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STATE OF WASHINGTON
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Court of Appeals No. 324133

**STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III**

GRANDVIEW SCHOOL DISTRICT NO. 200,

Appellant,

v.

MARIA SANCHEZ and JOSE GARCIA,

Respondents.

BRIEF OF APPELLANT

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ORIGINAL

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Introduction

The matter on appeal is currently limited to issues relating to the award of attorneys' fees and other costs, which a prevailing party may be entitled to under the Individuals with Disabilities Education Act (IDEA) of 2004, 20 U.S.C. § 1415.¹

Under the IDEA, eligibility for special education services is established, for students between ages 3 and 21, through an evaluation process conducted by the local school district. Once a student has been evaluated and determined to be eligible for, and in need of, special education services, an individualized education program ("IEP") must be developed by the school district with the participation of the parent (and the student as appropriate). A school district must have an IEP in effect at the beginning of the school year for each enrolled student eligible for special education services. IEPs are reviewed on an annual basis, and more often as necessary. Public school districts must provide each student eligible for special education a free appropriate

¹ Revised federal regulations (34 C.F.R Part 300) were published in 2006. State regulations were moved to WAC Chapter 392-172A.

public education (FAPE) program.

Public school districts are required to serve students eligible for special education in the least restrictive environment. That means, to the maximum extent appropriate, in the general education setting with students who are not disabled. Unless the nature or severity of the disability is such that education in general education classes cannot be achieved satisfactorily, even with the use of supplementary aids and services, special education students are not to be removed from general education and served in special classes, separate schools or other restrictive placements.

Each school district must ensure that a continuum of alternative placements is available to meet the special education and related service needs of eligible students. When a school district cannot provide an appropriate education within the district, it may place a student in a private school or facility that meets nonpublic agency (NPA) criteria. School districts are also authorized to enter into interdistrict agreements with other school districts, or contract with other public and private agencies (subject to

specific requirements) to provide special education and related services.

Students eligible for special education are reevaluated by the local school district, typically on a 3-year cycle. A parent who disagrees with a school district's evaluation has the right to request an independent educational evaluation ("IEE") at public expense.

A parent or a school district may file a due process hearing request on matters relating to the identification, evaluation, educational placement, or provision of FAPE. Any party aggrieved by the findings and decision has a right to bring a civil action, in state or federal court, with respect to the due process hearing.

II. ASSIGNMENTS OF ERROR

A. THE TRIAL COURT ERRED IN AWARDING ATTORNEYS' FEES ABSENT RESPONDENTS' COMPLIANCE WITH CIVIL RULE 54(d) (2) AND ANY SHOWING OF EXCUSABLE NEGLIGENCE.

Issues to be answered under this assignment of error: Was the motion for attorney's fees, including

expenses, filed no later than 10 days after entry of judgment, as required by Civil Rule 54 (d)(2)? If not, was there any showing of excusable neglect to justify filing said motion over 90 days after entry of judgment?

B. THE TRIAL COURT ERRED IN AWARDING UNREASONABLE COSTS, INCLUDING ATTORNEYS' FEES, IN EXCESS OF \$450,000.

Issues to be answered under this assignment of error: Did the Respondents meet their burden of demonstrating that the attorneys' fees and expenses, requested by two separate law firms, are reasonable? Did the trial court make findings and conclusions specific to the challenges raised by the School District, including inconsistent time entries, overstaffing, and incomplete success? In enhancing the hourly rate requested by one of the Respondents' attorneys, did the court provide a bonus contrary to law? Did the court have jurisdiction, in deciding a motion for attorneys' fees, to include fees relating to any proceedings other than the due process hearing

and civil review? In deciding a motion for attorneys' fees, did the court have discretion to include expert witness fees? In determining the amount of the award, did the court properly consider the purposes of IDEA 2004?

III. STATEMENT OF THE CASE

A. SUMMARY OF FACTS

The Grandview School District No. 200 (hereinafter "The School District") is located primarily within the boundaries of Yakima County in central Washington. The District serves approximately 3,500 students. Other demographic information available through the Office of the Superintendent of Public Instruction reflects that, during the 2009-2010 school year, over 87% of those students were Hispanic.²

Respondent Garcia (hereinafter "the Student") resides with Respondent Sanchez (hereinafter "the Parent"), within the School District's boundaries. The Student, who will turn 22 in December 2014, was diagnosed with bilateral sensorineural hearing loss

shortly after birth (CP -5025-5026).

The Student was fitted with hearing aids during the first year of his life at the Yakima Hearing and Speech Center ("Hearing & Speech Center). He was enrolled in the Parent/Infant Language Stimulation Program offered by the Hearing & Speech Center at approximately seven (7) months of age. However, attendance was reported to be sporadic due to transportation and other difficulties. Records from the Hearing & Speech Center documented the Student's intermittent use (and loss) of his hearing aids over the years (CP -4976 *et seq.*).

The Student enrolled in the School District when he was three years old, during the 1995-96 school year (CP 5069 *et seq.*); and was determined eligible for and in need of Special Education and related services. The Student was served on an IEP beginning in preschool. Spanish-language forms were signed by the Parent to provide consent for the initial evaluation and IEP (CP -5059 and 5076 *et seq.*). He continued to be served under an IEP in

² Reportcard.ospi.k12.wa.us.

elementary, middle and high school. The School District provided Special Education and related services (speech therapy) under the IDEA eligibility category Hearing Impaired.³

An audiologist working with the Student at the Hearing & Speech Center contacted the School District early in the 2009-2010 school year to report that he had been fitted with new digital hearing aids, and to request that new wireless FM systems be purchased for him and another student (CP -5015-5017). In addition to this new equipment, an itinerant teacher of the deaf who began working in the District suggested other services for the Student, including a having a notetaker in class, The Student was a junior in high school and his least restrictive environment was considered to be Resource Room Special Education classes in core academic areas (such as reading), in combination with regular education classes (CP -5479 *et seq.*).

³ Deafness and hearing impairment are separate eligibility categories under the IDEA. WAC 392-172A-01035 (2) (c) and (f).

On behalf of the Parent, the Feeney Law Office requested a Special Education due process administrative hearing on January 15, 2010 (CP -4953 *et seq.*). Three issues were identified therein: (1) Failing to provide appropriate programs and placements to the Student in the least restrictive environment; (2) failing to provide Supplementary Aids and Services; and (3) failing to allow the Parents [sic] meaningful participation in the educational process. The request for hearing did not indicate on its face that the Parent sought to raise issues occurring outside of the two-year IDEA statute of limitations.⁴

The School District convened a resolution meeting.⁵ (CP -4929). Attorney Feeney attended the meeting, but the School District did not have an attorney present (CP -7949-7950). The matter was not resolved either during the resolution meeting, or by the end of the 30-day resolution period on February 14, 2010 (CP -4922).

⁴ IDEA has included a specific statute of limitations only since the 2004 Reauthorization.

⁵ This requirement is also new since the 2004 Reauthorization.

Attorney Gregory Stevens entered his Notice of Appearance as counsel for the School District on February 16th (CP -4925). Administrative law Judge (“ALJ”) Matthew Wacker conducted the initial prehearing conference on February 18, 2010. At that time, counsel for the Parent first disclosed that she intended to file a motion to recognize an exception to the IDEA statute of limitations, based on a theory of continuing violations (CP -4915 *et seq.*).

On March 8, 2010, counsel for the Parent filed a brief but submitted no evidence. (CP- 4903 *et seq.*) The School District opposed said motion (CP -4825 *et seq.*). ALJ Wacker denied the motion on March 25, 2010, but ruled that this did not preclude the Parents⁶ from seeking to introduce evidence at the hearing “in an attempt to establish one or both of the exceptions to the statute of limitations.... To that end, the due process hearing shall be bifurcated. The Parents shall be given an opportunity to offer evidence *solely*

⁶ The hearing was requested on behalf of two identified parents, but only Sanchez participated.

for the purpose of attempting to establish one or both of the statutory exceptions to the two-year statute of limitations.” (CP -4793 *et seq.*).

The ALJ’s ruling further expanded the issues for hearing beyond those identified in a Prehearing Order dated March 18th, which enumerated five issues with a total of 18 subparts (CP -4889 *et seq.*) The School District objected, but the ALJ scheduled the two hearings to be held for a total of eight days at the beginning and end of May (CP -4793 *et seq.*). Mr. Stevens and Bronson Brown, an attorney in private practice who serves as general counsel for the School District, attempted to settle the case (CP -7910 – 7916).

Mr. Stevens gave notice of his intent to withdraw on April 28, 2010 and Joni Kerr was substituted as counsel for the School District (CP -4642, -4650-4655). Attorney Artis Grant filed his Notice of Appearance on behalf of the Parent the following day (CP -4727 *et seq.*) The hearing dates were continued, and the first part of the bifurcated hearing was held May 24 through May 26, 2010. The second part of the hearing was scheduled to commence on June 21, 2010 (CP

-4629 *et seq.*). Counsel for the School District continued to try to resolve the matter without further litigation (CP -7906-7907, -7918-7922).

Although promised earlier, the Interlocutory Order deciding the first part of the bifurcated due process hearing was not issued until Friday, June 11, 2010 (CP -4431 *et seq.*). Therein, the ALJ concluded that the Parent did not establish that the School District made specific misrepresentations that it had resolved the problem forming the basis of the complaint and, therefore, that exception to the statute of limitations did not apply. ALJ Wacker further concluded that “the Parent established by a preponderance of credible evidence that the District more likely than not withheld information it was required to provide ... thereby preventing the Parent from requesting a due process hearing prior to January 15, 2010,” citing *Marple Newtown_Sch. Dist. v. Rafael N. ex rel. R.N.*, No. 07-0558 (U.S.D.C. E.D. Pa. 2007). In the Marple case, the student began attending the Philadelphia school district in 1999. The hearing officer found that the school district failed to communicate with the Spanish-speaking parent in his native language until 2006.

ALJ Wacker ordered that the Parent was “not bound by the two-year statute of limitations, and may allege violations of the IDEA with respect to the Student’s education in the District, commencing with the 1998-1999 school year”. The ALJ did not treat his interlocutory ruling allowing the Parent to present complaints from the time the Student started kindergarten as an amendment to the complaint, requiring a new 30-day resolution period and new hearing timelines.

Instead, the second part of the bifurcated hearing began, as scheduled, on June 21, 2010. Due to the interpreter’s illness, no evidence was heard on that date and the hearing was continued to the following month (CP -4203 *et seq.*) The hearing resumed on July 12, 2010; and concluded on August 26th. The Parent called ten witnesses over a period of eight days; and the School District called an additional 16 witnesses over six days. The final day of hearing was limited to discussion regarding exhibits and the Parents’ rebuttal. Among the exhibits identified by the School District was a draft IEP that it had prepared and provided to the Parent, proposing that the Student be placed

in the Deaf Education program in the Yakima School District for the 2010-2011 school year.⁷ ALJ Wacker repeatedly refused to admit the draft IEP and accompanying documentation (CP -4026 *et seq.*)

Following post-hearing briefing, ALJ Wacker issued his Findings of Fact, Conclusions of Law and Order on October 13, 2010 (*Id.*) The ALJ ruled in favor of the Parent on certain issues; and in favor of the School District as to others. ALJ Wacker order relief in a form different than that which the Parent had requested:

“[T]he Parent should receive the following in response to her request for private placement and compensatory education for the Student. The [School] District shall contract with Dr. Marlowe and Ms. [Jennifer] White to design and implement an educational program and placement for the Student which is consistent with the recommendations contained in Dr. Marlowe’s Neuropsychological Evaluation (Exhibit P70) and the recommendations contained in Ms. White’s Consultation Services Report (Exhibit P72, Attachment 2). The program shall be designed and implemented for the Student within 60 calendar days of the entry of this Order.

⁷ RCW 28A.320.035.

The District shall bear all costs and expenses associated with the design and implementation of this educational program. The program shall continue for a period of **six years** from the date it is implemented.”
(bold in the original)

The School District attempted, without success, to get signed contracts in place with Dr. Marlowe and Ms. White, by the deadline ordered by ALJ Wacker. In late December 2010, the Respondents filed an action in the United States District Court for the Eastern District of Washington⁸ seeking to enforce ALJ Wacker’s decision, despite the fact that the School District gave notice that it intended to seek judicial review and that the time for doing so had not yet passed.

The School District timely sought judicial review of the administrative decision on January 11, 2011. Among the errors for review identified therein were the ALJ’s decisions on the statute of limitations, his exclusion/limitation of evidence, and his authority to award a prospective placement to be designed and implemented by private individuals.

The federal case was assigned to Judge Shea, who

⁸ Case No. 2:10-cv-03118-EFS.

ordered that the parties participate in mediation with United States Magistrate Judge Hutton in order to reach agreement on the contracts.⁹ Although Dr. Marlowe and Ms. White appeared for the mediation on March 1, 2011, they refused to meet face-to-face with School District representatives and left the mediation without signing the contracts offered and signed by the District's Superintendent that date.

Counsel for the parties agreed that the Magistrate Judge's Report re Dispute Resolution Meeting be unsealed and the Court so ordered.¹⁰ On April 12, 2011, Judge Shea entered an Order staying the case pending the outcome of the state court proceedings.¹¹ Approximately six months later, the stay was lifted, although judicial review had not been completed.¹² Thereafter, Judge Shea granted Plaintiffs' motion for leave to file Amended Complaint for Disability Discrimination and Harassment and Violation of Constitutional Rights.¹³ The federal case is still pending,

⁹ *Id.*, Docket Entry #38.

¹⁰ *Id.*, Docket Entry #s 52 and 53.

¹¹ *Id.*, Docket Entry #54.

¹² *Id.*, Docket Entry #66.

¹³ *Id.*, Docket Entry #75.

with jury trial scheduled for September 9, 2015.¹⁴

Following Judge Lawrence-Berrey's assignment to hear the case in state court, attorney Tolcacher entered her appearance as local counsel for the School District on May 19, 2011.

Counsel for the Respondents filed a citizen's complaint with OSPI¹⁵ relating to the failure to have contracts in place. OSPI's decision includes an accurate summary of the District's many attempts to reach agreement with the providers.¹⁶ With OSPI's assistance, which had previously been declined by counsel for the Respondents and/or Dr. Marlowe and Ms. White, contracts were signed by all parties in October 2011.

Subsequent to ALJ Wacker's decision, the School District prevailed at a separate due process hearing (conducted by ALJ Sullivan), concerning the need to reevaluate the Student.¹⁷ The Parent argued unsuccessfully therein that ALJ Wacker's decision addressed and precluded

¹⁴ *Id.*, Docket Entry #189.

¹⁵ Special Education Citizen Complaint No. 11-27.

¹⁶ *Id.*, Findings of Fact ¶¶ 7-26, 28-31, and 33-36.

¹⁷ Special Education Cause No. 2011-SE-0007.

the reevaluation. ALJ Sullivan disagreed and allowed the School District to conduct the reevaluation, which was completed by the end of 2011.

Dr. Marlowe and Ms. White first convened an IEP meeting for the Student in November 2011. By design, the educational services the Student received under that IEP were all delivered by instructors in the Seattle area. Despite OSPI's specific directive¹⁸ that the Student be served in his geographic area, the IEP required that he travel to Seattle weekly in order to access the instruction and/or to receive it via computer conferencing using Skype.

By January 2012, Dr. Marlowe and Ms. White were experiencing difficulties working together. This was known to counsel for the Respondents, although the School District was not informed for several months. Dr. Marlowe and Ms. White each accused the other of unethical and otherwise improper behavior. By April 2012, both OSPI and the School District were made aware of the problem. Ms. White terminated her contract with the School District shortly

¹⁸ Special Education Citizen Complaint No. 11-27, page 13 Amendment Provisions.

thereafter. Copies of communications between Dr. Marlowe and Ms. White, as well as letters sent to OSPI by counsel for Respondents, were identified and admitted as additional evidence for judicial review (CP -7505, PE J).

Since Ms. White's departure, Dr. Marlowe has been solely responsible for the design and implementation of the Student's program and placement. She has consulted with other professionals and has billed the School District therefor. However, there is no evidence that Dr. Marlowe has consulted anyone with Ms. White's vocational expertise. Nor has Dr. Marlowe brought any individual with such expertise in as a member of the IEP team for subsequent meetings (RP April 12, 2013 page 370 *et seq.*). Dr. Marlowe has arranged for the Student to receive services in and around the Grandview area, but he is not being educated with other students, disabled or otherwise (*Id.*).

Throughout the course of the Superior Court proceedings, counsel for the Respondents repeatedly, and unsuccessfully, sought to limit the Superior Court to review of the administrative record, contrary to the express language of IDEA that, on judicial review, the court "(i) shall

receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415 (i) (2) (C).

The trial on judicial review commenced on January 31, 2013 and concluded on April 12, 2013. Copies of the reevaluation reports, as well as the testimony of Dr. Debra Hill, a neuropsychologist who served as a member of the reevaluation team, were among the additional evidence admitted by the court (CP -7505, PE B-G). The court also allowed the Student’s physician, Dr. Field, to testify, and admitted hundreds of pages of his records, which were not identified as exhibits during the due process hearing (CP - 7505, PE A).

The court entered written Findings of Fact and Conclusions of Law on August 30, 2013. The Order entered therewith, drafted by counsel for the Respondents, provided that “Respondents may move for an award of reasonable attorney fees and costs” (CP -8188). An Order denying the School District’s motion for reconsideration was entered

September 20, 2013 (CP -8189).

Respondents filed a 4-page pleading titled Motion for Hearing to Determine Attorney Fees, and a Note for Motion Docket, on December 27, 2013 (CP -7683-7687). They filed a Memorandum of Authorities on January 3, 2014 (CP -7691 *et seq.*). Attached as an exhibit thereto were Ms. Feeney's invoices. Attorney Feeney filed her Declaration (CP -7785 *et seq.*), and those of three other attorneys (CP -7779 *et seq.*, -7799 *et seq.* and -7806 *et seq.*), on January 6, 2014.

Feeney requested an award of all her fees at her current rate of \$200 per hour, as opposed to a historical rate of \$175. Attorney Grant did not file his Declaration with attached fee statements until January 23, 2014 (CP -7812 *et seq.*). He requested an hourly reimbursement rate of \$350. Respondents filed additional Declarations (initial and Supplemental) on January 27 and 30, 2014 (CP -7880 *et seq.* and -7995 *et seq.*).

The School District filed the Declaration of its Associate Superintendent (CP -7894 *et seq.*) and a Declaration of Counsel in opposition to the requested fees (CP -7897 *et seq.*) Evidence concerning the parties'

settlement negotiations was attached as one of the exhibits to the Declaration of Counsel.

The court heard legal arguments on February 14, 2014; and entered written Findings of Fact and Conclusions of Law on February 24, 2014 (CP -8191-8198). Judgments and an Order denying the School District's motion for reconsideration were entered on March 14, 2014 (CP -8199 through -8200).

B. TRIAL COURT'S CONCLUSIONS

Through a series of pretrial rulings, the trial court allowed, but limited, the admission of additional evidence. Ultimately, each party was allowed to call one expert witness, but only with respect to the issue of the remedy.

During the trial in April 2013, the court ordered that the School District immediately pay for an independent educational evaluation performed by Dr. Marlowe (ALJ Wacker had previously allowed the Parent to have the cost of either Dr. Marlowe's or Ms. White's assessment reimbursed). However, following the review hearing, the

court agreed with the School District's position that certain of Dr. Marlowe's charges were more in the nature of expert witness fees, and ordered that said charges be remitted back.

The court upheld the administrative decision that the Parent had demonstrated one of the exceptions to the statute of limitations. Likewise, the court upheld the exclusion of the School District's proposed exhibits. The court reversed ALJ Wacker with respect to his findings and conclusions that the School District had failed to provide the related speech therapy services specified in the Student's IEPs.

Without ever addressing the School District's arguments that the form of relief ordered by ALJ Wacker was contrary to law and otherwise without legal precedent, or in any way addressing the change in the program since one of the two required service providers terminated her contract, the court affirmed the private program award but reduced its duration from six to four years.

During telephonic arguments concerning the requests for attorneys' fees on February 20, 2014, counsel for the

Respondents argued that a final judgment had previously been entered. Counsel for the School District disagreed with that position. The court agreed on the record that no final judgment had been entered, nor any order containing language required under Civil Rule 54(b) (RP February 20, 2014 page 38:18-25 through page 39:1-25). As such, the issue of the timeliness of the request for fees under Civil Rule 54(d) (2) was not addressed.

The court was not aware that it could consider evidence of settlement offers until the hearing on February 14, 2014 (RP February 14, 2014 page 29:13-14). In announcing a decision from the bench that date, the court held that there were no settlement negotiations constituting an offer of judgment under Civil Rule 68 for him to consider; and that in any event, the relief ultimately obtained by the Student was better than that offered in a letter sent by attorney Stevens (*Id.* at page 27:10-18). The court referenced 20 U.S.C. § 1415 (i) (3) (D), but did not specifically address the grounds for reducing attorney fees identified in § 1415 (i) (3) (F) (*Id.*).

In the court's view, the case "exploded" in the spring

of 2010 and, could not be settled due to the rapidity of the process (RP February 14, 2014 page 26:14-25 through page 27:1-9; and 30:1-12).

The court adjusted the rate requested by attorney Feeney upward from \$200 to \$250; and found that \$350 per hour was reasonable for attorney Grant (RP February 14, 2014 page 28:8-22).

In response to the School District's concern about Respondents' request that more than one attorney be reimbursed, the court noted that "Kerr had similarly associated with a second attorney" (RP February 14, 2014 page 28:22-25). However, the court decided that some of the work could have been done by a single attorney and, therefore, a reduction of 25% was reasonable (RP February 14, 2014 page 28:25 through page 29:1-21).

Based upon the foregoing, the court awarded attorney fees to the Feeney Law Office, PLLC in the amount of \$266,568.75; and costs in the amount of \$22,747.30; for a total of \$289,316.05. The court awarded fees to Grant & Associates in the amount of \$177,782.35; and costs in the amount of \$4,534.11; for a total of \$182,316.46 (CP -8198).

Judgments were entered accordingly (CP -8200 through -8205).

IV. ARGUMENT

A. THE TRIAL COURT ERRED IN AWARDING ATTORNEYS' FEES ABSENT RESPONDENTS' COMPLIANCE WITH CIVIL RULE 54(d) (2) AND ANY SHOWING OF EXCUSABLE NEGLIGENCE

- 1. Respondents' motion for hearing to determine attorney's fees and costs was not filed within 10 days after entry of judgment.**

Civil Rule 54(d) (2) requires that claims for attorney's fees be made by motion that "must be filed no later than 10 days after entry of judgment." In moving to dismiss the School District's appeal as untimely except as to the issue of fees and costs, Respondents argued that the trial court's findings, conclusions and order entered on August 30, 2014 constituted a final judgment. The Court of Appeals Commissioner and this Court have agreed.

Accordingly, Respondents' motion for

attorneys' fees should have been filed no later than September 30, 2013, which was the tenth day following the court's denial of the School District's motion for reconsideration.

The award of attorneys' fees should, therefore, have been reversed and denied as untimely.

2. Respondents made no showing to excuse filing their claim for attorney's fees and costs more than 90 days after entry of judgment.

In February 2014, Respondents similarly took the position, during argument on their motion for attorneys' fees, that a final judgment had been entered in the fall of 2013. They never requested that the 10 day time under Civil Rule 54(d) (2) be extended; nor did they make any showing of excusable neglect to support enlargement under Civil Rule 6(b).

Although the local Superior Court Rule (LCR 7 (b)(1)(A)(i)) required that necessary supporting affidavits be filed and served contemporaneously, attorney Feeney did not file copies of her fee invoices

for another week; nor her Declaration for 10 days. More troubling, attorney Grant did not file documentation to support his fee requests for almost a month after the motion was filed.

The Declarations of other attorneys filed in support, on and after January 3, 2014, allude (at least with respect to Mr. Grant) to review of draft invoices and otherwise reference documentation not shared with the court or counsel for the School District.

The 90-plus day delay in filing a motion for attorney fees resulted in the matter being heard by the court as Judge Lawrence-Berrey was transitioning from the Superior Court to the Court of Appeals. By his own admission, he did not have the “resources to pick through four years of time entries” (RP February 14, 2014 page 29:10-11).

The School District was prejudiced by Respondents’ failure to file their motion requesting fees within 10 days of the judgment, especially considering the sums requested.

The award of fees and costs to Respondents’

attorneys should, therefore, be reversed.

**B. THE TRIAL COURT ERRED IN
AWARDING UNREASONABLE
COSTS, INCLUDING ATTORNEYS'
FEES, IN EXCESS OF \$450,000.**

A fee applicant bears the burden of demonstrating that a fee is reasonable. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). "Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel." *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632, 966 P.2d 305(1998). The trial court's "findings must do more than give lipservice to the word 'reasonable.' The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis. *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745, 753 (Wash. App. Div. 1 2013). A trial court's failure to address "concerns

that certain blocks of time billed were duplicative or unnecessary” is reversible error. *Id.*, 312 P.3d 754.

- 1. The trial court failed to meaningfully review the concerns raised by the School District’s objections to the fees requested.**

The Declaration of Counsel in Opposition to Respondent’s Motion for Attorney Fees and Costs identified concerns that the matter was overstaffed when attorney Grant appeared in the case, inasmuch as attorney Feeney and her associate, Meg Bridewell, were already representing the Parent (CP -7898, ¶5 and -7899, ¶8). As of the time of the hearing, Ms. Feeney had been admitted to practice in Washington for over six years and had previously handled at least one Special Education due process hearing.¹⁹ Ms. Bridewell had been admitted for over 18 years. Mr. Grant had additional years of legal experience, but there is no record of his having represented parents in

¹⁹ Special Education Cause No. 2006-SE-0089, available on the OSPI Office of Professional Practices website.

Special Education due process hearings in the State of Washington. Among the attorneys who provided Declarations in support of Respondents' fee requests, only attorney Wiscarson represents parents in IDEA due process hearings (CP -7799 *et seq.*). Attorneys Wiscarson and Kerr represented the parents and school district, respectively, in a 33-day special education due process hearing in 2013.²⁰ In contrast, Respondents had at least two attorneys present throughout the due process hearing; and three attorneys on all but three days.

Mr. Grant billed for all but the three days of the due process hearing that he missed. On the days he was present, however, the hearing transcripts reflect that he handled the direct and cross-examinations of significantly fewer witnesses than attorney Feeney. As such, his proffered rationale for agreeing to act as co-counsel ("litigation skills to set-up a strong record for appeal")²¹ is not persuasive.

²⁰ Special Education Cause No. 2012-SE-0033.

²¹ CP -7814, ¶ 11.

The trial court responded to the objection that the case was overstaffed by pointing out that attorney Tolcacher (formerly Zimmerman) also appeared on behalf of the School District. However, this did not occur until after judicial review had been initiated in the Superior Court. Moreover, hiring local counsel is significantly different than having multiple attorneys routinely bill for the same tasks.

The Declaration of Counsel in Opposition to Respondent's Motion for Attorney Fees and Costs also identified concerns regarding changes between the block billing previously submitted to the School District by attorney Feeney and the invoices she submitted in support of the motion for fees. There were other inaccuracies, as well (CP -7901, ¶ 19). Rather than question her as to why, when and how the two types of billing statements were generated, the trial court simply allowed Feeney to add an additional day of time.

The Court never questioned the need for extensive discovery in the administrative proceedings;

nor examined the amount of time billed for various tasks. At the outset, Feeney billed a total of 9 hours for drafting the 6-page request for due process hearing (CP –7707). Over four hours were billed on March 1, 2010 to “chart IEPs” (CP –7711). Clerical tasks such as Bates numbering of school records on March 16, 2010 were billed at \$200 per hour (CP - 7712). These are just a few examples of excessive fees and failure to exercise billing judgment.

The Declaration of Counsel in Opposition to Respondent’s Motion for Attorney Fees and Costs likewise identified concerns regarding numerous discrepancies and other inaccuracies in attorney Grant’s invoices (CP -7902, ¶ 21). The trial court never questioned why, if attorney Grant maintained contemporaneous time records, over 36 hours would be reasonably required for “locating, gathering, collating time records, bills, mileage reports, court call receipts, copy charge records for four relevant years” (CP -7816, ¶17). The School District should not be required to pay opposing counsel to create

timesheets long after the fact, at a rate of \$350 per hour.

A side-by-side comparison of attorney Feeney's and Grant's invoices suggest that certain entries were "lifted" one from the other. For example, the entries on January 25, 2013 are identical and worded in a way that would not typically appear on a client invoice (CP -7766 and -7862). "Counsel must provide contemporaneous records documenting the hours worked.' Although such records need not be exhaustive, any reconstructed hours 'should be credited only if reasonable under the circumstances and supported by other evidence such as testimony or secondary documentation'." *Johnson v. Dep't. of Transp.*, 177 Wn. App. 684, 699, 313 P.3d 1197 (2013).

Even if both attorneys actually spent the time reflected on their invoices, there is little or no evidence that "billing judgment" was exercised. *Fetzer*, 122 Wash.2d at 156-57, 859 P.2d 1210. The amount of time actually spent by a prevailing attorney

is relevant, but not dispositive. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). “The lodestar must be limited to hours reasonably expended. The total hours an attorney has recorded for work in a case is to be discounted for hours spent on ‘unsuccessful claims, duplicated effort, or otherwise unproductive time.’” *Berryman*, 177 Wn. App. 644, 312 P.3d 745, 755-756, quoting *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

“It is also appropriate to discount for unproductive time.” *Bowers, supra*, 100 Wash.2d at 597. Respondents spent substantial time at the due process hearing pursuing claims upon which they did not prevail. One example is their insistence that the School District had changed the Student’s eligibility category from Hearing Impaired to Specific Learning Disability. In the Superior Court, Respondents filed numerous unsuccessful motions, including two motions for more definite statement and motions to limit the court’s review to consideration of the

administrative record.

The court's failure to address, and reduce, fees relating to unsuccessful work was reversible error.

2. The trial court's upward adjustment of the hourly rate requested by attorney Feeney is contrary to law.

In its findings, conclusions and order relating to the request for attorneys' fees, the trial court purported to apply the "lodestar," which is derived by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. Attorney Grant represented that his hourly rate had been \$350 for a decade. In comparison, attorney Feeney declared that her rate had changed over the course of the administrative proceedings from \$175 to \$200 per hour. She requested an award of all her fees at the higher hourly rate.

In making the "lodestar" calculation, the court should have determined whether the attorney's fees were "based on rates prevailing in the community in which the action arose for the kind and quality of services furnished. 34 CFR 300.517 (c) (1). Instead, the court decided that Feeney

could have (but did not) charged more; and increased her hourly rate by \$50 (CP –8089 ¶ 6).

IDEA differs from other fee-shifting statutes in that no bonus or multiplier may be used in the calculation. 20 U.S.C. § 1415 (i) (3) (C). The trial court, however, relied upon factors identified in *Kerr v. Screen Extras Guild, Inc.* 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). That decision has been criticized in subsequent cases, including *Stewart v. Gates*, 987 F.2d 1450 (9th Cir. 1993). Whether the fee is fixed or contingent is no longer a permissible factor to be considered.

“Once determined, the basic fee leaves ‘very little room’ for enhancement. *Delaware Valley*, 478 U.S. at 566, 106 S.Ct. at 3098. To overcome the strong presumption that the basic fee is reasonable, the applicant must satisfy stringent requirements. Foremost, the applicant must show the requested enhancement is “necessary to the determination of a reasonable fee.” *City of Burlington v. Dague*, 505 U.S. 557, 567 112 S.Ct. 2638, 2641, 120 L.Ed.2d 449 (1992) (emphasis in original). In carrying this heavy burden, the applicant may not rely on many of the *Kerr* factors. For example, enhancement for contingent risk of nonpayment of fees is not

permitted. *Dague* 112 S.Ct. at 2643. Other factors, including the novelty and complexity of the issues, the special skill and experience of counsel, the quality of representation and the results obtained from the litigation, are fully reflected in the basic fee, and thus cannot serve as independent bases for enhancement. *Delaware Valley*, 478 U.S. at 565, 106 S.Ct. at 3098. The applicant must present specific evidence demonstrating that any factor relied upon is not subsumed within the basic fee. *Id.* at 567-68, 106 S.Ct. at 3099-3100.

987 F.2d 1453. (italics added)

Washington case law is consistent with the federal case law to the extent that adjustments to the lodestar are reserved for “rare” occasions. *Berryman*, 312 P.3d at 757, citing *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010); *Mahler*, 135 Wash.2d at 434, 957 P.2d 632. Likewise in placing the burden of justifying any deviation from the lodestar upon the party proposing it. *Berryman*, 312 P.3d at 758, citing *Bowers*, 100 Wash.2d at 598, 675 P.2d 193. “[I]n virtually every case the quality of the work will be reflected in the reasonable hourly rate.” *Bowers*, 100 Wash.2d at 599, 675 P.2d 193.

Respondents neither requested nor justified a fee enhancement. Therefore, the award of fees for attorney Feeney’s

work, including the Judgment entered thereon, must be reversed.

3. The award of fees for work relating to the state citizen's complaint is contrary to law.

Counsel for Respondents each submitted invoices reflecting, and requested an award of fees relating to, Special Education Citizen Complaint No. 11-27. Those hours were included in the trial court's lodestar calculations.

The trial court had no legal authority to award such fees as part of costs to the Respondents. Courts have jurisdiction of actions brought under section 615 of the IDEA without regard to the amount in controversy. 20 U.S.C. § 1415 (i) (3) (A). Furthermore, in any action or proceeding brought under 20 U.S.C. § 1415 (i), courts have discretion to "award reasonable attorneys' fees as part of the costs" to a party who prevails in a due process hearing. 20 U.S.C. § 1415 (i) (3) (B).

Although the state special education citizen complaint process is included in Chapter 392-172A WAC,²² The state complaint process is not part of section 615 of the IDEA and its implementing federal regulations. Rather, it is contained

²² WAC 392-172A-05025 *et seq.*

in 20 U.S.C. § 1221e-3; and the corresponding federal regulations may be found at 34 C.F.R. § 300.151-153.

To the extent Respondents rely upon *Lucht v. Molalla River School District*, 225 F.3d 1023 (9th Cir. 2000), that case is factually distinguishable. In *Lucht*, the parents did not request fees for attorney representation in the state Complaint Resolution Procedure (“CRP”). Rather, they requested fees for their attorney’s participation at IEP meetings ordered by the Oregon Department of Education as part of the CRP. They did not do so as part of a judicial review proceeding, but as an independent action initiated in federal court.

The court having no jurisdiction to award legal fees relating to the state citizen complaint process, the decision and judgments entered thereon must be reversed.

4. The award of expert witness fees and other costs is contrary to law.

Resolution of this issue is governed by *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006). In that case, the Supreme Court rejected the argument that expert witness fees were

part of the “costs” that could be recovered by a prevailing parent and reaffirmed that IDEA does not seek to promote its objectives “at the expense of fiscal considerations.” 548 U.S. 291, 303 (2006). Central to the Court’s ruling was that Congress enacted the law as a Spending Clause statute. .” 548 U.S. 291, 295-98. The precise wording of the statute “The use of this term of art, rather than a term such as ‘expenses’, strongly suggests that 1415(i) (3) (B) was not meant to be an open-ended provision that makes participating States liable for all expenses incurred by prevailing parents in connection with an IDEA case—for example, travel and lodging expenses or lost wages due to time taken off from work.” 548 U.S. 291, 297.

The Court in *Arlington* also rejected the argument that § 1415 (i) (3) (B) authorizes an award of “costs” to prevailing parents. “This language simply adds reasonable attorney’s fees incurred by prevailing parents to the list of costs that prevailing parents are otherwise entitled to recover. This list of otherwise recoverable costs is obviously the list set out in 28 U.S.C. § 1920, the general statute governing the taxation of costs in federal court, and the recovery of witness fees

under § 1920 is strictly limited by § 1821, which authorizes travel reimbursement and a \$40 per diem.” 548 U.S. 291, 297-298.

Accordingly, not only must the award of Dr. Marlowe’s fees for testifying in the Superior Court be reversed, but also the award of costs (and Judgments entered thereon) totaling \$27, 281.41.

5. The relief ultimately secured by the Parent/Student is contrary to the purpose of IDEA 2004.

The purpose of the statute allowing for attorney fees must be considered in determining the amount of an award. *Fetzer, supra*, 122 Wash.2d at 149, 859 P.2d 1210; *Brand v. Dep’t. of Labor & Indus.*, 139 Wn.2d 659, 667, 989 P.2d 1111 (1999).

As early as the 1997 IDEA amendments, it was noted that “[t]he growing body of litigation surrounding IDEA is one of the unintended and costly consequences of this law.” S. Rep. No. 104-275 at 85 (1996). When the 2004 amendments were passed, it was noted that the “IDEA is already one of the largest underfunded Federal mandates; it

is wrong for courts to impose even greater financial burdens on these financially strapped districts as punishment for trying to do their job.” S. Rep. No. 104-275 at 85 (1996); see also H.R. Rep. No. 108-77 at 85 (2003); 150 Cong. Rec. S5250, S5337 (daily ed., May 12, 2004) (statement of Sen. Corzine); 149 Cong. Rec. H3458, H3470 (daily ed., Apr. 30, 2003) (statement of Rep. McKeon).

IDEA 2004 added a two-year statute of limitations.²³ Prior to that, courts held that parents must promptly communicate their objections to the school district and initiate legal proceedings with reasonable dispatch, or their claims would be deemed waived. *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 23 IDELR 293 (3d Cir. 1995), *cert. denied*, 517 U.S. 1135 (1996). Other courts recognized a duty on the part of parents to unequivocally place the appropriateness of an IEP at issue and held that the mere expression of dissatisfaction with the school district’s program was insufficient. See, *Bernardsville Board of Education v. J.H.*, 42 F.3d 149 (3d Cir. 1994); *Evans v. District No. 17 of Douglas County*, 841 F.2d 824 (8th Cir. 1988); and *Ash v Lake Oswego*

School District No. 7J, 766 F. Supp. 852 (D. Or. 1991), *aff'd*, 980 F.2d 585 (9th Cir. 1992).

Similarly, prior legislative history reflected an understanding of the importance of promptly resolving concerns relating to a student's education program and/or placement. In his remarks, Senator Williams stated that "delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. ... Thus, in view of the *urgent need for prompt resolution* of all questions involving the education of handicapped children it is expected that *all hearings and reviews* conducted pursuant to these provisions will be *commenced and disposed of as quickly as practicable* consistent with a fair consideration of the issues involved." 121 Cong. Rec. 37,416 (1975) (as quoted in *Department of Educ. v. Carl D.*, 695 F.2d 1154 (9th Cir. 1983) (emphasis supplied by the Court).

IDEA 2004 added a 30-day resolution period,²⁴ prior to the start of the timelines for due process hearings. The

²³ 20 U.S.C. § 1415(f)(3)(C)

²⁴ 20 U.S.C. § 1415(f)(1)(B)

purpose of the resolution meeting “is for the parent of the child to discuss the due process hearing request, and the facts that form the basis of the request, so that the school district has the opportunity to resolve the dispute that is the basis for the due process hearing request.” WAC 392-172A-05090(1) (b).

IDEA 2004 also added limitations on the ability of a party to amend a due process complaint notice. 20 U.S.C. § 1415 (c) (2) (E). Specifically, such an amendment is allowed “only if:

- (a) The other party consents in writing to the amendment and is given the opportunity to resolve the due process hearing request through a resolution meeting held pursuant to the procedures in WAC 392-172A-05090; or
- (b) The administrative law judge grants permission, except that the administrative law judge may only grant permission to amend not later than five days before the due process hearing begins. If a party is allowed to amend the due process hearing request under (a) or (b) of this subsection, the timelines for the resolution meeting in WAC 392-172A-05090 (2) (a) and the time period to resolve in WAC 392-172A-05090 (2) (b) begin again with the filing of the amended due process hearing request.”

WAC 392-172A-05085(6).

In the Analysis of Comments and Changes to the final federal regulations implementing IDEA 2004, the Department of Education stated: "This process ensures that the parties involved understand and agree on the nature of the complaint before the hearing begins." 71 Fed. Reg. 46703.

These provisions of IDEA 2004 build on the collaborative framework that has always existed in the IDEA for school districts and parents to work together to develop and revise an individualized education program. Congress purposefully intended that "parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways." 20 U.S.C. § 1400 (c) (8) (2011). The U.S. Supreme Court in *Schaffer v. Weast*, 546 U.S. 49, 57, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), recognized that the IDEA's collaborative dispute-resolution mechanisms promote prompt and amicable resolutions and "reduce its administrative and litigation-related costs."

These principles are also reflected in IDEA's prohibition on attorney's fees and related costs, and

reduction in attorneys' fees found in 20 U.S.C. § 1415 (i) (3) (E) through (G). In *El Paso Independent School District v. Richard R.*, 591 F.3d 417 (5th Cir. 2009), a parent who refused the settlement offered by the school district, which included all the educational relief he requested and reasonable attorney fees, was denied an award of attorney fees, even though he prevailed in the litigation, on the grounds that he unreasonably protracted the resolution of the dispute.

In light of the foregoing, the trial court's analysis about settlement being prevented because the case blew up was clearly incorrect. What is clear is that the School District offered each and every element of relief identified and demanded by the Parent more than 10 days prior to the due process hearing, including reasonable attorney fees. What is also clear is that, although counsel for Respondents kept increasing their demands, even those did not include a program and placement to be designed and implemented exclusively by private providers.

With the two-year reduction in the length of the private placement/compensatory education award ordered by the

court on review, the Student ended up with the same period of eligibility that he had prior to the due process hearing: four years.

One of the (presumably) unintended consequences of ALJ Wacker's decision in removing responsibility to provide FAPE from the School District and placing the design and implementation functions exclusively with private individuals, is that both the Parent and the Student lost the safeguards they would otherwise have been entitled to under IDEA. "IEP" meetings have been conducted, but what remedy does the Parent or the (now) adult Student have if they disagree? Clearly, they do not have a right to request a due process hearing against Dr. Marlowe. Nor can the School District be responsible if Dr. Marlowe does not offer FAPE, in that she now has sole responsibility for design and implementation.

Further, the Student lost the right to be educated in the least restrictive environment. As a class of one, he's been served exclusively in very restrictive settings, *e.g.*, the home under the private program. The Student has also stopped earning credits toward high school graduation, which is the primary goal of K-12 public education.

Obtaining a GED is not the equivalent of having a high school diploma.

The private program is also in violation of the law for the following reasons: A school district “shall not” award a contract to a nonpublic agency to provide special education to an IDEA-eligible student “until OSPI approves the nonpublic agency.” WAC 392-172A-04090(1). One of the purposes of the NPA approval process is to ensure that the program meets state standards for the delivery of special education and related services. IDEA allows each state to approve private schools consistent with federal and state requirements. According to OSPI’s website, Dr. Marlowe is not approved as a non-public agency provider. Although it is paying for the program provided by Dr. Marlowe, the School District cannot comply with the requirements of WAC 392-172A-04085.

In light of the foregoing, combined with the acknowledgment that the Student is not receiving the services awarded by ALJ Wacker due to the “fall out” between Dr. Marlowe and Jennifer White, and Ms. White’s decision to terminate her contract, this court should

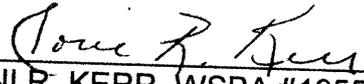
legitimately consider how and to what extent the purposes of IDEA are being served.

V. CONCLUSION

For the reasons stated, Respondents' requests for attorneys' fees and costs should be denied as untimely and contrary to the purposes of the IDEA.

In the event of a remand, the trial court should be directed to enter meaningful findings and conclusions, following its independent evaluation of the reasonableness of the fees claimed; and discount for overstaffing, unproductive time and lack of billing judgment. Assuming an attorney's requested hourly rate falls within the lodestar, the trial court should be instructed that no bonus may be applied, nor any enhancement based on the quality of the work or contingency. The trial court should also enter findings and conclusions addressing the factors for reduction of attorneys' fees specified in 20 U.S.C. § 1415 (i) (3) (F).

RESPECTFULLY SUBMITTED this 8th day of December, 2014.



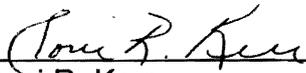
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