UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

AMY F., a Minor by her Mother and Father, JACQUELINE and DEAN F.,	)	CIVIL ACTION
	)	
	)	NO. 95-1867
Plaintiffs	)	
	)	
vs.	)	
	)	
BRANDYWINE HEIGHTS AREA SCHOOL DISTRICT,	)	
	)	
Defendant	)	

TULLIO GENE LEOMPORRA, U.S.M.J.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case involves an attorneys' fee petition filed on behalf of the minor plaintiff, Amy, by her parents. The case arises under the Individuals with Disabilities Education Act, (IDEA), 20 U.S.C. §1401, et seq., specifically, §1415(e)(4)(B), which provides for the award of a reasonable attorneys' fee to a prevailing party in administrative/judicial IDEA proceedings.

I. BACKGROUND AND PROCEDURAL HISTORY

There is no dispute in this action that Amy has multiple handicaps which entitle her to special education services under the IDEA statute. When appropriate services were allegedly denied her by the defendant school district, Amy's parents initiated administrative procedures to resolve the matter as provided by the IDEA statute and its implementing regulations. Eventually, the parties had a due process hearing before an

impartial hearing officer. Although plaintiffs obtained some of the relief they sought as a result of the hearing officer's decision and via agreements reached with the school district prior to and during the due process hearing, they appealed the hearing officer's decision in the hope of obtaining an even better outcome. Since the hearing officer's decision was modified by the Appeals Panel in response to plaintiff's objections, plaintiffs achieved additional benefit from their appeal.

After some additional problems concerning Amy's progress, her parents and the school district subsequently agreed on a different educational placement for Amy, a private school for which the school district pays Amy's tuition. Since Amy began attending the Vanguard School in the 1995--1996 school year, there has apparently been no further dispute between the parties concerning Amy's education and the school district's compliance with the IDEA statute.

As the IDEA statute permits, however, the plaintiffs are seeking reimbursement for the attorneys' fees and other expenses they incurred (1) during the time prior to the due process hearing in October, 1994, when plaintiffs obtained the services of various healthcare and educational professionals to evaluate Amy because of their belief that the school district's evaluations were inadequate; (2) for the due process hearing itself; (3) for the appeal. It also appears that plaintiffs are now asserting claims for some of the fees and costs incurred in

securing the Vanguard placement for Amy. Plaintiffs argue in their most recent briefs that the current agreement concerning Amy's placement is directly attributable to their success in the administrative proceedings relating to the 1994--1995 school year. Finally, plaintiffs seek reimbursement of expenditures relating to educational services they obtained for Amy during the administrative proceedings and during the time it took the school district to comply with the decisions of the hearing officer and Appeals Panel. (See, Complaint, Doc. #1, Count II; Memorandum in Support of Plaintiff's Petition for Attorneys' Fees, submitted April 18, 1997, at 1, n.1).

Since the only facts relevant to the Court's ruling on plaintiffs' fee petition involve the issues raised and determined in the underlying administrative proceedings, there was no need for discovery in this action. Indeed, soon after this action was commenced, plaintiffs filed a motion for summary judgment based upon the administrative record and affidavits of counsel and the parties. Defendant, however, opposed the motion with affidavits which contradicted plaintiffs' version of the events surrounding the administrative proceedings, thereby precluding summary judgment.[1]

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1. In general, resolution of the issues in civil actions brought pursuant to the IDEA statute involves judicial review of the administrative record with the discretion to take additional evidence at the request of a party in order to determine, independently, whether the requirements of the IDEA statute have been met. 20 U.S.C. §1415(e)(2); Carlisle Area School district v. Scott P., 62 F.3d 520 (3rd Cir. 1995); Bayonne Board of

(continued...)

After the summary judgment motion was denied, Judge Troutman, to whom the action was originally assigned, undertook serious, extensive, but ultimately unsuccessful efforts to resolve this dispute. Subsequently, the parties consented to proceed before a Magistrate Judge, and Judge Troutman referred the matter to the Hon. Tullio Gene Leomporra, USMJ.[2]

At an initial conference with counsel on March 19, 1997, the parties agreed that the decision concerning plaintiffs' entitlement to recover reasonable attorneys' fees and expenses in this action may be based upon the administrative record and that further hearing, therefore, is unnecessary. At the Court's direction and pursuant to order entered March 27, 1997, defendant submitted the record of the administrative proceedings to the United States District Court Clerk to be docketed, and the underlying administrative record became part of the record of this action on the same day.

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1. (...continued)
Education v. R.S. by K.S., 954 F. Supp. 933 (D.N.J. 1997). Nevertheless, in this case, neither party provided the Court with the entire administrative record in connection with plaintiff's motion for summary judgment. Consequently, the summary judgment motion was denied since it was impossible to choose between counsels' contradictory interpretations of the administrative record in the absence of a complete record to review.

2. Plaintiffs' Consent to Trial by Magistrate was docketed on January 17, 1997 (Doc. #16), and Defendant's Consent to Jurisdiction by a U.S. Magistrate Judge was docketed on January 30, 1997 (Doc. #17). Judge Troutman's Order of Referral was entered on February 5, 1997 (Doc. #18).

As agreed at the March, 1997, conference, the parties thereafter submitted briefs in support of and in opposition to plaintiffs' fee petition. Following oral argument on June 4, 1997, before Judge Leomporra, a settlement conference was scheduled. After several meetings with counsel, however, it now appears that settlement of this matter is not possible.

Accordingly, the Court's findings are as follows on plaintiffs' petition for an award of counsel fees. The findings and conclusions set forth herein are based upon the following documents: (1) the complaint; (2) the record of proceedings before Joseph G. Rosenfeld, Ph.D., a Pennsylvania Special Education hearing officer on October 4, 11, and 21, 1994, including exhibits; (3) the decision of the hearing officer, dated November 7, 1994; (4) the plaintiffs' exceptions to the decision; (5) the decision of the Pennsylvania Special Education Appeals Panel, dated December 23, 1994; (6) the briefs submitted by counsel at the Court's direction in April and May, 1997, and the exhibits attached thereto.

In applying the law to the facts, the Court has considered the arguments of counsel and the authorities cited in the parties' respective briefs and at oral argument, as well as the applicable legal standards disclosed by the Court's own research.

II. FINDINGS OF FACT

1. Amy F. was born on October 11, 1988, ten weeks premature. She spent 33 days on a ventilator immediately after birth and her first hospitalization lasted a total of 80 days. For the first three years of her life, Amy spent more time in the hospital than at home. (Parents Exhibit #1--Due Process Hearing, (P-1); Hearing Officer Decision (HOD) at 2).

2. Amy was diagnosed with the following medical problems: bronchopulmonary dysplasia with oxygen dependence; gastroesophageal reflux, an arterial septal defect and failure to thrive. She suffered frequently from pneumonia and otitis media, was oxygen dependent until age 4 and had a button feeding tube until December, 1993. She was unable to play outside until age 4. (Id.)

3. At about three months of age, Amy developed extreme tactile defensiveness, such that she fears people touching her or her things and can eat only very small quantities at a time. In addition, Amy has poor balance which causes her to trip, fall and walk into things. She has limited ability to organize her environment, often perceives sensory input incorrectly, and is hypersensitive to sounds and visual stimuli. As a result, Amy's ability to concentrate and focus on a task is poor and she will retreat into an autistic like state where she does not relate to others due to "sensory overload." (Id.; Transcript of 10/21/94 Due Process Hearing at 8).

4. Amy has an extreme need for order and predictability in her life. She constantly asks for a description of the day's activities and becomes very upset if the order of the day that she has memorized needs to be altered. (10/21/94 Tr. at 6, 7).

5. Amy received early intervention services in accordance with the IDEA statute from the local Easter Seal Society, initially, and later through the Berks County Intermediate Unit (BCIU). (Transcript of 10/4/94 Due Process Hearing at 36--37).

6. Since Amy is a resident of the Brandywine Heights School District, defendant became responsible for her education at the time she was required leave the early intervention program.

7. In early 1994, when Amy was 5 years old, the parties began planning for her transition to an educational program within the school district for the 1994--1995 school year. (School District Exhibit #5--Due Process Hearing, (S-5), 1/10/94 IEP).

8. In accordance with normal procedures mandated by the IDEA statute and its implementing regulations, defendant arranged for a Psychological Evaluation and an Educational Evaluation (EE) of Amy in order for the school district to develop an Individualized Education Plan (IEP) for her.

9. Amy's evaluation was performed by Conrad Yeager, a school psychologist employed by the school district, on April 19, 1994, when she was 5 1/2 years old. Mr. Yeager submitted a psychological report (P-4, S-7) and also prepared a Comprehensive

Evaluation Report (CER) (P-5; 10/4/94 Tr. at 66). These reports were accepted by the school district but not by Amy's parents. (P-5 at 3; 10/21/94 Tr. at 31--32).

10. Amy's parents noted five specific areas of disagreement with the CER, based primarily upon private psychological and educational evaluations of Amy that they had procured. (S-8, S-9). They requested a meeting with school district officials to discuss the areas of disagreement and to develop an appropriate IEP and educational placement for Amy. (P-5 at 4).

11. On July 22, 1994, a conference was held to develop an IEP for Amy's entrance into a school district program. At that time, the parents presented a proposed IEP and, according to the school district's special education coordinator, requested certain features in Amy's educational program, viz., a class size of no more than 8 students, elimination of disruption by students in the classroom and placement in a class in the East Penn School District, outside of the county. (S-13). Nevertheless, the IEP proposed by the parents contains no recommendation for a specific type of classroom or location. The IEP suggests only an Elementary Learning Support Class with specially designed instruction for sensory sensitivity needs. (S-12 at 4).

12. The school district indicated its acceptance of most of the goals, objectives, related services and accommodations in the IEP submitted by the parents, but noted two areas of disagreement with Amy's parents: (1) the school district listed Amy's primary impairment as "Learning disabled", while the parents wanted her

classified as "Other health impaired;" (2) the school district proposed a larger group size for Amy's classroom and would not recommend placement in a class outside of the school district. (S-13).

13. On July 25, 1994, the school district issued a Notice of Recommended Assignment (NORA) for Amy in the learning support classroom of the District Topton elementary school, with speech/language therapy and occupational and physical therapy to be provided as related services. (10/4/94 Tr. at 39; S-13)

14. The recommended assignment was to the same school that Amy would have attended had she not been disabled. (10/4/94 Tr. at 39).

15. Amy's parents timely expressed their disapproval of the NORA based upon their feeling that the class size of the proposed learning support classroom was too large to enable Amy to achieve the goals set forth in the IEP. They requested mediation to try to resolve the differences with the school district. (S-13).

16. There was another meeting between Amy's parents and school district personnel on July 25, 1994, designated a "pre-hearing conference." The meeting was chaired by Terry Mancini, school district Superintendent, who prepared and issued a written report of the meeting. (10/4/94 Tr. at 77; S-16).

17. As a result of the pre-hearing conference, Superintendent Mancini concluded that although the school district would not guarantee the eight student class size requested by Amy's parents, the recommended District Topton

primary learning support class assignment was appropriate for Amy and would meet her instructional needs. The school district also denied the parents' request for reimbursement of the costs of the independent psychological and occupational therapy evaluations that the parents had procured. (S-16).

18. On August 4, 1994, Amy's father requested a due process hearing to resolve the disagreement over Amy's IEP and the school district's denial of reimbursement for the independent evaluations. (S-17, 18).

19. The due process hearing required three sessions, held on October 4, 11 and 21, 1994, in the District Topton Elementary School before Joseph P. Rosenfeld, Ph.D.

20. At the beginning of the first session, the school district offered a stipulation with respect to changes, additions and deletions to various sections of Amy's IEP. Agreement on the IEP changes had been reached at a meeting of the parties held the evening before commencement of the hearing. The stipulations were designated "tentative" at the hearing, however, because the oral agreement as read into the record by the school district's counsel was subject to review and confirmation by Amy's parents when reduced to writing. (10/4/94 Tr. at 7, 9--21).

21. Included among the school district's proffered changes to Amy's IEP was the designation of her primary exceptionality as "Other health impaired/specific learning disabled" rather than simply "learning disabled", as the school district's psychologist had initially concluded. (Id. at 21). Before testimony began in

the hearing, Amy's parents agreed to the school district's proposed change in Amy's classification. (Id. at 34).

22. In addition, the school district agreed to reimburse the parents for their independent Occupational Therapy and Speech and Language Therapy evaluations conducted by Louise Miller and Maxine Young, respectively. (Id. at 8).

23. The school district was still denying reimbursement for the independent psychological evaluation that Amy's parents had obtained, (Id. at 65), and recognized that there were other areas of disagreement between the parties which had not been resolved, such as the amount of speech language therapy to be included in Amy's program. (Id. at 23).

24. The parties set forth their positions and perceived areas of disagreement in opening statements before testimony began. (Id. at 26--31).

25. The school district characterized the hearing as

> one to resolve the issue of least restrictive environment, noting that Amy's parents would not agree to any placement for Amy other than the learning support classroom in the East Penn School District, an out of county facility. (Id. at 27--28).

26. Counsel for Amy's parents noted that the school district's psychological evaluation contained significant errors, prompting the need for an independent evaluation, and that the school district had chosen a placement for Amy based upon the flawed evaluation prior to development of an IEP or consideration

of the independent psychological, occupational therapy and speech language evaluations that they had obtained. (Id. at 30).

27. Amy's counsel characterized the essential dispute as one concerning class size and the structure of the learning environment, maintaining that if Amy were placed in a classroom containing more than eight children and one that did not provide a highly structured, language based, sensory support program, she could not meet the goals stated in her IEP. (Id. at 30--31).

28. Amy's parents specifically denied that they were insisting upon Amy's placement in the East Penn School District. (Id. at 31). Rather, counsel argued that Amy's parents considered the East Penn learning support class for developmentally disabled children a model for the type of program that Brandywine Heights could and should create for Amy, i.e., one which featured a class size of no more than 8 children, a structured language based program and minimal distractions. (Id.).

29. Counsel also specifically delineated the areas of conflict between the school district and Amy's parents with respect to the program and classroom the school district proposed for Amy : 1) size of the class would be 12 children, not 8 or fewer; 2) children would be coming in and out on a regular basis, since the classroom was not intended to be "home base" for any child; 3) numerous distractions; 4) the lack of an actual proposed program which incorporated and guaranteed the structure and language base that Amy needed. (Id. at 32).

30. At the end of plaintiff's opening, the hearing officer clarified the limits of his ability to provide a remedy, noting that he could determine whether the program proposed by the school district for Amy was appropriate and could delineate the components of an IEP appropriate for Amy, but could not order a particular placement in a particular school. (Id.)

31. Counsel for Amy's parents specifically agreed to the hearing officer's description of the limits of his authority. (Id. at 32--33).

32. William Hayes, the school district's Supervisor of Special Education, testified on behalf of the school district that Amy's admittedly detailed and rigorous IEP could be implemented successfully in the proposed learning support classroom in the District-Topton elementary school. (Id. at 79--80).

33. Nevertheless, under cross-examination, it became quite apparent that Mr. Hayes had little, if any, specific understanding and ideas concerning how Amy's problems and needs would be accommodated in the proposed program. (Id. at 83--109; 129--130).

34. It was also apparent, and Mr. Hayes admitted, that the school district's multidisciplinary evaluation, upon which the recommendations for Amy's placement was primarily based, was both inaccurate and obscure in several respects. (Id. at 116--119).

35. Moreover, Mr. Hayes admitted that the school district's decision concerning Amy's placement in the recommended learning

support classroom was made prior to the development of an IEP for her. (Id. at 128).

36. Conrad Yeager, the school district psychologist who had evaluated Amy, testified that he spent 15 minutes with her, one on one, and never observed her in a group setting. His opinion of the appropriateness of the recommended placement for Amy was not, therefore, based upon personal knowledge of her functioning in a group setting, but upon his review of the written observations of others. (Id. at 162, 163).

37. After Mr. Yeager's evaluation of Amy, he expressed to Amy's mother that he had little confidence that Amy would be able to learn to read or work with mathematical concepts in the proposed school district program or at all. (Id. at 185--186; 10/21/94 Tr. at 30--31).

38. Natalie Sokol, a speech clinician employed by the Berks County Intermediate Unit (BCIU), who worked with Amy in her early intervention preschool class, testified that the program proposed by the school district would be appropriate for Amy if the stipulations offered by the school district at the outset of the hearing were implemented and if she could work in a small group, in a separate setting within the larger classroom. (10/4/94 Tr. at 202).

39. Ms. Sokol also noted the importance of language-based instruction for all of Amy's classroom activities, which should be accomplished by consultation between a speech therapist and Amy's classroom teacher, so that the skills a speech therapist

would attempt to develop were integrated into her daily instructional activities. (Id. at 203, 208--209).

40. Louise Miller, an Occupational Therapist from the Easter Seal Society who evaluated Amy on several occasions, stressed that her classroom environment should be as free as possible from extraneous stimuli when Amy needs to do individual work. (Id. at 222). Ms. Miller suggested, in general, carpeting and barriers to muffle sound and that those who work with Amy should be aware of her need to remain in control of her environment and her need to not be subjected to surprise. (Id.)

41. Ms. Miller also testified concerning Amy's problems with sensory integration and the goals and benefits of sensory integration therapy that Amy had begun receiving approximately seven months prior to the due process hearing. (Id. at 245--248).

42. Ms. Miller essentially agreed with Ms. Sokol that the proposed IEP, as modified by the agreements reached at the meeting on the evening before the hearing, could be implemented in the school district's proposed setting, assuming appropriate teacher and aide training, related services and classroom modifications. (Id. at 242).

43. The school district rested its case after Ms. Miller's testimony, and the hearing was then recessed for a week. (Id. at 258).

44. On October 11, 1994, as the hearing was reconvened, the school district offered additional stipulations concerning Amy's

program, including specific provisions for sensory integration therapy, a structured language based program and a full-time paraprofessional aide for Amy. (10/11/94 Tr. at 5, 6).

45. Maxine Young, an audiologist and speech/language pathologist who had provided an independent evaluation of Amy, testified that Amy's auditory environment would be good if she were educated in a classroom with soundproof barriers placed to permit her to work in a group of no more than four children. (Id. at 69-70).

46. Linda Weaver, special education teacher in the classroom which the school district recommended for Amy, described the characteristics of the classroom and the children currently placed there, including the amount of traffic in a day. Her testimony focused, in large part, on how the classroom could be made appropriate for Amy based upon prior testimony concerning her need for minimal distractions, and, in general, her need for a satisfactory auditory environment. (Id. at 77--100).

47. Dr. Vincent Morello, who had performed an independent psychological evaluation of Amy, noted that the most significant inconsistency between his evaluation of Amy and the evaluation performed in fifteen minutes by the school district psychologist was Amy's verbal IQ score, which Mr. Yeager placed in the normal range, while Dr. Morello found her to be quite delayed in that area. (Id. at 117).

48. Dr. Morello further noted that to destroy the raw testing data upon completion of a report, as Mr. Yeager

admittedly did, is a breach of accepted guidelines and procedures for clinical school psychologists. (Id. at 119).

49. In general, Dr. Morello found that Mr. Yeager's evaluation report concerning Amy significantly understated and minimized the extent of her disabilities. (Id. at 120, 121).

50. Dr. Morello visited and observed the learning support classroom in which the school district proposed to place Amy and did not find the number of children excessive. (Id. at 135, 139). He did, however, find the lack of a structured program in the classroom problematical, as well as the likelihood of distraction resulting from the movement of the children in and out of the classroom, notwithstanding their quiet and well-behaved demeanor. (Id. at 139, 140).

51. On the last day of the due process hearing, Amy's mother testified concerning the problems Amy experienced in her preschool class and other activities that had been attempted which involved interaction with more than four or five other children at a time and/or a lot of noise. (10/21/94 Tr. at 11--17; 55--56).

52. Amy's mother also testified that the "Stay Put" provisions of the IDEA statute required Amy to remain in her BCIU preschool class until the ongoing problems with her IEP and placement were resolved. (Id. at 18).

53. In an effort to prepare Amy for a more academically oriented kindergarten program, her parents procured tutoring for

her and presented a document which disclosed the amount paid for tutoring during that school year. (Id.)

54. Counsel for Amy's parents noted that they were seeking reimbursement for the costs of the tutoring. (Id. at 19).

55. The Hearing Officer issued his decision on November 7, 1994.

56. Dr. Rosenfeld reached the following conclusions as a result of the testimony at the due process hearing sessions: A) the IEP issued by the school district on July 25, 1994, was appropriate and could be implemented as modified by the approximately 5 1/2 pages of stipulations read into the record by the school district's counsel at the beginning of the first two hearing sessions; B) the placement offered by the school district was appropriate with proper modification, screening and soundproofing; C) no more than four students were to participate in group instruction with Amy; D) no more than 12 students were to be assigned to the classroom in which Amy was placed; E) Amy was to receive individual speech therapy once a week and integrated speech therapy twice weekly in accordance with the school district's proposal; F) the school district's psychological evaluation was inappropriate, and, therefore, reimbursement was ordered for the independent psychological evaluation arranged by Amy's parents; G) Reimbursement for tutoring services during the pendency of the due process procedures was denied; H) the IEP team was required to meet again

within four months of placement to determine the need for modifications to Amy's program. (HOD at 15).

57. Amy's parents raised five specific objections to the hearing officer's decision: A) he ignored the central issue of the hearing, i.e., Amy's need for a structured language based program; B) it was error to conclude that the IEP and placement offered by the school districts could be implemented, with appropriate screening and support services, to permit Amy to achieve reasonable educational benefit; C) it was error for the hearing officer to fail to define "appropriate screening"; D) it was error as a matter of law, or an abuse of discretion, for the hearing officer to ignore testimony regarding the harm that Amy was likely to suffer as a result of the school district's proposed placement; E) the hearing officer abused his discretion in finding that Amy enjoys playing with other children. (Exceptions by the Parents of Amy F. to the Decision of the Hearing Officer).

58. Amy's parents did not take exception to the hearing officer's decision to deny reimbursement for the tutoring they had procured for Amy during the 1994--1995 school year. (Id.)

59. The Appeals Panel was asked to require the school district to provide a structured language based program for Amy in a classroom setting of no more than eight children. (Id. at 27).

60. Having considered the exceptions to the hearing officer's decision and the school district's response, the Appeals Panel issued its decision on December 23, 1994.

61. The Appeals Panel concluded that although the hearing officer's decision was supported by the record, the parents' exceptions highlighted the need for clarification and supplementation of the decision. (Appeals Panel Decision at 4).

62. The Appeals Panel noted that the stipulations offered by the school district during the due process hearing contained the elements of a structured language based program as requested by Amy's parents. (Id. at 5).

63. The Appeals Panel decision recognized that the "model" of a program presented by Amy's parents as one that would meet her needs was not proposed as an actual placement. (Id., n. 2).

64. The Appeals Panel noted the importance of structure in Amy's school day, and, therefore, required the school district to "develop and integrate into the amended IEP a specific and predictable daily schedule for Amy's classroom activities." (Id. at 6).

65. The Appeals Panel further required the school district to establish parameters for Amy's schedule that would prevent "itinerant" children from compromising it. (Id.).

66. The school district was also directed to specifically describe in Amy's IEP the configuration of the "screening" necessary to address Amy's "high degree of distractibility and tendency to withdraw." (Id.)

67. The screening was described as a "highly critical aspect of her program" and the school district was reminded that the objective in finding an effective method for isolating Amy from the distractions of the classroom was to meet her needs. Consequently, the school district was urged to consider a variety of means and methods for providing maximum isolation, including time, space and distance alternatives. (Id. at 7).

68. The Appeals Panel did not, however, agree with Amy's parents that she could not be educated effectively unless she was assigned to a classroom with no more than eight children. (Id.).

69. Amy's parents did not further appeal the decisions concerning the appropriateness of Amy's IEP and placement.

70. By letter dated February 10, 1995, Vivian Narehood, Esq., on behalf of plaintiffs, made a demand for reimbursement of attorneys' fees and expert testimony fees relating to the due process hearing and appeal. (Complaint, Doc. #1, Exh. D).

71. Since the defendant school district refused such demand, plaintiffs filed the instant action on March 30, 1995. (Complaint, Doc. #1).

72. In the complaint, plaintiffs specifically sought reimbursement of attorneys' fees in the amount of $9,380.50 (Doc. #1, ¶28a, Exh. A); expert testimony expenses in the amount of $800 (Id., ¶28(b); Exh. B to the Complaint); and reimbursement for services provided by Maxine Young as an expert audiologist to evaluate the modifications to Amy's classroom made by the school

district in its efforts to comply with the Appeals Panel decision. (Id., ¶28(c); Exh. C).

73. At the direction of the Court, plaintiffs submitted revised and updated itemized statements of the attorneys' fees, expert witness testimony fees and costs for which they are seeking reimbursement prior to oral argument on this matter in June, 1997.

74. The revised and updated attorneys' fee request includes charges for the services of Charles Dennison, Esq., who was consulted in the matter of obtaining reimbursement for attorneys fees by the attorney who represented plaintiffs throughout the administrative hearing and appeals process. In addition, Mr. Dennison consulted and assisted in reaching agreement with the school district with respect to Amy's IEP and placement in the Vanguard School during the 1995--1996 school year. (Affidavit of Charles Dennison, attached to Plaintiff's Brief in Support of Attorneys' Fees, dated April 18, 1997). Mr. Dennison, however, never entered his appearance in this action.

75. The Vanguard School placement for the 1995--1996 school year, which remains Amy's educational program and placement, was part of a settlement agreement between plaintiffs and defendant which contained a release of liability for claims relating to Amy's education during the 1995--1996 school year, including any claim for attorneys' fees and costs. (Defendant's Brief in Opposition to Plaintiff's Petition for Attorneys Fees, (Doc. #21), Exh. 2 at 2).

76. The documentation for reimbursement of the fees of Vivian Narehood, Esq., plaintiff's original attorney, likewise includes charges relating to Amy's IEP and placement for the 1995--1996 school year, as well as for services directed toward implementing the Appeals Panel decision. (Exh. C to Plaintiff's Reply Brief, dated May 19, 1997).

77. Plaintiffs' updated fee request includes charges for the services of Charles Coleman, Esq., who entered his appearance in this action on November 25, 1996, replacing Ms. Narehood, who withdrew her appearance on the same date. (Entry/Withdrawal of Appearance, Doc. #15).

78. Mr. Coleman's fees are attributable entirely to the instant litigation. (Exh. C to Plaintiff's Memorandum in Support of Plaintiff's Petition for Attorneys' Fees, dated April 18, 1997; Exh. A to Plaintiff's Reply Brief, dated May 19, 1997).

79. Despite the submission of billing records and acknowledgements that adjustments are appropriate to eliminate fees covered by the 1996 settlement agreement, plaintiffs have made little effort to establish precisely the amount of the compensable attorneys' fees in this matter relating to the services of Ms. Narehood and Mr. Dennison during 1995 and early 1996, when their billing records reflect services directed toward both the instant litigation and resolution of Amy's IEP and placement for the 1995--1996 school year. (Id., Exh. B, C).

80. Indeed, plaintiffs have nowhere placed in the record a precise total of the attorneys' fees they are currently seeking in this action.

III. DISCUSSION

A. Applicable Legal Standards

Congress has provided for an award of attorneys' fees to the "prevailing party" in a dispute over compliance with the substantive provisions of the IDEA statute. 20 U.S.C. §1415(e)(4)(b). Since there is no provision for an award of counsel fees by a hearing officer, or otherwise in the administrative process, a civil action in federal district court limited to a petition for an award of counsel fees is permitted. E.P. v. Union County Regional High School, 741 F. Supp. 1144 (D.N.J. 1989).

Inasmuch as the substantive issues relating to Amy's IEP and placement for the 1994--1995 school year were resolved without a court action, the primary legal issue to be determined by the Court in this matter is whether plaintiffs were "prevailing parties" in the administrative process as that term has been defined and refined in the context of the IDEA statute.

Generally, a party is deemed to have prevailed in IDEA administrative proceedings if the actual relief obtained on the merits of the claim materially altered the legal relationship between the parties, i.e., the defendant modified its behavior in a way that conferred a direct benefit upon the plaintiff. D.R.

by M.R. v. East Brunswick Board of Education, 109 F.3d 896 (3rd Cir. 1997). In Bayonne Board of Education v. R.S. by K.S., 954 F. Supp. 933, 943 (D.N.J. 1997), the court noted that under Third Circuit caselaw, determining prevailing party status involves an inquiry into "(1) whether the litigant has achieved relief, and (2) whether there is a causal connection between the litigation and the relief achieved."

A party achieves relief if some benefit was realized from the litigation, even if the party is not entirely successful, and, indeed, fails to obtain a favorable judgment. Wheeler v. Towanda Area School District, 950 F.2d 128 (3rd Cir. 1991). As noted by the court in K.A.L. V. Salem board of Education, Civ. A. No. 94-661, 1994 WL 327160 at *2 (D.N.J. June 24, 1994), "The resolution of the dispute need not be formal and judicial in order to confer prevailing party status. Rather, settlements, consent decrees, or changes in conduct that redress the grievances at issue are enough to allow a court to deem the plaintiff the prevaling party."

A causal connection between the litigation and the relief obtained is established "if [the litigation] was a material contributing factor in bringing about the events that resulted in obtaining the desired relief." Bayonne Board of Education, 954 F. Supp. at 943.

In making an award of counsel fees, the Court take must take into account the extent of the success achieved by the prevailing party such that the amount of fees awarded is

reasonable in comparison to the scope of the litigation and the relief sought and obtained by the successful litigant. Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031 (3rd Cir. 1996); Bernardsville Board of Education v. J.H., 42 F.3d 149 (3rd Cir. 1994); Muth v. Central Bucks School District, 839 F.2d 113 (3rd Cir. 1988).

Finally, although plaintiffs involved in a special education dispute are likewise permitted to assert claims under other potentially applicable statutes such as §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794(a)) and 42 U.S.C. §1983, they are generally required to exhaust IDEA procedures before bringing a civil action for relief that could likewise be obtained via the IDEA statute. 20 U.S.C. §1415(f); Jeremy H. v. Mount Lebanon School District, 95 F.3d 272 (3rd Cir. 1996); W.B. v. Matula, 67 F.3d 484 (3rd Cir. 1995). "This provision bars plaintiffs from circumventing IDEA's exhaustion claims by taking claims that could have been brought under IDEA and repackaging them as claims under some other statute." Jeremy H. at 281.

Thus, in this action, although plaintiffs asserted a claim under §1983 as well as under the attorneys' fee provision of the IDEA statute, they may obtain the relief sought pursuant to that claim only to the extent that they either exhausted administrative remedies with respect to that claim or to the extent that resort to the administrative process would have been futile or inadequate.

B. Issues to be Determined

This action was commenced in the midst of a two year dispute between the parties concerning an appropriate education for Amy. The complaint was filed at the end of the first phase of the dispute, in which plaintiffs had pursued a due process hearing and an appeal of the hearing officer's decision.[3] Based upon their assessment of the outcome of those administrative proceedings, plaintiffs sought reimbursement of the fees and costs they had expended in obtaining a detailed IEP for Amy for the 1994--1995 school year and a definitive description of the features of the classroom and program in which Amy's IEP was to be implemented.

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3. The entire dispute can be roughly divided into four phases: (1) the administrative procedures relating to Amy's IEP and placement for the 1994--1995 school year, which ended with the decision of the Appeals Panel in December, 1994; (2) federal court litigation over reimbursement for attorneys fees and costs, and the costs of compensatory education incurred in phase 1, which is still ongoing; (3) disputes over the school district's compliance with the Appeals Panel decision, which do not appear to have been satisfactorily resolved, but which became moot when Amy's IEP and placement for the 1995--1996 school year were agreed to by the parties and which were never the subject of a due process hearing or other administrative procedures; (4) disputes concerning Amy's IEP and placement for the 1995--1996 school year, which were resolved by a settlement agreement, including release of all claims for attorneys' fees, executed by the parties in January, 1996.

The Court is here concerned only with the first two issues in the long-running dispute, notwithstanding the suggestion that costs relating to the plaintiffs' efforts to assure the school district's compliance with the Appeals Panel decision and efforts to remediate the school district's perceived noncompliance with the outcome of the initial phase of the dispute are likewise compensable in this action without further resort to the administrative procedures provided in the IDEA statute.

In addition, in Count II of the complaint, plaintiffs sought compensatory education for Amy under §1983 for the school district's failure to provide her with an appropriate transition to kindergarten at the beginning of the 1994--1995 school year.

To resolve plaintiffs' request for attorneys' fees and costs, the Court is first required to focus on the results of the due process hearing and the additional benefits obtained by plaintiffs via the appeal of the hearing officer's decision in order to evaluate plaintiffs' success in those administrative proceedings.

In making that evaluation, the Court must also determine whether a downward adjustment is required in order to reflect a reasonable relationship between the fees attributable to both the administrative proceedings and the instant litigation to secure payment of counsel fees and the plaintiff's level of success in such efforts.

As a secondary matter, the Court is also required to carefully scrutinize the documentation relating to the attorneys' fees requested in this matter since, as noted in the findings of fact, plaintiffs have not well delineated the fees that are clearly attributable to the administrative proceedings concerning the 1994--1995 school year and to the instant litigation, which are the only fees and costs that are compensable in this action.

Finally, to the extent that plaintiffs are still pursuing such issues, the Court must determine whether other

costs expended by plaintiffs for Amy's education during the 1994--1995 school year are compensable via this action.

C. Outcome of the Administrative Procedures Relating to the 1994--1995 School Year

At the outset, it is important to eliminate the extremes in the parties' positions concerning whether plaintiffs "prevailed" in the administrative process. The school district has consistently argued that plaintiffs cannot be considered prevailing parties because they sought nothing less than placement for Amy in the East Penn School District and requested the due process hearing in the expectation that the school district would either accede to that demand to bring an end to the administrative process or be ordered to provide a program so similar to the East Penn program that assigning Amy there would prove the simplest and most expeditious means of compliance.

At oral argument in June, 1997, plaintiffs' counsel suggested, for the first time in these proceedings, that Amy's current placement in the Vanguard School clearly demonstrates that plaintiffs were prevailing parties, since the school district's inability to provide a program for Amy that met the standards imposed as a result of the due process procedures ultimately led to its willingness to consider and agree to a private school placement for Amy.

As noted, both of these positions represent extremes that, in effect, "cancel" each other. It is clear that Amy's parents understood that they could not secure placement in East

Penn or in any out of county facility as a result of the due process procedures instituted to resolve disputes over Amy's IEP and recommended assignment for the 1994--1995 school year. (See, Findings of Fact ##28, 30 and 31, supra.). Indeed, the only evidence of defendant's assertions that plaintiffs were seeking only an East Penn placement for Amy is found in testimony of school district officials and in documents prepared by the school district characterizing plaintiffs' position in that regard. All argument, testimony and evidence submitted directly by plaintiffs stress the beneficial features of the East Penn program, especially the class size limit of eight children, but plaintiffs nowhere insist that only an East Penn placement could meet Amy's needs. Consequently, defendant's argument that plaintiffs could not have prevailed because the school district never agreed to an East Penn placement is not supported by the record.

Similarly, because Amy's long term placement was not at issue in the dispute over Amy's 1994--1995 IEP, plaintiffs cannot be considered prevailing parties in that dispute because the parties later agreed to a revised IEP and an out of district placement in the Vanguard School to implement it.

Rather, the focus of the prevailing party inquiry must be on the issues which actually precipitated the due process hearing, the decision of the hearing officer with respect to such issues, the plaintiff's exceptions to the decision and the revisions to the hearing officer's decision made by the Appeals

Panel, which were not further appealed by either Amy's parents or by the school district.

Review of the record reveals that despite its acceptance of the IEP proposed by Amy's advocate at the conference of July 22, 1994, the school district had little, if any, notion of how to implement the IEP, or that the IEP needed to be refined and expanded in order to set forth specific methods to accomplish the goals set forth in the IEP. Indeed, prior to testimony at the due process hearing from the BCIU speech clinician and from the occupational therapist from whom the parents had obtained an independent OT evaluation, neither the school district's special education coordinator nor its psychologist demonstrated an understanding of how to develop a program for Amy calculated to permit her to make reasonable educational progress as required by the IDEA statute.

It is quite obvious that the school district was initially concerned only with the most cost effective approach to Amy's education, regardless of her individual needs or the likelihood that she would make reasonable educational progress in the class selected for her. The record establishes that had Amy's parents not requested a due process hearing, the school district would have simply placed Amy in the existing learning support classroom at the District Topton elementary classroom, accompanied by a "rigorous" IEP, it is true, but without a developed and realistic plan for implementing it.

As a result of a meeting on the night before the impending hearing, however, and after detailed testimony at the first session of the hearing, the school district offered an exhaustive list of stipulations to modify and implement Amy's IEP, all of which became part of the hearing officer's decision. In addition, the school district added the parents' proposed classification of Amy's exceptionality to its own in the IEP, and agreed to reimburse the costs of two independent evaluations after previously rejecting the parents' request for reimbursement. There is nothing in the testimony of the school district personnel most involved in the development of the plan for Amy's placement or, indeed, anything elsewhere in the record, which suggests that the school district would have made such focused and concrete efforts to develop a program for Amy that was appropriate in fact, and which included specific directions for implementation, absent the parents' rejection of the half-hearted and cursory approach taken by the school district in the initial phases of developing Amy's IEP. If Amy's parents had not sought a due process hearing, Amy's IEP would have remained an ambitious document, but so generalized as to be ultimately meaningless.

By the second session of the hearing, the tenor of the school district's position subtly shifted from its original assertion that it had recommended an entirely appropriate placement for Amy from the outset, which her parents had unreasonably rejected, to an effort to demonstrate to the hearing

officer that all of the conditions required for Amy to make reasonable educational progress could be accommodated by appropriately configuring the recommended classroom.

Consequently, the placement recommendation that the hearing officer ultimately upheld had been so modified by the extensive stipulations offered by the school district before and during the hearing, all of which were incorporated onto the hearing officer's decision, that defendant's position at the end of the due process hearing hardly resembled the proposal that had precipitated plaintiffs' resort to the available administrative process in the first instance. Most basically and importantly, the hearing officer rejected as entirely inadequate the school district's psychological evaluation which was purportedly the primary source for its initial placement recommendation. Recognizing the need for a far more detailed and accurate psychological evaluation, the hearing officer ordered the school district to reimburse Amy's parents for the cost of Dr. Morello's independent examination, for which the school district had continued to refuse payment. Until the order of the hearing officer, the school district maintained that Mr. Yeager's examination and report were sufficient despite admitted errors and omissions. In addition, although a classroom with a maximum of twelve children was permitted, the school district was directed by the hearing officer to limit Amy's instructional group to four.

The Appeals Panel decision was likewise favorable to the plaintiffs and provided additional benefits. The Appeals Panel specifically mandated that the school district develop a structured program with a predictable routine for Amy, and directed it to provide effective soundproofing and screening to eliminate distractions. The Appeals Panel obviously concluded that these elements of Amy's program were so essential that explicit directions were required to supplement the hearing officer's decision. Such elements were stressed by the witnesses who testified on behalf of plaintiffs at the due process hearing.

The overall impression generated by the testimony and by the arguments of counsel before, during, and after the due process hearing, and by the decisions which resulted from the hearing, is that Amy's parents succeeded in re-shaping the school district's position from the simple and broad recommendation of placement in the learning disabled classroom in her neighborhood school to a plan for an actual program and specific modifications to her classroom that had much more potential for making Amy's placement truly workable and appropriate for her than what the school district had first proposed. Some of the school district's adjustments in both attitude and planning were discernible from the nature of the stipulations, which were offered only in the shadow of the due process hearing, and the remainder were mandated by the decisions of the hearing officer and the Appeals Panel, which provided for additions and

modifications to the classroom and program in which Amy was to be placed.

It is true, of course, that Amy's parents did not obtain perfect or entirely satisfactory results from the administrative procedures. Nevertheless, it is clear that the outcome of the due process hearing, and the entire administrative process, was far more favorable to the plaintiffs than to the defendant. Consequently, the Court concludes that plaintiffs were prevailing parties in the administrative procedures that they invoked pursuant to the IDEA statute.

D. Relationship of Litigation Success to Fees Claimed

The defendant school district's primary argument in this action has been that plaintiffs achieved so little success in the administrative proceedings that they either cannot be considered prevailing parties at all or that the fees they seek should be substantially reduced to reflect their limited success. Defendant likewise contends that the fees of two expert witnesses who testified for plaintiff at the due process hearing, Maxine Young and Dr. Vincent Morello, are not compensable and should be disallowed.

It should be obvious from the discussion of the outcome of the due process hearing that the Court fundamentally disagrees with defendant's assessment of the level of success achieved by plaintiffs during the administrative process. Quite understandably, defendant focuses on narrowly defined issues that it contends were actually decided by the hearing officer and the

Appeals Panel to support its argument that plaintiffs succeeded, at most, in obtaining only one-fourth of the relief they sought. As noted, however, review of the administrative record reveals that the school district offered significant concessions at the beginning of the first two sessions of the due process hearing, all of which became part of the program offered by the school district and evaluated by the hearing officer. Consequently, when the hearing officer and the Appeals Panel assessed the school district's proposal and determined that it was generally appropriate, they were examining a program that plaintiffs had already succeeded in substantially altering for Amy's benefit.

Moreover, although the Appeals Panel affirmed the decision of the hearing officer, including the maximum number of children permitted in Amy's classroom, it clearly concluded that the hearing officer's decision was inadequate to assure that Amy would make reasonable educational progress in the approved program without certain explicit direction. Thus, the Appeals Panel mandated an organized, predictable school day and elimination of distractions likely to be caused by the movement of children not in Amy's instructional group--which was limited to four by the hearing officer's decision. Obviously, therefore, the Appeals Panel paid close attention to the opinions of Ms. Young and Dr. Morello, both of whom testified in detail concerning the need for these specific features in Amy's program.

Clearly, the placement offered by the school district would not have been found acceptable without the school

district's proffered modifications during the due process hearing. Moreover, the extensive testimony in the record provided guidance for further refinements to Amy's program in order to make the school district's placement appropriate for her. As noted, both the stipulations and the other essential features of an appropriate program, which were taken from the testimony of plaintiffs' witnesses, were incorporated into the administrative decisions. In short, the final contours of the orders resulting from the due process procedures demonstrate a significant alteration in the legal relationship between the parties. In the first instance, the school district program ultimately approved was acceptable, in part, because of the stipulations reached just before and during the due process hearing. Second, to the extent that the school district's final proposal was further modified, the requirements imposed by the administrative decisions arose from testimony at the hearing.

Since the changes in the school district's original proposal which were offered voluntarily during the due process hearing, as well as the additional refinements mandated by the decisions of the hearing officer and the Appeals Panel, were extensive and significant when compared to the original school district proposal, the results of the due process proceedings instituted by the plaintiffs are not amenable to the narrow parsing of the issues urged by the defendant as the appropriate method for analyzing the success achieved by plaintiffs through the administrative process. Rather, an overall view of the

nature of the change in the legal relationship between the parties is a more accurate, and, therefore, more appropriate way to assess the success achieved by plaintiffs. Such global analysis does not support any reduction of fees in order to assure a reasonable relationship between litigation success and an award of counsel fees.

E. Assessment of Attorneys' Fees and Compensable Costs

1. Attorneys' Fees

In addition to its primary arguments that plaintiffs did not prevail in the administrative procedures or that the fees claimed by plaintiffs should be reduced to reflect limited litigation success, which the Court has rejected, defendant has also challenged the number of hours expended by the two attorneys who have represented plaintiff in this action and by the attorney who provided services on behalf of plaintiffs in this matter without becoming an attorney of record.[4]

In general, defendant questions the need for three attorneys to litigate this matter, contending that duplicative services must have resulted and, therefore, should be eliminated from any fee award. More specifically, defendant notes that plaintiffs failed to substantiate the amount of fees claimed for the services of Vivian Narehood, Esq., that were incurred after

4. Defendant does not, however, challenge the hourly rate charged by any of the attorneys, or plaintiffs' basic entitlement to recover fees expended in litigating in district court their petition for counsel fees pursuant to the IDEA statute, assuming that plaintiffs are, as the Court has now concluded, prevailing parties in the administrative proceedings.

plaintiffs' motion for summary judgment was submitted in this action. Ms. Narehood represented plaintiffs (1)through the entire administrative process; (2) through the period of securing the school district's compliance with the administrative decisions; (3) through negotiation and settlement of issues relating to Amy's IEP and placement for the 1995--1996 school year; (4) from commencement of this action through November 25, 1996, and plaintiffs are seeking reimbursement for all such fees. There is no longer an issue with respect to documentation for Ms. Narehood's fees, however, since plaintiffs submitted her complete billing records with their reply brief.

Defendant further notes that Charles Dennison, Esq., who is not an attorney of record in this action and who did not become involved in plaintiffs' dispute with the school district until after the decision of the Appeals Panel, provided services which were both duplicative of Ms. Narehood's efforts and attributable to plaintiffs' unsuccessful summary judgment motion. Defendant contends that hours expended for unsuccessful motions or for the same services provided by another attorney must be eliminated from any fee award.

In addition, defendant notes that Mr. Dennison has submitted billing records for services relating to the negotiation and settlement of issues concerning Amy's placement for the 1995--1996 school year. Defendant points out that attorneys fees for services directed toward the 1995--1996 school

year are not compensable by reason of the settlement agreement executed by the parties in January, 1996.

Finally, defendant argues that there is no justification for raising Ms. Narehood's hourly rate as suggested in Mr. Dennison's affidavit submitted in support of plaintiff's petition for counsel fees, which purports to offer an opinion with respect to the reasonableness of the hourly rate charged by Ms. Narehood and by Charles Coleman, Esq., the attorney who succeeded Ms. Narehood as attorney of record in this action.

With respect to Mr. Coleman, defendant asserts only that his hourly rate should not be increased as suggested in Mr. Dennison's affidavit, and that his services are likewise a duplication of Mr. Dennison's efforts.

Upon review of the billing records submitted by plaintiffs' counsel in light of the history of the dispute between the parties concerning an appropriate education for Amy and the applicable legal standards, the Court agrees that an adjustment to the fees claimed for the services of Ms. Narehood and Mr. Dennison is warranted, although not, for the most part, for the reasons suggested by defendant. The Court will discuss separately the rationale underlying the award of fees attributable to each attorney, as well as the amount of fees and costs that can properly be awarded in this action.

a. Vivian Narehood, Esq.

The Court has carefully examined the records submitted to substantiate the time expended by Ms. Narehood and concludes,

in the first instance, that her fees are entirely proper and compensable at the rate of $100/hour from the time plaintiffs first engaged her as their counsel through her review of the decision of the Appeals Panel and work which appears to have been undertaken in January, 1995, to implement the Appeals Panel decision. The Court agrees with defendant that there is no justification for relying upon the opinion of Mr. Dennison that Ms. Narehood ought to have billed her time at a higher hourly rate for the services she provided. On the other hand, defendant has not specifically challenged the fees incurred by plaintiffs during this period, assuming the $100 hourly rate and plaintiff's status as prevailing parties. Defendant, therefore, will be ordered to pay the fees reflected in Ms. Narehood's billing records dated October 13, 1994 ($3,047); November 17, 1994 ($3,500); December 12, 1994 ($840); January 11, 1995 ($110), and charges on the February 13, 1995 invoice, with the exception of a $100.00 charge on 1/30/95 which appears to relate to a matter unconnected to the administrative process concerning Amy's 1994--1995 IEP. Thus, the charges on the February 13, 1995, invoice that defendant is required to pay will be reduced to $1,040. With this reduction, the total amount of counsel fees that defendant is required to pay for the periods before, during and immediately following the due process hearing is $8,537.00.

Other than the charges for a demand letter to defendant on February 1, 1995 ($40), an intra-office conference on February 2, 1995, concerning federal court relief ($30.00), and telephone

calls to Charles Dennison and her client on February 17, 1995, ($100), it is unclear whether any other charges reflected on the March 13, 1995, statement are attributable to either the administrative proceedings on which plaintiffs succeeded or the effort to secure payment of counsel fees pursuant to the IDEA statute. Consequently, all other fees on that statement will be disallowed. The total amount of the compensable fees for February, 1995, as set forth on the March 13, 1994 invoice, therefore, is $170.00.

The charges on the invoice dated April 10, 1995, are clearly related to the instant litigation to collect counsel fees, and, therefore, are completely compensable in the stated amount of $440.00.

The charges reflected on invoices dated May 15, 1995, through February 15, 1996, however, appear to relate to plaintiffs' unsuccessful motion for summary judgment or to matters concerning final settlement of the parties' ongoing dispute over an appropriate long-term placement for Amy, and, therefore, will be entirely disallowed.

There are several reasons for refusing reimbursement for those fees. In the first instance, with respect to the summary judgment motion, plaintiff's failure to provide the court with the administrative record rendered it impossible to issue a final decision in this action as might have occurred if the court had had a complete record to review. At the least, the issue at the heart of this matter, i.e., whether plaintiffs prevailed in

the administrative proceedings, could have been resolved in the context of the summary judgment motion. Thus, not only did plaintiffs lose the summary judgment motion, their counsels' failure to provide an adequate factual basis for granting the motion made a successful outcome impossible.

In addition, it appears that many of the charges reflected on the May, 1995--February, 1996, invoices do not relate either to efforts to properly implement the 1994--1995 IEP or to the instant fee litigation. Indeed, the docket entries in this action reflect no activity related to the instant fee petition during the time the summary judgment motion was pending. On the other hand, it appears from the billing records that there was considerable activity during this period relating to developing an IEP and placement for Amy for the 1995--1996 school year.

The Court has already noted that the fees compensable in this matter are limited to those that enabled plaintiffs to achieve a successful outcome in the administrative proceedings which resolved Amy's placement for the 1994--1995 school year. Efforts directed toward developing the next school year's IEP were not, in the first instance, any part of the administrative proceedings on which plaintiffs succeeded in 1994 and, therefore, fees attributable to the later negotiations between the parties concerning Amy's placement in the 1995--1996 school year cannot be awarded as a result of plaintiffs' status as prevailing parties in the 1994 proceedings.

Second, development of Amy's 1995--1996 IEP and placement were not the subject of a due process hearing or of any other administrative proceedings which plaintiffs are required by the IDEA statutory scheme to exhaust before seeking relief in court. Consequently, plaintiffs are not permitted to seek prevailing party fees for the 1995-1996 IEP and placement negotiations and decision because they did not pursue, much less exhaust, IDEA administrative remedies in that regard. See, Jeremy H. v. Mount Lebanon School District.

Finally, as noted by defendant and as found by the Court, the settlement agreement between the parties executed in early 1996, precludes plaintiffs from seeking counsel fees for the resolution of the parties' dispute concerning Amy's 1995--1996 placement in the Vanguard School. Moreover, an award of fees via the "back door" of plaintiffs' failure to appropriately redact the fees requested for Ms. Narehood's services, or otherwise, would not further the purposes of the IDEA statute, even if we were to credit plaintiffs' argument that the settlement agreement does not preclude an award of some counsel fees for the process of ultimately finding a placement for Amy that all parties agree is appropriate. It is unlikely that the school district would have agreed to a settlement concerning Amy's 1996--1996 placement, which appears to have become her long-term placement, if it realized that plaintiffs might attempt to make it responsible for their counsel fees during the negotiation process, notwithstanding a release of liability

clause in the final settlement agreement. At the least, the school district would likely have delayed a settlement of Amy's permanent placement until final judgment or other resolution of the instant petition for attorneys' fees. At worst, the school district might have forced plaintiffs to again resort to the IDEA due process procedures. Obviously, neither course of conduct would have served Amy's best interests. To now, in effect, penalize the school district for complying with its IDEA obligations simply because the instant case was still ongoing when attorneys' fees related to a later-arising issue were incurred would provide a disincentive to future settlements that would be far from beneficial to students protected by the IDEA statute.

The reimbursement for the remainder of Ms. Narehood's fees, reflected on the March 22, 1996, through September 24, 1996, invoices are again compensable, since such charges clearly relate to the instant petition for attorneys' fees and costs and include charges for court ordered conferences and documents to be submitted by plaintiffs. The only fees not recoverable on this set of invoices is the charge of $50.00 on February 8, 1996, which appears to relate to preparation of a document concerning Amy's placement in that school year. Otherwise, the fees reflected on the March--September, 1996 invoices, in the total amount of $2,460.00, are recoverable.

Thus, the entire amount of fees recoverable for the services of Ms. Narehood from September, 1994, through August, 1996 is $11,607.00.

b. Charles Dennison, Esq.

Mr. Dennison was consulted by Ms. Narehood and provided services related to plaintiffs' pursuit of the instant fee petition. In addition, however, it appears from the records submitted to substantiate his fees that Mr. Dennison was also heavily involved in reaching the settlement concerning Amy's placement in the Vanguard School. For the same reasons that Ms Narehood's fees for those services were disallowed, recovery of Mr. Dennison's fees will likewise be denied.[5] In addition, the fees that are attributable to the failed motion for summary judgment will be disallowed for the reasons previously discussed.

Consequently, upon review of Mr. Dennison's billing records, the Court will deny reimbursement for fees incurred from the beginning of Mr. Dennison's charges in this matter on July 6, 1995, until February 8, 1996, since it appears that fees in that

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5. Indeed, in Mr. Dennison's additional affidavit, submitted with plaintiffs' reply brief, he acknowledges that some of the charges included on his original affidavit are not compensable as a result of the settlement agreement relating to Amy's placement in the Vanguard School.

Upon review of both affidavits, however, the Court concludes that Mr. Dennison's reduction in his fees did not go far enough. In addition, the slip numbers by which he identifies the charges that are admittedly not compensable do not correspond to the numbers which identify the charges on the original affidavit. Consequently, it was necessary for the Court to make the appropriate deductions from the fees sought for Mr. Dennison's services.

period were attributable either to the motion for summary judgment in this action or to attempts to resolve post-due process disputes concerning Amy's IEP for the 1995--1996 school year.

All charges from February 8, 1996, through May 16, 1997, however, are reimbursable, since such fees are clearly attributable to the ongoing dispute over plaintiffs' entitlement to fees resulting from the 1994 due process proceedings. In addition, upon comparison of Mr. Dennison's and Ms. Narehood's charges in that period, there is no discernible overlap, i.e., plaintiffs are not attempting to obtain reimbursement for the same services provided by both attorneys. Indeed, there are only a few charges by Mr. Dennison for the period during which Ms. Narehood remained counsel of record in this case, and none appear to be for the same services provided by Ms. Narehood.[6]

After appropriate deductions, the total amount of compensable fees for Mr. Dennison's services between February 8, 1996, and May 15, 1997 is $6,664.85.

c. Charles Coleman, Esq.

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6. The last date for which plaintiffs submitted a charge for Ms. Narehood's services was August 17, 1996, to draft a document for possible use in this action as directed by an order of court. Mr. Dennison's only charge in August, 1996, was for a telephone call to Amy's mother.

Prior to August, 1996, the Court has allowed only two of Mr. Dennison's charges, both in February, 1996, which reflect telephone calls with the client on dates that Ms. Narehood did not also charge for client calls.

Mr. Coleman entered his appearance in this action on November 25, 1996, the same day that Ms. Narehood withdrew her appearance. Consequently, contrary to defendant's suggestion, plaintiffs have not, for the most part, been represented by three attorneys in this matter for which they are seeking, in effect, triple fees. Prior to Ms. Narehood's withdrawal of appearance, Mr. Coleman's records reflect only 2.5 hours spent on this litigation, which appears to be a reasonable amount of time for consultation among counsel and between client and counsel to assure a good transition of attorney responsibilities for this litigation.

Since Mr. Coleman did not become counsel of record until late November, 1996, and has not submitted billing records for any services provided prior to October 25, 1996, all charges for his services are attributable to this action and, therefore, are compensable to the extent that such charges are reasonable and do not duplicate services provided by Mr. Dennison. Review of Mr. Coleman's records reveals that he devoted a total of 14.9 hours to this litigation, which includes the 2.5 hours prior to Ms. Narehood's withdrawal of appearance. This appears to be a reasonable amount of time, since he has been the attorney responsible for complying with Court orders and directives and attended a conference with the Court.

Although it appears that Mr. Coleman, as well as Mr. Dennison and his staff, devoted some time to legal research in connection with the briefs required in this matter, it is not

unreasonable for counsel to collaborate on such an undertaking, and the total amount of time spent by both attorneys to research and prepare plaintiffs' opening brief and reply brief appears to be reasonable. Finally, since Mr. Coleman rather than Mr. Dennison attended the pretrial conference in this matter in March, 1997, the Court notes that counsel fees are considerably less than the fees that would have been incurred had Mr. Dennison been obliged to travel to Reading from his office in Swarthmore to attend court proceedings at his higher billing rate.

The Court concludes, therefore, that the counsel fees sought for Mr. Coleman's services in the total amount of $1,639.00 are entirely compensable.

3. Costs

Defendant has not specifically challenged any of the litigation costs submitted by plaintiffs' counsel, but does object to reimbursing the charges for the expert testimony of Maxine Young and Vincent Morello at the October, 1994, due process hearing. Defendant has not addressed in any way the issue of reimbursement for compensatory education expenses incurred by plaintiffs during the 1994--1995 school year while the administrative procedures were ongoing and while the school district was in the process of complying with the hearing officer and Appeals Panel decisions.[7]

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7. Plaintiffs have only tangentially addressed this issue themselves in their April, 1997, brief submitted at the direction of the Court. Since a claim for compensatory education costs
(continued...)

a. Litigation Costs

With respect to plaintiffs' claim for reimbursement of litigation costs, those costs that appear on the billing records which the Court has approved as related to plaintiffs' success in the 1994 administrative procedures will be completely allowed, while any litigation costs associated with disallowed attorneys' fees will likewise be disallowed. From review of the billing records of counsel, the Court has determined that plaintiffs incurred compensable litigation costs in the amount of $274.63.

b. Expert Testimony Fees

As noted, review of the record establishes that the Appeals Panel relied heavily on the testimony of Dr. Morello and Ms. Young, since the modifications made to the hearing officer's decision by the Appeals Panel strongly reflect the opinions they expressed and the recommendations they made at the due process hearing. Consequently, plaintiffs are entitled to reimbursement for the fees charged by Maxine Young and Vincent Morello for their testimony at the due process hearing, in the combined amount of $800.[8]

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7. (...continued)
appears in Count II of the complaint, however, and since plaintiffs do not appear to have completely abandoned such claim, it is appropriate to address the legal and factual issues relating to plaintiffs' ability to recover those costs in this action.

8. The record is not entirely consistent with respect to the amount plaintiffs presently seek as reimbursement for the services of Ms. Young and Dr. Morello.

(continued...)

c. Compensatory Education Costs

To the extent that plaintiffs continue to seek an adjudication of their right to recover the costs of tutoring services and other compensatory education provided to Amy during the 1994--1995 school year, as alleged in Count II of the

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8. (...continued)

Plaintiffs attached to the complaint an invoice from Ms. Young with a highlighted charge of $525 for an IEP meeting in January, 1995. Although the $300 charge for her appearance at the October, 1994, due process hearing appears on the same invoice, it was not highlighted. (See, Doc. #1, Exh. C). In response to the Court's direction to plaintiffs in March, 1997, to submit revised and updated statements of the charges for which plaintiffs seek reimbursement, plaintiffs submitted an invoice which appears to be identical to Exh. C to the complaint except that it ends with the October, 1994, charge for Ms. Young's appearance at the due process hearing. (See, Exh. C to Plaintiffs' May, 1997, Reply Brief). To resolve this discrepancy in the record, the Court has determined to rely only upon plaintiffs' latest submission, in light of the clear directive in March, 1997, to place in the record in connection with submission of a brief in support of counsel fees the entire amount of fees and costs presently claimed by plaintiffs in this matter. Thus, only the $300 charge will be reimbursed to plaintiffs.

With respect to Dr. Morello, plaintiffs attached an invoice reflecting a $500 charge for his testimony at the due process hearing, which is the amount that plaintiffs have consistently stated as the charge for Dr. Morello's services for which they seek reimbursement in this action. In addition, however, plaintiffs also attached two invoices for services provided by Dr. Morello in July and September, 1994, prior to the due process hearing. Since defendant was ordered by the hearing officer to reimburse plaintiffs for Dr. Morello's evaluation services, the July and September, 1994, charges were presumably paid subsequent to the decision of the hearing officer. Plaintiffs never before suggested that such charges were not paid by defendants and did not argue in their current briefs that payment for such charges has not been received. There is no explanation, therefore, for the inclusion of the additional invoices as part of Exhibit C to Plaintiffs' Reply Brief. Consequently, the Court has considered only the $500 charge as compensable in this action.

complaint in this action, such claim fails as a matter of law on both procedural and substantive grounds.[9]

In the first instance, although plaintiffs sought compensation in the due process hearing for the tutoring services they obtained for Amy at the beginning of the 1994--1995 school year, they did not appeal the hearing officer's denial of that claim. Moreover, plaintiffs never invoked the administrative procedures available to them for any additional costs they incurred while awaiting the outcome of the administrative procedures or during the time it took the school district to comply with the decisions of the hearing officer and the Appeals Panel. Consequently, it is clear that plaintiffs are now precluded from litigating this matter in accordance with the legal standards set forth in W.B. v. Matula and Jeremy H. v. Mount Lebanon School District. There is no precedent in this Circuit for permitting plaintiffs to pursue reimbursement for compensatory education as an additional claim in a fee petition,

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9. Plaintiffs have, to this point, made no real attempt to pursue their §1983 claim through which they asserted a right to compensatory education costs. It is unclear, however, whether they intended to continue with the litigation after the decision of the Court with respect to Count I of the complaint, which sets forth their claim for attorneys fees and costs.

In light of the legal standards applicable to plaintiffs' ability to obtain relief under §1983 in the context of an IDEA action and the legal standards applicable to the right to compensatory education, the Court can and will dispose of this claim as a matter of law regardless of plaintiffs' intentions.

or as a separate claim under 42 U.S.C. §1983, when they failed to exhaust administrative remedies provided by the IDEA statute.

Second, even if plaintiffs could overcome the procedural bar to their claim for compensatory education, it is highly unlikely that they could meet the high substantive threshold for proving an entitlement to compensatory education. In Carlisle Area School v. Scott P., 62 F.3d 520, 536--537 (3rd Cir. 1995), the court noted that "[C]ompensatory education is available to respond to situations where a school district flagrantly fails to comply with the requirements of IDEA...Although we do not believe that bad faith is required, most of the cases awarding compensatory education involved quite egregious circumstances." (Citations omitted).

In this case, the hearing officer obviously decided that a delay of several weeks in placing Amy in a school district program during the due process proceedings did not meet the substantive standard for establishing the right to compensatory education, and the plaintiffs did not challenge that conclusion. The record presently before the Court does not establish precisely how long Amy was denied an appropriate educational placement after completion of the administrative procedures, but it was clearly not much longer than the duration of the 1994--1995 school year. In Carlisle Area School, the court specifically noted that thirty months to place a child in an alternative program after the school district admitted that its recommended placement was inappropriate is an example of the type

of delay that can support a claim for compensatory education. See, also, Lester H. v. Gilhool, 916 F.2d 865 (3rd Cir. 1990). The delay in Amy's placement clearly does not approach that type of dilatory conduct on the part of the school district.

Finally, the court noted that it remains an open question whether compensatory education can be ordered for the time during which a school district attempts in good faith to find an appropriate placement. Id. It follows, therefore, that it is likewise uncertain whether compensatory education can be ordered for the time in which a school district attempts to comply with an administrative decision.

In light of the "culpable conduct" standard enunciated in Carlisle Area School, 62 F.3d at 537, and the maximum length of time that Amy was denied an appropriate placement, the Court concludes that plaintiffs cannot establish that reimbursement for compensatory education costs is an appropriate remedy under the circumstances. Consequently, Count II of the complaint will be dismissed for failure to state a claim upon which relief can be granted since plaintiffs have not exhausted administrative procedures as required in order to pursue a claim under §1983 for remedies that are encompassed by the IDEA statute, and since the school district's delay in providing Amy with an appropriate education, which does not appear to exceed one school year, cannot support a claim for compensatory education.

4. Defendant's Suggested Reduction for

"Overlitigation"

Defendant argues that plaintiffs "overlitigated" the matter of Amy's placement for the 1994--1995 school year, and, therefore, that their attorneys' fees should be reduced accordingly. As the Court has repeatedly emphasized, however, the due process procedures were necessary in light of the school district's previous reluctance to engage in a meaningful effort to develop an appropriate placement for Amy.

Moreover, in focusing on the stipulations reached at a conference on the day before the due process hearing and arguing that it could have been held earlier but for the plaintiffs' inability to attend previously scheduled conferences, defendant ignores the second set of stipulations offered only after testimony was concluded in the first session of the due process hearing. In addition, defendant discounts the favorable decisions of the hearing officer and the Appeals Panel obtained by plaintiffs only after testimony at the due process hearing was concluded. Thus, there was no overlitigation of the administrative proceedings, and plaintiffs, therefore are entitled to full recovery of the fees and costs which the Court has determined are properly compensable.

IV. CONCLUSIONS OF LAW

1. Plaintiffs were prevailing parties in the administrative proceedings in which the school district's

proffered IEP and program placement for Amy for the 1994--1995 school year were approved, but in a substantially modified form.

2. Plaintiff's success in the administrative procedures was significant when compared to the original school district proposal for Amy's placement, which did not include the stipulations incorporated into the hearing officer's decision, or the following elements: a specific and predictable daily program; an instructional group of no more than four; a precise description of the screening needed to provide Amy with maximum isolation from distraction.

3. As a result of the stipulations reached just before and during the due process hearing and the order of the hearing officer, plaintiffs likewise succeeded in securing reimbursement for all of the independent evaluations they had procured as a basis for Amy's 1994--1995 IEP.

4. The record, therefore, does not support a reduction in fees based upon limited litigation success.

5. The procedural history of this case does not support a reduction in fees due to "overlitigation" of this matter by plaintiffs.

6. Plaintiffs are entitled to reimbursement of attorneys' fees and costs attributable only to: a) the period prior to the due process hearing; b) the hearing itself; c) the appeal period; d) review of the final, unappealed administrative agency decision; e) the instant fee petition.

7. Plaintiffs, therefore, are entitled to recover the following amounts as reasonable attorneys' fees in this matter: a) $11,607.00 for the services of Vivian Narehood, Esq.; b) $6,664.85 for the services of Charles Dennison, Esq.; $1,639.00 for the services of Charles Coleman, Esq.

8. Plaintiffs are entitled to reimbursement of litigation costs in the amount of $274.63.

9. Plaintiffs are entitled to reimbursement of expert witness fees for testimony at the due process hearing, since the modifications to the hearing officer's decision made by the Appeals Panel were explicitly based upon the testimony of plaintiffs' expert witnesses, Maxine Young and Vincent Morello.

10. Plaintiffs properly documented $800.00 as the amount expended for the testimony of Ms. Young and Dr. Morello.

11. Judgment, therefore, will be entered for plaintiffs with respect to Count I of the complaint in the total amount of $20,985.48.

12. Plaintiffs are not entitled to reimbursement for any compensatory education costs still sought in this matter, since in the first instance, the matter of compensatory education costs from the beginning of the 1994--1995 school year until the October, 1994, due process hearing was decided against them by the hearing officer and not appealed. In addition, plaintiffs failed to pursue additional administrative remedies with respect to any compensatory education costs incurred after the due process hearing during the 1994--1995 school year.

14. It is likewise clear from record currently available tot he Court that plaintiffs would not, in any event, be able to prove the type of egregious conduct on the part of the school district necessary to sustain a claim for compensatory education.

13. Count II of the complaint, therefore, is subject to dismissal for failure to state a claim upon which relief can be granted.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

AMY F., a Minor by her Mother and Father, JACQUELINE and DEAN F.,	)	CIVIL ACTION
	)	NO. 95-1867
Plaintiffs	)	
vs.	)	
BRANDYWINE HEIGHTS AREA SCHOOL DISTRICT,	)	
Defendant	)	

TULLIO GENE LEOMPORRA, U.S.M.J.

O R D E R

And now, this day of October, 1997, upon consideration of the complaint in this matter, the underlying administrative record and the submissions of counsel, upon which the Court's Findings of Fact and Conclusions of Law are based, **IT IS HEREBY ORDERED** that:

1. Judgment is entered in favor of the plaintiffs and against the defendants on Count I of the complaint, for counsel fees and costs, in the total amount of **$20,985.48**.

2. Defendant shall pay the judgment as follows: a) **$11,820.50** to Vivian Narehood, Esq. ($11,607 in fees + $213.50 in costs); b) **$6,699.17** to Charles Dennison, Esq. ($6664.85 in fees + $34.32 in costs); c) **$1,665.81** to Charles Coleman, Esq. ($1,639

in fees + $26.81 in costs); d) **$800** to plaintiffs for expert witness fees.[1]

3. Count II of the complaint is **DISMISSED** for failure to state a claim upon which relief can be granted.

4. This order having disposed of all claims in the above-captioned action, the Clerk shall mark this action **CLOSED** for statistical purposes.

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Tullio Gene Leomporra, USMJ

1. The Court directs counsel to refund to plaintiffs any amount already paid to counsel, via retainer or otherwise, for services as to which defendants have been ordered to reimburse counsel fees and costs, as set forth in the accompanying Findings of Fact and Conclusions of Law.