IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WOODSIDE, et al.		**CIVIL ACTION**
v.		**NO. 99-1830**
THE SCHOOL DISTRICT OF PHILADELPHIA BOARD OF EDUCATION		

MEMORANDUM

BRODERICK, J. **JANUARY 27 , 2000**

Presently before this Court are cross motions for summary judgment between the parties, Plaintiffs J. Stephen Woodside, Esq. and Rebecca R. Woodside, and Defendant the School District of Philadelphia Board of Education. For the reasons that follow, the Court will grant in part and deny in part Plaintiffs' motion for summary judgment and will grant in part and deny in part Defendant's motion for summary judgment.

BACKGROUND

This action arises from Plaintiffs' attempt to recover attorney's fees and costs pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, et seq. (the "IDEA"), in connection with Plaintiff J. Stephen Woodside's representation of his son, Henry, at an administrative due process hearing convened under the IDEA. The IDEA mandates that a state receiving federal funds for the education of handicapped children must provide these children with a "free appropriate

public education." 20 U.S.C. § 1412 (a). A "'free appropriate public education' consists of educational instruction designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." Board of Education v. Rowley, 458 U.S. 176, 188-89 (1982).

The 'centerpiece' of the IDEA's education delivery system for disabled children is the Individualized Education Program, ("IEP"). Honig v. Doe, 484 U.S. 305, 311 (1988). "The IEP consists of a detailed written statement arrived at by a multi-disciplinary team summarizing the child's abilities, outlining the goals for the child's education and specifying the services the child will receive." Oberti v. Board of Educ., 995 F.2d 1204, 1213 n.16 (3d Cir. 1993). The IDEA requires a school to have in effect an IEP for each eligible handicapped child and to review that plan on an annual basis to determine whether revisions are needed. 20 U.S.C. §§ 1414 (d)(2)(A), 1414 (d)(4)(A). The handicapped child's IEP must be "reasonably calculated to enable the child to receive educational benefit." Rowley, 458 U.S. at 207. The IEP must be "likely to produce progress, not regression or trivial educational advancement." Board of Education v. Diamond, 808 F.2d 987, 991 (3d Cir. 1986). The School District has the burden of proving that a child's IEP is appropriate. Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 533 (3d Cir.

1995).

In addition to the substantive rights the IDEA provides, the IDEA also provides extensive procedural protections for the enforcement of the rights conferred on disabled children. These protections include: participation of parents in the development of the IEP, the right to review all relevant school records, and 'an opportunity to participate in meetings with respect to any matter relating to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate education to such child, and to obtain an independent educational evaluation of the child." 20 U.S.C. § 14115 (b)(1). The IDEA also affords the right to an impartial due process administrative hearing, 20 U.S.C. § 1415 (f)(1), to be conducted in accordance with state law.

Under the IDEA, any party disagreeing with the decision at the administrative level may then bring an action in federal district court. 20 U.S.C. § 1415 (i)(2)(A). The IDEA also provides that "in any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415 (i)(3)(B). Plaintiffs seek attorney's fees under this section for work done by J. Stephen Woodside, Esq. for his son at the administrative hearing.

The issue as to whether a disabled child who successfully procured relief in an administrative hearing can bring an action in federal court solely for the attorney's fees incurred in the administrative proceeding has been faced by several courts. In Burpee v. Manchester School District, 661 F.Supp. 731 (D.N.H. 1987), the court after an analysis of the statute and its legislative history, concluded that it could award attorney fees for success at the administrative level. "[T]he clear language of the statute and the legislative history thereof mandate a ruling that where parents or guardians of a handicapped child are successful at the administrative level of a proceeding under [the IDEA], they may apply to the Court for an award of attorney fees." Id. at 733. See also E.P. by P.Q. v. Union County Reg. High Sch. D. 1, 741 F.Supp. 1144, 1148 (D.N.J. 1989)(holding prevailing parents under the IDEA may bring an independent action in federal court for attorney fees for work done at the administrative level); Amy F. v. Brandywine Heights Area School District, Civ.No. 95-1867, 1997 WL 672627 at *11 (E.D. Pa. Oct. 30, 1997).

A review of this caselaw as well as the text and legislative history of the IDEA make it apparent that this Court does have jurisdiction of this action. As has heretofore been stated, Plaintiffs, pursuant to subsection 1415 (i)(3)(B), filed an action with this Court seeking attorney's fees and costs arising

from Stephen Woodside's representation of his son at a due process hearing held in accordance with 20 U.S.C. § 1415 (f)(1). Both parties now move for summary judgment. Because the material facts of this case are uncontested by the parties, the Court agrees that this matter is appropriate for summary judgment.

FACTS

Robert Henry Woodside, ("Henry") was born January 28, 1993. Henry has been diagnosed with a chromosomal disorder, Klinefelter Syndrome, which causes speech and language delays, motor planning difficulties, hypotonia, and an overall delay in muscle development resulting in physical weakness. These disabilities make him eligible for educational and related services under the IDEA. Henry entered the Thomas Holme School, a public school in the Philadelphia School District, in September 1998 after spending the previous year participating in a pre-school program at Kencrest School. At Kencrest, Henry received a special educational program consisting of early intervention services focussing on speech and language therapy, as well as occupational therapy ("OT") and physical therapy ("PT").

Upon Henry's transition from early intervention at Kencrest to kindergarten for the 1998-99 year at Holme, several areas of disagreement arose between the Woodsides and the District regarding the level of services prescribed for Henry.

Specifically, the Woodsides took issue with the frequency, duration, and service delivery mode of OT and PT services as proposed in the June, 1998 IEP. The June IEP set down a combined level of OT/PT services at two times per week, for five school weeks only. This was based upon the District's medical prescription for 10 to 20 sessions of combined PT and OT services. The Woodsides claimed that the June IEP violated the IDEA because it was derived solely from one evaluation by a District physician, Dr. Vaidya. Dissatisfied with the June IEP, the Woodsides requested a due process hearing on the OT and PT issues. In their letter requesting a due process hearing, the Woodsides complained: (1) the frequency and duration of OT and PT services recommended by the District was "grossly inadequate", (2) they were not given adequate notice of the District's refusal to provide requested OT and PT services, (3) OT and PT are two "distinct disciplines" which should be addressed and prescribed separately, (4) the medical evaluation by the District neglected to address several issues which would affect the physical education component of Henry's academic program, (5) the District "failed and refused to give due consideration to all tests, records, independent evaluations, IEP team members' evaluations and recommendations, and parents' evaluations and recommendations for occupational and physical therapy" in formulating the IEP. The Woodsides then requested that Henry be given 1 hour of OT per

week and 1 hour of PT per week until June, 1999. (Pl.'s Mot. Ex. D p 1-3).

Thereafter, on September 11, 1998, a due process hearing commenced under the IDEA for the purpose of considering the appropriate level of PT and OT services for Henry and to address the procedural violations of the IDEA alleged by the Woodsides. Six additional sessions of the due process hearing took place throughout the Fall of 1998. At each session Stephen Woodside, Esq. represented his son.

On December 27, 1998, the hearing officer, Dr. Dorothy J. O'Shea, issued her decision and order. Dr. O'Shea's decision concluded that the District unlawfully relied upon a single criterion, its combined OT and PT medical evaluation, in determining Henry's IEP. (Pl.'s Ex. C at 17). Dr. O'Shea found that the District's medical evaluation failed to address major problems affecting Henry's "coordination and completion of physical tasks and lower body requirements, especially pertaining to educational skills necessary at the Kindergarten level." (Pl.'s Ex. C at 18). Dr. O'Shea concluded that this failure led to a deficient IEP, because it failed to consider recommendations from the parents, Kencrest personnel, and outside evaluators familiar with Henry's OT and PT needs. Dr. O'Shea also concluded that the District did not fulfill its obligation to assure Henry's smooth transition from early intervention services at

Kencrest to kindergarten in the District. "The District's lack of coordination and support jeopardized Henry's transition process." (Pl.'s Ex. C at 19). Dr. O'Shea then ordered the District to "specify and separate" Henry's OT and PT services and to amend the June IEP to provide one hour per week of OT to consist of 3/4 hours individual and 1/4 hour teacher-therapist consultation. (Pl.'s Ex. C at 24). Henry's June IEP was also ordered amended to provide one hour per week of PT "to include adaptive physical education , teacher/therapists- consultations, and individual assistance as Henry requires." (Pl.'s Ex. C at 25). In addition, the IEP was ordered amended to provide for the continuation of OT and PT services at the same level until June 30, 1999. Finally, the district was ordered to assure in writing that Henry's future IEPs would be in conformity to the law.

DISCUSSION

Stephen Woodside, Esq. claims that he is entitled to attorney's fees under the fee-shifting provision of the IDEA which states:

> In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

20 U.S.C. § 1415 (i)(3)(B)

A Plaintiff prevails when "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that

directly benefits the plaintiff." D.R. v. East Brunswick Bd. Of Educ., 109 F.3d 896, 902 (3d Cir. 1997). See also Wheeler v. Towanda Area Sch. Dist., 950 F.3d 128, 131 (3d Cir. 1991) (plaintiffs are considered prevailing party if they succeeded on "any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit."). The Woodsides requested a due process hearing to contest the frequency and duration as well as the service delivery mode of the OT and PT services proposed for Henry in the June, 1998 IEP. As a result of the claims raised by the Woodsides at the due process hearing, the District was ordered to do several things which directly benefited Henry. Namely, the District was ordered to amend the IEP to provide one hour each per week of separate OT and PT services, precisely the relief requested by the Woodsides. Thus, Plaintiffs must be considered prevailing parties.

It does not follow, however, that Stephen Woodside, Esq. is entitled to attorney's fees for the work he performed on behalf of his son at the administrative hearing. In Kay v. Ehrler, 499 U.S. 432 (1991), the Supreme Court, in a unanimous opinion, held that an attorney who represents himself in a successful civil rights action is not entitled to attorney's fees under section 1988. Id. at 438. The Court concluded that the primary purpose of section 1988 was to enable plaintiffs to obtain the assistance of capable attorneys to vindicate their rights. Id. at 436. The

Court held that "a rule that authorizes awards of counsel fees to pro se litigants--even if limited to those who are members of the bar--would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf." Id. at 438.

Courts in the Third Circuit have used the reasoning of Kay to deny fees to pro se attorneys under other fee shifting statutes as well. In Peoples v. Nix, No. 93-5892, 1994 WL 423856 (E.D. Pa. Aug. 11, 1994), Judge Waldman pointed out in a footnote that pro se attorney litigants were not entitled to attorney's fees under federal fee shifting statutes. See also Marks v. Stinson, No. 93-6157, 1994 WL 396417 (E.D. Pa. July 21, 1994) (holding pro se attorney not entitled to attorney fees under section 1988).

In Collinsgru v. Palmyra Board of Education, 161 F.3d 225, 227 (3d Cir. 1998), the Third Circuit held that non-attorney parents are not empowered by the IDEA to institute without counsel an action in federal court. The court rejected the parents' contention that they were entitled to represent their child pro se in the district court. "In the IDEA, Congress expressly provided that parents were entitled to represent their child in administrative proceedings. That it did not also carve out an exception to permit parents to represent their child in federal proceeding suggests that Congress only intended to let

parents represent their children in administrative proceedings." Id. at 232. In the case at bar, Stephen Woodside, Esq. argues that because his representation of his child cannot be considered pro se representation under Collinsgru, he is thus entitled to attorney's fees. The issue of whether an attorney-parent is entitled to attorney's fees for representation of his child under the IDEA has not yet been decided in the Third Circuit. However, the reasoning of courts interpreting this issue in other jurisdictions, as well as the reasoning of the Supreme Court in Kay, makes it clear that Stephen Woodside is not entitled to attorney's fees under the IDEA for the representation he provided for his son at the administrative hearing.

In Doe v. Board of Education of Baltimore County, 165 F.3d 260, (4th Cir. 1998), cert. denied, 119 S.Ct. 2049 (1999), the Fourth Circuit affirmed the district court's denial of attorney's fees for services performed by an attorney-parent for his child in administrative proceedings convened under the IDEA. Although the Doe Court rejected the argument that the parent-attorney was acting pro se in pursuing his son's IDEA claim, the court found that the Supreme Court's reasoning in Kay nevertheless had significant relevance. The Doe court thus invoked the special circumstances doctrine to bar an award of attorney's fees for services performed by an attorney-parent during a proceeding under the IDEA. Id. at 265.

Other courts considering the issue have come to similar conclusions. In Miller v. West Lafayette Community School Corporation, 665 N.E.2d 905 (Ind. 1996), the Indiana Supreme Court held that the IDEA's fee-shifting provision did not permit an award of attorney's fees to an attorney-parent for successful work done on behalf of his child at an IDEA administrative hearing. Id. at 907. Similarly, in Rappaport v. Vance, 812 F.Supp. 609 (D. Md. 1993), the Court held that an attorney who represented his daughter in IDEA proceedings was not entitled to attorney's fees. Id. at 612. The Court noted that "attorney's fee awards in general provide litigants with access to legal expertise they would not normally have. Since [plaintiff] is a lawyer, such a provision is not as critical." Id. at 611.

The policy considerations reflected in these various cases further warrant against an award of attorney's fees in the case at bar. As noted by the Supreme Court in Kay, Congress's goal in enacting fee-shifting statutes- to encourage the successful prosecution of meritorious claims- is better served by a rule that gives an incentive to hire independent counsel in such cases. Id. at 437. As the Doe court pointed out loving parents can always be counted on to protect the rights of their children regardless of the existence of a statutory financial award for doing so. Id. at 264.

Stephen Woodside, Esq. obtained successful results for his

son. This Court, however, has found no evidence that Congress, in enacting the IDEA, intended that a parent who is an attorney and who represented his son in an administrative proceeding convened under the IDEA, should be entitled to come into federal court and obtain a fee for the representation he has personally provided to his son in that administrative proceeding. As heretofore pointed out, section 1415 (i)(3)(B) of the IDEA makes clear that the court may award reasonable attorney fees "in its discretion." In the exercise of its discretion, this Court will deny Stephen Woodside, Esq.'s claim for attorney's fees and grant Defendant's motion for summary judgment with respect to this issue.

Plaintiffs also claim that they are entitled to costs in connection with the fee of Plaintiffs' expert, Carole-Samango Sprouse, Ed.D., who testified as to the need for Henry's physical and occupational therapy services at the level and frequency requested and awarded, as well as other various expenses accrued by Plaintiffs in connection with the due process hearing. The IDEA gives this Court discretion to award prevailing parties with reasonable expenses and fees for expert witnesses. See Arons v. New Jersey State Bd. Of Educ., 842 F.2d 58, 62 (3d Cir.), cert. denied, 488 U.S. 9942 (1988). See also David P. v. Lower Merion School District, No. 98-1856, 1998 WL 720819 (E.D. Pa. Sept. 18, 1998); Bailey v. District of Columbia, 839 F.Supp. 888, 892 (D.

D.C. 1993). As has heretofore been stated, Plaintiffs must be considered prevailing parties because they achieved success on the significant issue of dispute between the parties- the level and frequency of Henry Woodside's occupational and physical therapy. Plaintiffs request $1000.00 for the expert fee of Carole-Samango Sprouse, Ed.D., and $359.85 for costs incurred in connection with the due process hearing. Because the amounts listed by Plaintiffs appear reasonable on their face and because Defendant does not contest the validity of these costs, this Court will award Plaintiffs $1000.00 in expert testimony fees and $359.85 for costs incurred to Plaintiffs as a result of the due process hearing.

Also before this Court is a motion by Defendant to strike and redact the names of other district students contained in Plaintiffs' response to Defendant's motion for summary judgment. Although it was the District which wrongly disclosed these names in its own summary judgment motion, its motion will nevertheless be granted. The Court will redact the names of those other students wrongly included in both Defendant's summary judgment motion (Document #6, Ex. 6) and Plaintiff's response (Document #7).

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WOODSIDE, et al.	**CIVIL ACTION**
v.	**NO. 99-1830**
THE SCHOOL DISTRICT OF PHILADELPHIA BOARD OF EDUCATION	

O R D E R

AND NOW, this 27th day of January, 2000; the Court having considered the parties' cross-motions for summary judgment and the responses thereto; the Court having determined that there are no genuine issues of material fact; for the reasons set forth in the Court's accompanying Memorandum of this date;

IT IS ORDERED: that the motion of Plaintiffs J. Stephen Woodside, Esq. and Rebecca Woodside for summary judgment is **GRANTED** in part with respect to Plaintiffs' claim for expert fees and costs and **DENIED** in part with respect to Plaintiff Stephen Woodside, Esq.'s claim for attorney's fees in connection with the representation of his son at the administrative proceeding; the motion of Defendant School District of Philadelphia Board of Education is **GRANTED** in part with respect to Plaintiffs' claim for attorney's fees and **DENIED** in part with respect to Plaintiffs' claim for expert fees and costs.

IT IS FURTHER ORDERED: that **JUDGMENT** is entered in favor of

Plaintiffs and against Defendant in the following amounts: (a) $1000.00 for costs relating to Plaintiffs' expert witness and (b) $359.85 for costs incurred by Plaintiffs in preparation for the due process hearing.

IT IS FURTHER ORDERED: that Defendant's motion to impose sanctions upon Plaintiffs pursuant to Federal Rule of Civil Procedure 11 is **DENIED**.

IT IS FURTHER ORDERED: that Defendant's motion to strike and redact Plaintiffs' response to Defendant's motion for summary judgment of the names of children unrelated to Plaintiffs' case is **GRANTED**. All mention of those names in both Defendant's summary judgment motion (Document # 6, Ex. 6) and Plaintiff's response (Document # 7) have been redacted by this Court.

Raymond J. Broderick, J.