover, as far as the persons affected are concerned--that is, students with physical impairments--the result is virtually the same as if the statute had been declared unconstitutional, since the statute will no longer operate to bar them from participating in sports with their parents' and physicians' consent. Those students will be treated the same as any others, which is essentially all that plaintiffs sought when they filed suit.

I am not persuaded by defendants' arguments that the time claimed is excessive because plaintiffs' attorneys were familiar with the issues because of their involvement in the Johnny Doe case. Although some of the legal issues were the same in both this case and in Johnny Doe, the case at bar also involved other issues not present in Johnny Doe. For example, the instant case was commenced as a class action, which necessitated some discovery concerning the prospective class, and preliminary work on a motion to certify the class.² Just because that motion later turned out to be unnecessary because of the settlement does not mean that it was unreasonable for plaintiffs' counsel to have spent time preparing the motion.

I am also unpersuaded by defendants' argument that the time spent in negotiating the new District policy is not compensable because such relief could not have been obtained in the form of an enforceable judgment against defendants. It is not novel for courts to order

²In addition, the District did not retain its present counsel until about two months after this action was commenced; up to that point it was represented by another attorney, who was apparently not particularly familiar with federal practice, a circumstance which plaintiffs' attorneys state made it more difficult for them to proceed swiftly.

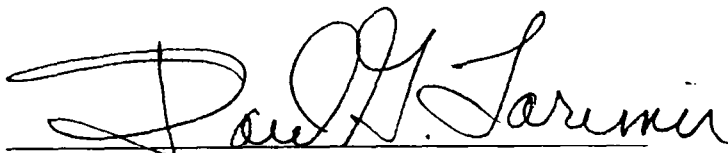
parties to devise plans to remediate constitutional or statutory violations. See, e.g., United States v. Commonwealth of Virginia, 976 F.2d 890, 900 (4th Cir. 1992) (remanded to district court with directions to require defendant military school to formulate, adopt, and implement a plan that conforms with Equal Protection Clause), cert. denied, 113 S.Ct. 2431 (1993); Santiago v. Miles, 774 F.Supp. 775, 801 (W.D.N.Y. 1991) (directing defendant prison officials to submit plan to remedy equal protection violations, and permitting plaintiffs to comment on proposal, as part of process by which "plaintiffs, defendants and the Court together" could fashion appropriate relief). Defendants offer no cogent reason why plaintiffs should not be awarded some fees for time reasonably spent in that aspect of the case. See Daggett v. Kimmelman, 811 F.2d 793, 800-01 (3d Cir. 1987) (plaintiffs entitled to attorney's fees under § 1988 for time spent in devising congressional redistricting plan); cf. United States v. Board of Ed. of Waterbury, Connecticut, 605 F.2d 573, 576-77 (2d Cir. 1979) (attorney's fees in school-desegregation case not limited solely to party which proposed desegregation plan that was ultimately adopted; fees could also be awarded to intervenors who worked in support of a different plan that bore a substantial resemblance to plan that was adopted).

CONCLUSION

Plaintiffs' motion for attorney's fees under 42 U.S.C. § 1988 (Item 22) is granted, and plaintiffs are awarded \$37,008.20 in attorney's fees. That sum is to be paid to plaintiffs

by defendants within twenty (20) days of the date of entry of this Decision and Order.

IT IS SO ORDERED.

A handwritten signature in cursive script, reading "David G. Larimer". The signature is written in black ink and is positioned above a horizontal line.

DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

Dated: Rochester, New York
June 2, 1995.