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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____



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.

REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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I. ARGUMENT

The issues on appeal are currently limited to (1) the timeliness of the Respondents' "Motion for Hearing to Determine Attorney Fees" filed, without any supporting documentation, on December 27, 2013 in the state court action brought by the Grandview School District (hereinafter "the School District") under 20 U.S.C. § 1415 (i)(2); and (2) the reasonableness of the attorneys' fees and expenses awarded by the Superior Court "as part of the costs" under 20 U.S.C. § 1415 (i)(3).

As to the first issue, the School District's position is that the trial court exercised no discretion but erred, as a matter of law, in determining and awarding attorneys' fees in response to an untimely filed motion and absent any showing of excusable neglect.

As to the second issue, the School District's position is that the trial court failed to make findings and conclusions with respect to each of the objections raised to the attorneys' fees requested. Further, that to the extent the trial court responded to the objections raised by the School District, the awards of fees and expenses are contrary to law.

A. THE TRIAL COURT ERRED IN AWARDING ATTORNEYS' FEES AND EXPENSES 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 was not filed within 10 days after entry of judgment.

Assuming, *arguendo*, that a judgment was entered on August 30, 2013,¹ it is undisputed that the motion for attorneys' fees was not filed within 10 days thereof, nor within 10 days of the Order denying the School District's motion for reconsideration,² as required by CR 54 (d)(2).

The provisions of CR 54 (d)(2) were recommended by the Washington State Bar Association and added as an amendment in 2007. The Drafters' Comment stated that "[t]he primary purpose of the proposed amendments is to require a prevailing party to move for attorneys' fees (and any other costs not provided by the statute) within 10 days of the entry of judgment – the same deadline imposed for other

¹ The trial court entered "Findings of Fact, Conclusions of Law and Order on Judicial Review of Administrative Record" on that date (CP 8159-8189).

post-judgment motions.”

“Application of a court rule to a particular set of facts is a question of law reviewed de novo.” *Corey v. Pierce County*, 154 Wn. App. 752, at 773, 225 P.3d 367 (Div. I 2010); review denied 170 Wn.2d 1016, 245 P.3d 775 (2010), citing *Kim v. Pham*, 95 Wn. App 439, 441, 975 P.2d 544 (Div. I 1999). In *Corey*, the prevailing plaintiff moved for attorney fees, which was denied as untimely under CR 54 (d)(2). On appeal, the denial of attorney’s fees was affirmed. The court stated: “We do not believe the mandate of liberal construction of the statutory attorney fees claim precludes the application of a temporal limitation, such as that in CR 54(d). ... *Corey* has not shown excusable neglect or reason for delay in making her request for fees.” 154 Wn. App. at 774.

Respondents’ reliance upon *O’Neill v. City of Shoreline*, 183 Wn. App. 15, 322 P.3d 1099 (2014) and *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 709 P.2d 774 (1985) is misplaced. *Goucher* was decided prior to the amendment to CR 54. Moreover, both cases involved

² CP 8190.

1

application of CR 6(d), which governs the time for serving motions (and affidavits) prior to hearing. However, neither case addressed the application of CR 6(b), which governs enlargement of time.

The *Shoreline* case is also distinguishable on its facts, in a number of ways. First, it is not clear from the reported decision whether all claims had been decided. The trial court granted a partial summary judgment, which included an order that “Plaintiffs shall be awarded reasonable attorney’s fees and all costs incurred in this action to date, ... to be determined after subsequent briefing and argument.” Thereafter, the City made an offer of judgment, which was accepted, with the same language. 183 Wn. App. at 18. The City subsequently sought discovery as to the amount of attorney’s fees and, after the Plaintiffs provided responses thereto, Shoreline sent them a letter stating the position that they had waived any claim to such fees. Plaintiffs moved for determination of the fee and cost award promptly thereafter. Said motion was filed less than 30 days after entry of the judgment. *Id.* at 19-20.

Contrast the facts in *Shoreline* with the undisputed

facts in this case. First, the trial court's August 30, 2013 decision did not find, conclude or order that Respondents shall be awarded attorneys' fees.³ Nor was there any ongoing communication between the parties with respect to attorneys' fees thereafter. For reasons unknown, Respondents waited more than 90 days to file their motion for said fees. They obtained a hearing date contrary to Local Rule 7 (b)(1)(A)(i), which required them as movants to file and serve the motion and any necessary supporting affidavit contemporaneously with the note for motion docket. Again, for reasons unknown, attorney Feeney waited another week to provide her updated invoices, and 10 days to file her supporting Declaration, respectively. The School District remained "in the dark" as to the fees requested on behalf of attorney Grant for almost a month after the motion and note for motion docket were filed, when Mr. Grant finally filed his Declaration and copies of invoices.

As a matter of law in this case, the Court should hold that Respondents' Motion for Hearing to Determine Attorney Fees was not timely filed.

³ CP 8159-8189.

2. Respondents made no showing to excuse filing their motion for hearing to determine attorney's fees more than 90 days after entry of judgment.

The CR 54 (d)(2) 10-day requirement must be read in conjunction with CR 6 (b), which governs enlargement of time. The requirements under CR 6 (b) are different, depending upon whether a request to enlarge time is made within the 10-day period, or after the expiration of the time period. As to the former, the trial court may order the period enlarged, with or without motion or notice, "for cause shown." CR 6 (b)(1). However, after the 10-day period has expired, the trial court may, "upon motion made," permit the act to be done "where the failure to act was the result of excusable neglect." CR 6 (b)(2).

This is an affirmative obligation upon the part of the party making a claim for attorney's fees. There is no dispute that, after the expiration of the 10 day period, Respondents did not move to enlarge the time for filing their motion for attorneys' fees. Nor did they make any showing that their failure to timely act was the result of excusable neglect.

In *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430

F.3d 1377 (Fed. Cir. 2005), defendant's motion for attorney fees was filed 17 days after entry of judgment, as opposed to the 14 days required under Fed.R.Civ.P. 54 (d)(2)(B). The prevailing defendant made no attempt to claim excuse for breach of the 14-day rule under Fed.R.Civ.p. 6 (b). The trial court denied a motion to strike, holding that the fee request was not time barred; and that, even if Rule 54 did apply, the court would exercise its discretion to allow leave to file. Noting that the record was clear that Amazon never made a motion under Rule 6 (b)(2), seeking enlargement of time, the appellate court held that the district court must apply the excusable neglect standard in exercising discretion to enlarge time. Further, that the district court abused its discretion in enlarging time and denying the motion to strike. The award of attorney fees and costs was, therefore, reversed. *IPXL Holdings, Id.* 430 F.3d at 1385-1386

In this case, Respondents' argument, that it was somehow incumbent upon the School District to alert them to the requirements of CR 54 (d)(2) and CR 6 (b)(2), is unsupported by any citation to legal authority. Respondents' claim that, had the School District done so, they could have

moved for an enlargement of time, is meaningless absent any showing of excusable neglect.

The record reflects that the School District expressed concern about the filing of a motion for attorney fees more than 90 days after the entry of the Findings, Conclusions and Order on August 30, 2013.⁴ The record further reflects that the trial court did not enlarge the 10-day period for Respondents to file a motion for attorneys' fees because it agreed that no final judgment had as yet been entered in the case.⁵ An issue, which was not decided below, cannot be reviewed under the abuse of discretion standard because, in fact, the trial court was never asked to and, in fact, did not enlarge time under CR 6 (b)(2).

Respondents' argument that the School District waived any claim that the motion to determine attorney fees was not timely filed is not supported by either the facts or citation to law.

Respondents' reliance upon RAP 2.5 (a) is likewise misplaced. At the outset, it must be noted that the issue of

⁴ RP February 20, 2014 page 39, lines 10-16.

⁵ *Id.*, page 38, lines 18-25 through page 39, lines 1-25.

the timeliness of the motion to determine attorney fees arose as a result of this Court's decision, on motion filed by the Respondents to limit the issues, that the August 30, 2013 Order constituted a final judgment. RAP 2.5 (a) states that the appellate court may refuse to review any claim of error which was not raised in the trial court (emphasis added). Under the particular facts of this case, it would be unfair for the Court to do so concerning the timeliness of the Respondents' motion for attorney fees.

Assuming, hypothetically, (1) that the trial court had viewed its August 30th decision as a final judgment; (2) that Respondents had moved to enlarge the time for filing their motion for fees (and demonstrated excusable neglect); and (3) that the trial court had granted said motion, the court would then, presumably, have gone on to award fees. The School District would still be seeking appellate review of the fees awarded. It is, therefore, difficult to understand how resolution of the timeliness issue below would have served the underlying policy of RAP 2.5 (a), namely, correcting an error and avoiding an appeal.

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

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

"Trial courts must independently decide what represents a reasonable amount of attorney fees; they may not merely rely on the billing records of the prevailing party's attorney. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987). Trial courts must also create an adequate record for review of fee award decisions. *Mahler [v. Szucs]*, 135 Wn.2d at 435, 957 P.2d 632. Failure to create an adequate record will result in a remand of the award to the trial court to develop such a record. *Mahler*, 135 Wn.2d at 435, 957 P.2d 632." *Mayer v. City of Seattle*, 102 Wn. App. 66, at 79, 10 P.3d 408 (Div. I 2000).

In response to the School District's objections, the trial court made an across the board reduction of 25% based on a "substantial amount of redundancy."⁶ Review of

⁶ CP – 8196, line 25.

attorney Grant's invoices is difficult due to the fact that the Description of Services is often cut off. Nevertheless, the specific concerns that the School District raised below were not limited to overstaffing or double billing.

Even if the individual entries were for relatively small amounts of time, the cumulative amounts were significant. In addition, identical time entries by independent law offices raise legitimate concerns as to whether, in fact, each attorney kept contemporaneous time records, as well as the accuracy of their respective billing invoices, especially in light of attorney Grant's delay in submitting documentation, as well as the amount of time (almost 40 hours) that he claimed it took him to do so (and which the trial court included as part of "reasonable" attorneys' fees).

There are a number of entries that record tasks, such as checking case cites, that it would not be anticipated for two attorneys to do, much less reasonable to seek payment for as "reasonable" attorneys' fees. A side-by-side comparison of the invoices submitted by attorneys Feeney

and Grant⁷ include, but are not limited to, the following examples: 8/18/2010 (did both attorneys Feeney and Grant issue a records subpoena?); 11/5/2010 (both attorneys describe an email from opposing counsel as “rejecting” the Marlowe program); 11/8/2010 (same language referring to “contempt”); 3/21/2011 (“Kerr claims ...”); 7/25/2011 (“counsel failed to support ...”); 10/7/2011 (“Kerr arrived 45 minutes late ...”); 1/31/2012 (both Feeney and Grant are researching and drafting); 2/24/2012 (more duplicate checking of case cites); 6/19/2012 (again, did both attorneys finalize and check citations?); 12/14/2012 (more double checking of case cites); 12/21/2012 (both “continue charting”); 1/28/2013 (“case cites”); 3/7/2013 (both note identical times for receipt of information); 3/19/2013 (identical entries and time, including research); 4/22/2013 (identical language re communication from opposing counsel); 5/6/2013 (both researching and drafting but the time amounts vary slightly); 7/23 and 25/ 2013 (did both attorneys communicate with the court administrator/clerk?);

⁷ Attorney Feeney's relevant invoices are at CP -7707 through 7737, and -7745 through 7775; attorney Grant's invoices are at CP

and 9/9/2013 (both checking case cites); 9/18/2013 (both researching).

At times, it appears that Mr. Grant used the same billing language as attorney Feeney, but on a different date. For example, on January 25, 2013 attorney Grant's entry, including references to times, is the same as Ms. Feeney's entry on January 28, 2013. On October 23, 2010, attorney Grant recorded time for reviewing a letter, which attorney Feeney did not draft until October 28th. On March 2, 2012, attorney Grant recorded the same entry as attorney Feeney did on March 1st. Similarly, Grant's 4/19/2013 entry duplicates Feeney's entry from the previous day.

Although he has a separate entry for travel time on 8/23/2013, attorney Grant recorded 8.0 hours, but attorney Feeney's invoice reflects 0.7 hours for the same appearance.

Mr. Grant's invoices also reflect time that Ms. Feeney did not request reimbursement for, and which the School District believes may be related to the federal court case or other matters. For example, attorney Grant's entries 12/1

-7823 through .7840, and -7842 through 7870.

through 22/2010, 1/11 through 20/2011, and 2/1 through 25/2011. Likewise, entries on 4/12/11 and 9/7/11.

On 3/29/2011, attorney Grant's entry relates to a discussion with attorney Feeney regarding a Forensic Accountant. The School District believes that is not likely recoverable as part of "reasonable" attorneys' fees in this matter.

In the event of a remand, the trial court should be directed to enter meaningful findings and conclusions following its independent review of the documentation submitted by counsel for respondents, relating to the concerns raised by the School District.

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

There was no indication, either in the Respondents' motion to determine attorney fees or the supporting memorandum and documentation submitted subsequent thereto, that attorney Feeney sought to be awarded fees other than at her usual and customary billing rate, adjusted

upward from her historical rate of \$175 to her current rate of \$200 per hour. The School District did not object to the reasonableness of Feeney's requested rate.

Ms. Feeney is included on the Legal Assistance List for Special Education Due Process Disputes.⁸ Therein, she is identified as a private attorney, as opposed to entities providing free or low cost legal services. Significantly, attorney Grant is not listed thereon. Of the attorneys submitting Declarations in support of the respondents' requested attorneys' fees, only Diane Wiscarson appears on the Legal Assistance List.

The United States Supreme Court agreed, in *City of Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986), "Congress intended that statutory fee awards be 'adequate to attract competent counsel, but ... not produce windfalls to attorneys'." 477 U.S. at 580. Unlike some civil rights fee-shifting statutes, including 42 U.S.C. § 1988, IDEA specifically prohibits a bonus or multiplier. 20 U.S.C. § 1415 (i)(3)(C).

As this Court noted in *McGreevy v. Oregon Mut. Ins.*

Co., 90 Wn. App. 283, at 284, 951 P.2d 798 (Div. III 1998), “When attorneys have an established rate for billing clients, that rate will likely be a reasonable rate” citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, at 597, 675 P.2d 193 (1983).

By increasing her (already adjusted) fee upward by \$50 per hour, the trial court provided a windfall to attorney Feeney, in addition to violating IDEA.

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

Attorney Feeney separately itemized and requested fees and costs relating to the Special Education Citizen Complaint No. 11-27 in the amount of \$3,711.55.⁹ Mr. Grant requested \$2,100 in fees relating thereto.¹⁰

Again, the School District cautions this Court not to rely upon *Lucht v. Molalla River School District*, 225 F.3d 1023 (9th Cir. 2000), as support for respondents’ fee requests herein. In *Lucht*, counsel for the parent had filed a

⁸ CP -7797 and 7798.

⁹ CP -7742-43.

state citizen complaint. They did not request attorney fees relating thereto. Rather, the request was only for fees for attending an IEP meeting ordered to be held as a result of the state complaint process. IDEA and its implementing regulations limit the circumstances under which a parent's attorney can be compensated for attending IEP meetings. For example, WAC 392-172A-05120 (3)(c) states that "Attorneys' fees may not be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action." In *Lucht*, the Court held that the state complaint procedure was an administrative proceeding justifying an award of attorney fees in connection with attorney participation at a subsequent IEP meeting. *Id.* at 225 F.3d 1029-1030.

The federal regulations governing the state complaint process are found 34 C.F.R. § 300.151 *et seq.* At the time the current regulations were adopted, subsequent to the IDEA 2004 Reauthorization, and specifically in response to a request that an award of attorneys' fees be included in the state complaint procedures, just as they are available for due

¹⁰ CP – 7873.

process hearings, the United States Department of Education provided the following explanation: "The awarding of attorneys' fees is not addressed in § 300.151(b) because the State complaint process is not an administrative proceeding or judicial action, and, therefore, the awarding of attorneys' fees is not available under the Act for State complaint resolutions. 71 Fed. Reg. 46,602 (2006).¹¹

Therefore, the trial court erred in including attorney's fees and expenses for the state citizen complaint process as part of reasonable attorney's fees relating to the due process hearing and subsequent civil review.

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

Respondents filed no cost bill within 10 days after the entry of judgment, in accordance with Chapter 4.84 RCW; and the court clerk did not tax costs and disbursements pursuant to CR 78 (e); as required by CR 54 (d)(1).

"Costs" is a term of art. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, at 297, 126 S.Ct. 2455,

¹¹ Copy attached as APPENDIX A.

165 L.Ed.2d 526 (2006). The Court in *Arlington* held that “the term ‘costs’ in Rule 54(d) is defined by the list set out in [28 U.S.C.] 1920” and “the recovery of witness fees is strictly limited ... by [28 U.S.C.] 1821.” *Id.*, at 548 U.S. 301. Similarly, under Washington State law, costs allowed to a prevailing party are as defined in RCW § 4.84.010; and recovery of witness fees and mileage is limited by RCW § 2.40.010.

The “costs” requested by counsel for the Respondents include their own mileage, parking fees, food and hotel charges, unspecified copying charges,¹² the cost of binders, court reporting fees for depositions and other transcriptions, demonstrative exhibits, postage, and medical records processing.¹³

Those “costs” are not authorized by RCW 4.84.010. *Wagner v. Foote*, 128 Wn.2d 408, 908 P.2d 884 (1996); *In re Marriage of Van Camp*, 82 Wn. App. 339, 918 P.2d 509 (Div. III 1996); and *Estep v. Hamilton*, 148 Wn. App. 246, 201

¹² Attorney Grant’s invoices include \$361 for 7,2220 [sic] pages of copies; attorney Feeney’s invoices include \$27.62, \$82.83, and \$387.42 for unspecified copying costs.

¹³ CP – 7738 through 7740, - 7776 through 7778; - 7840-41, -

P.3d 331 (Div. III 2008).

Respondents sought, and were awarded, thousands of dollars in deposition costs. RCW 4.84.010 (7), however, includes “the reasonable expense of the transcription of depositions used at trial” only to the extent that the court finds that it was necessary to achieve the successful result. No such finding was included as part of the trial court’s award of attorney fees herein.¹⁴

One of attorney Feeney’s invoices summarizing “Cost/Mileage Breakdown” also included \$4,612 described as “TRAVEL EXPENSES AND FEE FOR TESTIMONY ON 4/12/2013” for Dr. Marlowe.¹⁵ Respondents attempt to avoid the Court’s holding in *Arlington*, that expert witness fees are not included among the costs that prevailing parents may recover in IDEA cases, and ask that this Court affirm the award of Dr. Marlowe’s fee, citing an Idaho District Court decision in which expert fees were awarded as part of the civil court’s broad discretion to craft appropriate relief under 20 U.S.C. § 1415 (i)(2)(C)(iii). *Meridian Joint Sch. Dist. No. 2*

7852-53, - 7861, - and 7871-72.

¹⁴ CP – 8191 through 8198.

v. D.A., 2013 U.S. Dist. LEXIS 168257 (D. Idaho 2013) (copy attached as APPENDIX B). That case is currently on appeal to the Ninth Circuit.

The *Meridian* case is distinguishable, both factually and legally. To the extent the Court allowed expert fees, it was in the context of activities related to an independent educational evaluation (“IEE”) to which the parents were legally entitled. The fees requested and awarded were those related to the IEE. The Court specifically rejected the parents’ request for “review, testimony, hotel, and airfare in connection with” Section 504 proceedings. *Id.*, at page 4.

More significantly, the request for expert fees in *Meridian* was not made in the context of a motion for attorney fees following entry of final judgment. In contrast, the matter currently at issue relates to Respondents’ motion for determination of attorney fees. Therein, Respondents did not cite to 20 U.S.C. § 1415 (i)(2)(C)(iii). To the contrary, Respondents’ position has been that final judgment had already been entered as to all claims prior to filing their motion to determine attorney fees.

¹⁵ CP – 7776.

Accordingly, Respondents' reliance upon the *Meridian* decision is misplaced. The trial court erred as a matter of law in awarding Dr. Marlowe's fee for testimony as part of the costs herein, including attorney fees.

In addition to the untimeliness of Respondents' request for attorney fees, the court below erred in awarding expenses not properly authorized as costs.

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

In affirming dismissal of a prevailing parent's action to recover attorneys' fees under the IDEA's predecessor statute,¹⁶ the United States Court of Appeals discussed the "conflicting policy concerns that must be carefully balanced." *Johnson v. Bismarck Public School Dist.*, 949 F.2d 1000, at 1003-1004 (8th Cir. 1991). "on the one hand, procedural safeguards, including those ensuring meaningful parent participation in the decision-making process, are a major component of this statute. ... On the other hand, as Congress recognized when it mandated reduced fees for a

¹⁶ Education of the Handicapped Act ("EHA"), 20 U.S.C. §§ 1400-

parent who 'unreasonably protracted the final resolution,' § 1415(e)(4)(F),¹⁷ needless litigation frustrates the EHA's objectives by fostering delay, exacerbating ill-will among parties who should cooperate in educating the handicapped child, and wasting the resources of all concerned. Thus, before a § 1415(e)(4) lawsuit is commenced, '[a] school district should be [put] on notice of disagreements and given an opportunity to make a voluntary decision to change or alter the educational placement of a handicapped child.' *Evans v. District No. 17*, 841 F.2d 824, 831-832 (8th Cir. 1998). And such litigation should not be 'continued ... in an extensive and expansive fashion after ... plaintiffs [achieve] most, if not all, of the substantial results' they seek. *Howey v. Tippecanoe School Corp.*, 734 F.Supp. 1485, 1490 (N.D. Ind. 1990)." *Johnson, Id.*

It bears noting that the *Johnson* decision predated the 2004 IDEA Reauthorization, which instituted the resolution process and limited the ability to amend a due process hearing request, by over a decade.

1485.

¹⁷ Currently found at 20 U.S.C. § 1415 (i)(3)(F).

The record reflects that, in response to Respondents' motion to determine attorney fees, the School District repeatedly raised the applicability of 20 U.S.C. § 1415 (i)(3)(F)¹⁸ and that the trial court failed to enter findings and conclusions with respect thereto.

In the event of a remand, the trial court should be directed to enter meaningful findings and conclusions specific to that provision of IDEA.

III. CONCLUSION

For the reasons stated, the award of attorneys' fees as part of costs to the Respondents should be reversed as untimely, in the absence of a motion to enlarge time.

Alternatively, 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

¹⁸ In addition to 20 U.S.C. § 1415 (i)(3)(D).

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 16th day of
March, 2015.



JONI R. KERR, WSBA #19551
Law Offices of Joni R. Kerr, PLLC
And
JEANIE R. TOLCACHER, WSBA #22313
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ATTORNEYS FOR APPELLANT
GRANDVIEW SCHOOL DISTRICT NO. 200

APPENDIX A

Remedies for Denial of Appropriate Services (§ 300.151(b))

Comment: Many commenters requested retaining current § 300.660(b)(1), regarding the awarding of monetary reimbursement as a remedy for denial of appropriate services. One commenter stated that the regulations should clarify that States continue to have authority to award monetary reimbursement, when appropriate. A few commenters stated that the regulations should clarify that monetary reimbursement is not appropriate for a majority of State complaints. Some commenters stated that removing current § 300.660(b)(1) creates ambiguity and may result in increased litigation because parents may choose to use the more costly and time-consuming due process system if they believe that monetary relief is not available to them under the State complaint system. Some commenters stated that removing current § 300.660(b)(1) implies that monetary reimbursement is never appropriate. A few commenters stated that removing the monetary reimbursement provision in current § 300.660(b)(1) suggests that the Department no longer supports the use of this remedy. A few commenters requested that the regulations clarify that compensatory services are an appropriate remedy when the LEA has failed to provide appropriate services.

Discussion: The SEA is responsible for ensuring that all public agencies within its jurisdiction meet the requirements of the Act and its implementing regulations. In light of the SEA's general supervisory authority and responsibility under sections 612(a)(11) and 616 of the Act, we believe the SEA should have broad flexibility to determine the appropriate remedy or corrective action necessary to resolve a complaint in which the SEA has found that the public agency has failed to provide appropriate services to children with disabilities, including awarding monetary reimbursement and compensatory services. To make this clear, we will change § 300.151 to include monetary reimbursement and compensatory services as examples of corrective actions that may be appropriate to address the needs of the child.

Changes: We have added compensatory services or monetary reimbursement as examples of corrective actions in § 300.151(b)(1).

Comment: One commenter stated that the remedies available in § 300.151(b) are silent about whether the complainant may be reimbursed for attorneys' fees and requested clarification as to whether reimbursement is permissible for State complaints. Another commenter requested that the language in section 615(i)(3)(B) of the Act, regarding the awarding of attorneys' fees for due process hearings, be included in the State complaint procedures as a way to limit repetitive, harassing complaints.

Discussion: The awarding of attorneys' fees is not addressed in § 300.151(b) because the State complaint process is not an administrative proceeding or judicial action, and, therefore, the awarding of attorneys' fees is not available under the Act for State complaint resolutions. Section 615(i)(3)(B) of the Act clarifies that a court may award attorneys' fees to a prevailing party in any action or proceeding brought under section 615 of the Act. We, therefore, may not include in the regulations the language from section 615(i)(3)(B) of the Act, as suggested by the commenters, because State complaint procedures are not an action or proceeding brought under section 615 of the Act.

Changes: None.

APPENDIX B



3 of 20 DOCUMENTS



Analysis
As of: Mar 14, 2014

MERIDIAN JOINT SCHOOL DISTRICT, NO. 2, Plaintiff, v. D.A. and J.A., on behalf of themselves and as legal guardians and parents of M.A., a minor individual with a disability, Defendants.

Case No. 1:11-cv-00320-CWD

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

2013 U.S. Dist. LEXIS 168257

November 25, 2013, Decided

November 25, 2013, Filed

PRIOR HISTORY: *Meridian Joint Sch. Dist. No. 2 v. D.A., 2013 U.S. Dist. LEXIS 40794 (D. Idaho, Mar. 20, 2013)*

COUNSEL: [*1] For Meridian Joint School District No. 2, Plaintiff: Merritt Lynn Dublin, LEAD ATTORNEY, Eberharter-Maki & Tappen, Boise, ID; James B Lynch, LYNCH & ASSOCIATES, Boise, ID; Lyndon P. Nguyen, Eberharter-Maki and Tappen, P.A., Boise, ID; Elaine F Eberharter-Maki, Eberharter-Maki & Tappen, PA, Boise, ID.

For D.A., Mother of minor, M.A., J.A., Father of minor, M.A., Defendants: Charlene K Quade, LEAD ATTORNEY, C.K. Quade Law, PLLC, Boise, ID; Scott R Learned, Scott R. Learned, Attorney at Law, Boise, ID.

For J.A., Father of minor, M.A., D.A., Mother of minor, M.A., Counter Claimants: Charlene K Quade, LEAD ATTORNEY, C.K. Quade Law, PLLC, Boise, ID; Scott R Learned, Scott R. Learned, Attorney at Law, Boise, ID.

For Meridian Joint School District No. 2, Counter Defendant: James B Lynch, LYNCH & ASSOCIATES, Boise, ID; Elaine F Eberharter-Maki, Eberharter-Maki & Tappen, PA, Boise, ID.

JUDGES: Honorable Candy W. Dale, United States Magistrate Judge.

OPINION BY: Candy W. Dale

OPINION

MEMORANDUM DECISION AND ORDER

Before the Court is the question of appropriate relief in this action under the Individuals with Disabilities Education Act ("IDEA"), *20 U.S.C. § 1400 et seq.* Plaintiff, the Meridian Joint School District No. 2 ("MSD"), [*2] initiated this administrative appeal to challenge Hearing Officer Guy Price's determination that M.A., a child diagnosed with high-functioning autism and the student at the center of the dispute in this case, was entitled to an Independent Educational Evaluation ("IEE") at public expense. The Court affirmed HO Price's decision and ruled in favor of Defendants D.A. and J.A., M.A.'s Parents. (Dkt. 63.)

When doing so, the Court requested additional briefing on appropriate relief by late April 2013. A decision on this issue was prolonged by Parents' motion for interim attorney fees and costs for the underlying due process hearing, (Dkt. 64), and MSD's request that the Court bifurcate the issue of entitlement to interim fees from the issue of the reasonableness of such fees (Dkt.

70). The Court granted the motion to bifurcate, (Dkt. 71), determined M.A.'s Parents were entitled to interim attorney fees, (Dkt. 92), and ultimately granted in part and denied in part Parents' motion for interim fees (Dkt. 101.)

As alleged appropriate relief, M.A.'s Parents request reimbursement for the IEE and various amendments they obtained at their own expense after MSD denied their request. The facts and legal [*3] arguments are adequately presented in the briefs and the record. Accordingly, in the interest of avoiding delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this matter will be decided on the record pursuant to District of Idaho *Local Civil Rule 7.1(d)*. For the reasons set forth below, the Court finds M.A.'s Parents are entitled to \$6,854.00 for the IEE.

BACKGROUND

The underlying facts and procedural history of this case are well known to the parties and set forth in more detail in the Court's rulings on Parents' motion for interim attorneys' fees, (Dkt. 92, 101), and the Court's Memorandum Decision and Order entered March 20, 2013 (Dkt. 63). They need not be repeated in full.

Relevant here, on June 6, 2011, HO Price found M.A. was entitled to an IEE at public expense. In his Memorandum Decision and Order, HO Price declined to decide whether M.A. was eligible for special education, concluding that such a ruling would be premature without an IEE. Although HO Price initially retained jurisdiction, he issued an Addendum and Errata to Memorandum Decision in July 2011, in which he relinquished jurisdiction and [*4] again noted that issues related to special education eligibility could not be decided until "the IEE is completed and acted upon by the District." (Dkt. 1-3 at 2.) MSD timely appealed shortly thereafter.¹ After considering the record before HO Price and additional evidence presented by the parties, the Court affirmed the Hearing Officer and ordered the parties to brief the issue of appropriate relief by late April 2013.² (Dkt. 63.)

1 In their pleadings, both parties urge the Court to decide issues and grant relief related to M.A.'s alleged eligibility for special education. However, the Court will not do so here. HO Price properly declined to decide the eligibility question without the benefit of the IEE, and, accordingly, that question is not before the Court in this appeal.

2 MSD has appealed--without permission from the Court--two interlocutory orders in this case to the United States Court of Appeals for the Ninth Circuit. (See Dkt. 105 (appealing the Orders at Dkt. 92 and 101); 67 (appealing the Order at Dkt.

63).) As of this date, the Ninth Circuit has not ordered a stay of these proceedings pending appeal.

While the appeal of HO Price's decision proceeded in this Court, M.A.'s Parents [*5] retained Dr. Barbara Webb, an expert in autism with twenty years of experience as a school psychologist, to review M.A.'s educational records and prepare an IEE. On August 29, 2011, Dr. Webb provided Parents an initial IEE based on input from other professionals and an extensive review of tests, previous school district evaluations, meeting transcripts, and other records. (Dkt. 22-16.) Dr. Webb amended the initial IEE on September 13, 2011, to include additional opinions regarding M.A.'s eligibility for special education and a review of testimony by M.A.'s teachers during the spring 2011 due process hearing before HO Price. (Dkt. 22-21.) Dr. Webb also prepared two supplemental assessments in January 2012 and presented her findings at meetings of MSD's special education eligibility team in late 2011 and early 2012. (Dkt. 65-3 at 6-7.)

MSD reviewed the IEE in connection with its determination that M.A. is not eligible for special education, a finding currently before the Court in a separate proceeding. See *D.A. ex. rel. M.A. v. Meridian Joint Sch. Dist. No. 2*, No. 1:12-cv-00426-CWD (D. Idaho). The parties also engaged in separate litigation over M.A. and his Parents' claims against MSD [*6] and the Independent School District of Boise City under the Americans with Disabilities Act and *Section 504 of the Rehabilitation Act*. See *D.A. ex. rel. M.A. v. Meridian Joint Sch. Dist. No. 2*, No. 1:11-cv-00119-CWD (D. Idaho). Trial in that case resulted in a jury verdict favorable to the school districts. Since 2011, this IEE proceeding, along with the *Section 504* proceedings, all were litigated first at the administrative level and then in this Court. Each case, including the ADA/*Section 504* jury trial, involved somewhat overlapping evidence. That is significant because, as discussed below, M.A.'s Parents seek reimbursement here for professional services related to the *Section 504* litigation.

Claiming a total cost of \$18,509.90, M.A.'s Parents now seek reimbursement from MSD for the cost of Dr. Webb's IEE. According to M.A.'s Parents, the cost of the IEE includes additional assessments of M.A., report preparation, and presentations to MSD during various meetings after the IEE was submitted. In other words, M.A.'s Parents argue they should be reimbursed for not only the cost of the evaluation and its amendments, but also the cost of presenting the IEE to MSD as the school district [*7] assessed M.A.'s eligibility for special education. M.A.'s Parents further request that the Court order an assistive technology evaluation pursuant to *34 C.F.R. § 300.105*. MSD objects, arguing M.A.'s Parents are entitled to only \$1,500 for the cost of the IEE.

DISCUSSION

1. Legal Standard

After the Court has reviewed the administrative record, heard additional evidence, and entered a decision on the preponderance of the evidence, the IDEA authorizes "such relief as the court determines is appropriate." *20 U.S.C. § 1415(i)(2)(C)(iii)*. The United States Supreme Court interpreted identical language in the IDEA's predecessor statute as conferring "broad discretion on the court." *Sch. Comm. of Burlington v. Dept. of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). Finding the statutory term "appropriate" must be understood in light of the Act's purposes, the Supreme Court went on to hold that "Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case." *Id.*

Congress included the right to an IEE at public expense as one of the IDEA's essential procedural safeguards.

School districts have a natural advantage in information and expertise, but Congress addressed [*8] this when it obliged schools to safeguard the procedural rights of parents and to share information with them.... [Parents] have the right to an independent educational evaluation of the[ir] child. The regulations clarify this entitlement by providing that a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

Schaffer ex. rel. Schaffer v. Weast, 546 U.S. 49, 60-61, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005) (citations and quotations omitted).

The right to an IEE entitles parents to a publicly funded independent, expert assessment of their child. 34 C.F.R. § 300.502(a)(3)(i). The IEE, like MSD's own evaluation, must assess "all areas related to the suspected disability." *Id.* § 300.304(c)(4); see also *IDAPA 08.02.03.109.05.j* ("[T]he criteria under which the evalu-

ation is obtained, including the [*9] location of the evaluation and the qualifications of the examiner, shall be the same as the criteria the education agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent or adult student's right to an IEE."). But this does not entitle parents to expenses unrelated to the expert's independent reevaluation of the student. Rather, the Court will order reimbursement only for costs clearly linked to the IEE.

2. Cost of the IEE

With respect to this case, the Court agrees with HO Price that the IEE of M.A. "should be specifically designed to understand the student's disabilities and whether they affect his academic performance and indicate a need for specialized instruction..." (Dkt. 1-2 at 18.) The August 2011 IEE M.A.'s Parents obtained from Dr. Webb addresses these criteria through analysis of educational records, observations, and testing by Dr. Webb and other professionals. Dr. Webb supplemented the IEE with new analyses in September 2011 and twice in January 2012. Dr. Webb also participated in two meetings, one in November 2011 and one in January 2012, where she presented her findings to the MSD team tasked with determining whether M.A. [*10] was eligible for special education. M.A.'s Parents seek reimbursement for all of these services, whereas MSD insists only the cost of the initial IEE prepared by Dr. Webb is reimbursable.

In addition to the cost of Dr. Webb's evaluations, M.A.'s Parents claim they should be reimbursed "for IEE-related activities, assessments, observations, and reporting to the district" by Michael Spero, Rebecca Thompson, Dr. Craig Beaver, Chris Curry, and Dr. Tyler Whitney. (*Id.* at 6-7.) MSD argues that the costs for these professional services constitute non-reimbursable expert consultation fees. In support, MSD claims the United States Supreme Court has held that "school districts are not responsible for reimbursing prevailing parents for services rendered by experts or consultants." (Dkt. 77 at 11 (citing *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 126 S. Ct. 2455, 165 L. Ed. 2d 526 (2006).) But this overstates the holding in *Arlington* and misconstrues the scope of the Court's discretion under the controlling statutory provision.

Arlington addresses a narrow, clearly defined issue: Whether the IDEA's fee-shifting provision "authorizes prevailing parents to recover fees for services rendered by experts in IDEA actions." [*11] 548 U.S. at 293-94. There, a student's parents sought \$29,350 for services by a non-lawyer educational consultant as litigation costs under *20 U.S.C. § 1415(i)(3)(B)*.³ The Supreme Court held that neither the goals of the IDEA, the Court's interpretation of identical language in other statutes, nor the text of the fee-shifting provision itself evidenced unam-

biguous congressional intent to make expert fees part of the "costs" available to a prevailing parent under 20 U.S.C. § 1415(i)(3)(B). *Id.* at 302-04. Accordingly, the consultant's services were not compensable under the fee-shifting provision. However, *Arlington* says nothing about the permissible scope of the relief that may be granted pursuant to 20 U.S.C. § 1415(i)(2)(C)(iii)--the governing IDEA provision here.

3 *Section 1415(i)(3)(B)* provides that "the court, in its discretion may award reasonable attorneys' fees as part of the costs - (1) to a prevailing party who is the parent of a child with disability...."

As stated above, 20 U.S.C. § 1415(i)(2)(C)(iii) authorizes "such relief as the court determines is appropriate." Unlike the fee-shifting provision at issue in *Arlington*, the text of § 1415(i)(2)(C)(iii) evinces clear congressional [*12] intent that the district courts should have broad discretion to craft appropriate remedies for IDEA violations. Indeed, that is precisely what the United States Supreme Court held in *Burlington*. 471 U.S. at 369. While the Court may not award expert fees as part of costs claimed under the IDEA's fee-shifting provision, here, the Court may include such fees as part of the relief if "appropriate."

Appropriate relief includes only expenses that enabled M.A.'s Parents to obtain the IEE considered by MSD's eligibility team. Although the Court recognizes the IEE of M.A. is a compilation of work by several professionals, the Court also notes that many of these same professionals have provided services to M.A.'s Parents in other proceedings involving MSD. Accordingly, the Court will not assume an expense is reimbursable simply because it appears in an invoice for services rendered to M.A.'s Parents. Rather, the Court will look for a clear link between the services rendered and the IEE. Absent such a link, the expense will be disallowed. With these standards in mind, the Court now reviews Parents' requested relief.

a. *Dr. Barbara Webb*

M.A.'s Parent claim \$11,569.40 for Dr. Webb's services, including [*13] her review of M.A.'s educational record, IEE preparation, supplemental assessments, and presentations to MSD's eligibility team. (Dkt. 65 at 7.) MSD contends that only \$1,500--the amount Dr. Webb billed for preparing the initial IEE--is reimbursable. It is noteworthy that HO Price determined M.A.'s Parents were entitled to an IEE on June 6, 2011 and that, on June 14, 2011, Parents' counsel sent MSD's counsel a letter stating Parents' intention to have Dr. Webb prepare an IEE. (Dkt. 65-2.) Yet M.A.'s Parents claim reimbursement for \$3,963 in services Dr. Webb rendered from

February to April, 2011, months before Parents were found to be entitled to an IEE. (Dkt. 65-3 at 1-3.) These services include record review, interviews, and testimony, some of which is attributed to the "504 Case" and some to the "Special Education Case". (*Id.*) But Dr. Webb's IEE indicates her assessments were conducted in August 2011 and her invoices otherwise contain specific charges from August 2011 through February 2012 that are linked to the IEE. Therefore, it is unclear how Dr. Webb's spring 2011 services relate to the IEE, and the Court finds these charges are outside the appropriate scope of relief.

M.A.'s Parents [*14] also claim \$2,056.40 for Dr. Webb's protocol review, testimony, hotel, and airfare in connection with "Meridian S.D. 504." (Dkt. 65-3 at 5.) This cryptic notation likely refers to services rendered in proceedings under *Section 504 of the Rehabilitation Act*. Yet Parents do not explain how expenses from the *Section 504* proceedings relate to the cost of the IEE required under the IDEA. Accordingly, the Court finds these costs do not constitute appropriate relief.

However, the Court finds the \$4,650 billed by Dr. Webb for the IEE and its amendments qualifies as appropriate relief. (*See* Dkt. 65-3 at 4-7.) These costs include record review, preparation of the initial IEE, preparation of the Vineland assessment supplement, and preparation of the Social Responsiveness Scale supplement--all performed between August 2011 and January 2012. MSD argues, without supporting authority, that "[f]ederal law does not contemplate such a 'rolling' evaluation." (Dkt. 77 at 12). Yet MSD also concedes the IEE and its amendments were all considered in connection with the school district's February 2012 determination that M.A. is not eligible for special education. (*Id.* at 13.) MSD cannot have it both ways, especially [*15] because the school district does not argue the IEE is deficient in any way. If the eligibility team considered the IEE and its amendments, then M.A.'s Parents are entitled to reimbursement for the full cost of Dr. Webb's evaluation.

In addition, the Court regards the \$900 Dr. Webb billed for participating in "IEP Teleconference[s]" on November 10, 2011 and February 2, 2012, as costs appropriately incurred to obtain the benefit of the IEE. (Dkt. 65-3 at 6-7.) There is sufficient information in the record for the Court to find that these teleconferences are for eligibility team meeting where Dr. Webb presented her findings. And the conclusion that such costs are reimbursable is not without precedent. *See M.M. v. Lafayette Sch. Dist., Nos. CV 09-4624, 10-04223, 2012 U.S. Dist. LEXIS 15631, 2012 WL 398773, *11 (N.D. Cal. Feb. 7, 2012)* (including expert's IEE presentation as part of the "full cost" of an IEE). The purpose of an IEE, after all, is to counter the school district's expert opinion.

MSD contends this purpose was met once Dr. Webb delivered the initial IEE to M.A.'s Parents in August 2011. But Parents' right to an IEE, let alone their right to participate in decisions on the educational placement of M.A., [*16] *see* 34 C.F.R. § 300.501(c), would mean little if they were left to challenge the District's experts with a partial assessment or "without an expert with the firepower to match the opposition." *Schaffer*, 546 U.S. at 60. Therefore, Parents are entitled to reimbursement for time Dr. Webb spent explaining her IEE to the eligibility team. In total, M.A.'s Parents are entitled to \$5,550 for Dr. Webb's services in connection with the IEE.

b. Rebecca Thompson and Michael Spero

Dr. Webb's IEE incorporates independent assessments conducted in August 2011 by Michael Spero, an occupational therapist, and Rebecca Thompson, a speech-language pathologist. (IEE at 1, Dkt. 22-16.) The IEE states Thompson assessed M.A. between August 9 and 18, 2011, and Spero's assessments took place between August 18 and 25, 2011. (*Id.*) M.A.'s Parents note that third-parties, such as Medicaid, paid for some of Thompson's and Spero's services and that Parents do not seek reimbursement for those costs. (Dkt. 65 at 5.) However, M.A.'s Parents claim reimbursement for \$880 in billings by Thompson and \$630 by Spero. MSD attacks these charges as non-reimbursable expert consultation fees.

Both Thompson's and Spero's billing records [*17] are imprecise. All of their invoices are dated months after the assessments noted in the IEE. Thompson's billing records include a \$560 invoice for "legal representation," yet she is not licensed to practice law and the briefs and billing records do not otherwise disclose the nature of her services. (Dkt. 65-5 at 1.) Thompson's billing also includes a \$320 invoice for "Administration Time/Paperwork" and "Mileage." (*Id.* at 3.) And, unlike Dr. Webb's invoices, which describe the nature of the services rendered, Thompson's invoices use general "activity codes" such as "Administrative." (Dkt. 65-5 at 2, 4.) M.A.'s Parents contend Thompson's invoices relate to preparing unspecified reports, conducting unspecified observations, and attending an unspecified "school team meeting." (Dkt. 65 at 6.) These contentions invite the assumption that the paperwork and administrative efforts referenced in these invoices were incorporated into the IEE and considered by the eligibility team. But, given that Thompson is involved in other the proceedings between the parties, her invoices and Parents' vague statements provide no basis for such a conclusion.

Spero's billing records are somewhat more descriptive [*18] but do not disclose the dates on which his services were rendered. (*See* Dkt. 65-6.) One invoice for therapy and reporting is dated March 2012, the month

after MSD utilized the IEE and other evidence to make its eligibility determination. (*Id.* at 2.) Spero's other invoice, dated December 2011, contains charges for *Section 504* matters and an "Opinion Letter" with no mention of the subject. (*Id.* at 1.) These deficiencies likewise invite the Court to assume a connection to the IEE where M.A.'s Parents make little effort to demonstrate one. By providing only cryptic invoices and the bare assertion that "all of the amounts claimed were related to the IEE," (Dkt. 84 at 13), M.A.'s Parents have not established the amounts claimed for Thompson's and Spero's services qualify as appropriate relief.

c. Chris Curry, Dr. Craig Beaver, and Dr. Tyler Whitney

M.A.'s Parents also seek reimbursement for services rendered by Chris Curry, Dr. Craig Beaver, and Dr. Tyler Whitney. The IEE references reports prepared by these professionals, but all of this information predates HO Price's finding that M.A.'s Parents were entitled to an IEE at public expense. (Dkt. 22-16 at 1 (Curry's report dated March 14, 2011; [*19] Beaver's report dated May 19, 2010; Whitney's report dated April 29, 2009).) Close inspection of the invoices confirms that many of these expenses relate to Parents' efforts to establish their entitlement to the IEE--as opposed to the cost of preparing or presenting the IEE itself. Indeed, Dr. Beaver's and Ms. Curry's invoices include charges for April 2011 testimony in the due process hearing before HO Price. (Dkt. 65-4, Dkt. 65-7.) More problematic, Curry's invoice also includes costs for observations and a report on "504 accommodations," yet M.A.'s Parents again do not explain how assessments for Rehabilitation Act purposes relate to the IEE they are entitled to under the IDEA. (Dkt. 65-4 at 1.)

The entirety of Dr. Whitney's billing is for services in late 2010, before M.A.'s Parents even requested an IEE from MSD. (Dkt. 65-1 at 2-3.) Further, Dr. Whitney's charges relate to either unspecified school meetings or travel time to and from unspecified locations. Simply put, it is largely unclear how these three professionals' services relate to the cost of the IEE prepared by Dr. Webb and considered by MSD. The Court is not inclined to guess.

The only exceptions are expenses for the [*20] special education eligibility portion of Curry's Educational Needs Assessment. In particular, Curry's invoice discloses \$1,304 in expenses for travel, a six-hour observation session "for eligibility," and a report "on eligibility" dated March 14, 2011. Dr. Webb specifically references Curry's March 14 report in the IEE. (Dkt. 65-1 at 1, 9-14.) This is a clear link between the invoices and the IEE, the type of link absent from many of the other invoices attached to Parents' request for relief. Thus, there

is sufficient basis for the Court to conclude this \$1,304 in expenses may appropriately be considered part of the IEE cost.

3. Assistive Technology Evaluation

Near the end of their initial brief on appropriate relief, M.A.'s Parents make a terse request for a Court-ordered independent assistive technology evaluation. (Dkt. 65 at 8.) The only support for the request is an allusion to *34 C.F.R. § 300.105*, which directs school districts to make assistive technology services "available to a child with disability *if required as part of the child's* - (1) *Special education* under § 300.36; (2) *Related services* under § 300.34; or (3) *Supplementary aids and services* under §§ 300.38 and 300.114(a)(2)(ii)." [*21] (emphasis added). MSD contends that M.A.'s need for assistive technology is not properly before the Court and is otherwise beyond the scope of an appropriate IEE. The Court agrees.

By stating "if required as part of the child's... Special education," the regulations clearly contemplate assistive technology services only for students *eligible* for special education. *34 C.F.R. § 300.105(a)*. This appeal, however, presented the narrow question of whether HO Price correctly found that M.A.'s Parents were entitled to an IEE at public expense. The legally and factually distinct question of whether M.A. is eligible for special education is now pending before the Court in a separate case. *See D.A. ex. rel. M.A. v. Meridian Joint Sch. Dist. No. 2,*

No. 1:12-cv-00426-CWD (D. Idaho). Therefore, the assistive technology evaluation is not appropriate relief in this action.

CONCLUSION

The Court, in its discretion, has determined that M.A.'s Parents are entitled to \$6,854.00 in reimbursement for the expenses of the IEE. The additional expenses claimed by M.A.'s Parents are not clearly linked to the IEE and are thus outside the scope of appropriate relief. Likewise, an assistive technology evaluation, as [*22] it relates to the M.A.'s alleged eligibility for special education, is not before the Court in this proceeding.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that judgment in the amount of \$6,854.00 shall be entered in this matter, that Plaintiff reimburse Defendants the amount of \$6,854.00 for the reasonable expenses of the IEE, and that final judgment be entered in this case accordingly.

Dated: **November 25, 2013**

/s/ Candy W. Dale

Honorable Candy W. Dale

United States Magistrate Judge

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2015, I mailed a true and accurate copy of the foregoing Appellant's Reply Brief to Respondents' attorneys as follows:

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