IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EDIE F. & MICHAEL F.,
as parents of and on behalf
of their minor child, CASEY F.,

Plaintiffs,

v.

RIVER FALLS SCHOOL DISTRICT,

Defendant.

OPINION AND ORDER

99-C-354-C

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In this civil action, plaintiffs Edie F. and Michael F., are suing as parents of and on behalf of their minor child, Casey F. Plaintiffs contend that they are entitled to have defendant River Falls School District pay their reasonable attorney fees and costs because they qualify as prevailing parties under the Individuals with Disabilities Education Act. See 20 U.S.C. § 1415 (i)(3)(B). Defendant argues that (1) plaintiffs are not prevailing parties as a result of the agreement reached between the parties after mediation; and (2) if plaintiffs are awarded attorney fees, the amount should be modified to reflect the rates prevailing in the community as well as plaintiffs' limited success. Subject matter jurisdiction is present. See 20 U.S.C. §

1415(i)(3)(A); 28 U.S.C. § 1331.

Presently before the court is plaintiffs' motion for summary judgment. Because I find that plaintiffs have not introduced facts from which I can conclude that they qualify as prevailing parties entitled to attorney fees, plaintiffs' motion for summary judgment will be denied.

Both sides have referred in their briefs to "facts" that were never made the subject of a proposed fact as required by this court's Procedures to be Followed on Motions for Summary Judgment, a copy of which was given to each party with the Preliminary Pretrial Conference Order on July 15, 1999. For example, plaintiffs assert in their brief that "there is no question that prior to the plaintiffs' request for an administrative due process hearing, the defendant RFSD had refused to pay for an [Independent Educational Evaluation] for Casey," but because plaintiffs failed to propose this as a fact supported by evidence in the record, I have not considered the assertion in deciding their motion for summary judgment. See Procedures, I.C.1 ("The court will not consider any factual propositions contained in a brief that are not the subject of a proposed finding of fact.") For the sole purpose of deciding plaintiffs' motion for summary judgment, I find the following facts submitted by the parties to be material and undisputed.

UNDISPUTED FACTS

Plaintiffs Edie F. and Michael F. are the parents of Casey F., a minor child with disabilities who is a student in defendant River Falls School District. Casey F. receives special education services from defendant.

Plaintiffs wrote a letter dated June 4, 1998, to the Wisconsin Department of Public Instruction in which they requested a due process hearing. In the letter, plaintiffs alleged that defendant had failed to provide Casey F. with a free appropriate public education and requested that defendant (1) pay for an Independent Educational Evaluation of Casey; (2) retain an expert in transition planning; (3) create an appropriate Individualized Education Program; and (4) provide compensatory education.

The parties held a mediation session on July 31, 1998. At the mediation session, defendant agreed to retain an independent educational evaluator and a transition consultant for Casey in an effort to resolve the dispute. Defendant also agreed that it would not take disciplinary action against Casey for being tardy or absent from school or make a referral for truancy against plaintiffs until it received an evaluation.

The parties held additional mediation sessions on February 2, 1999 and February 26, 1999, and a final Individualized Education Program session on March 12, 1999. Those sessions resolved all of the issues between the parties and resulted in an Individualized

Education Program for Casey that meets his unique needs. The final program contains elements that defendant had either tried previously or had recommended to plaintiffs.

Between August 1997 and January 1998, defendant gave Casey at least fifteen discipline reports. Since August 1998, when the parties reached an agreement, defendant has not taken any disciplinary action against Casey for being tardy or absent.

OPINION

A. Summary Judgment Standard

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex v. Catrett, 477 U.S. 317, 324 (1986). All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

B. Prevailing Party

The Individuals with Disabilities Education Act provides that "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); see Brown v. Griggsville Community Unit School District No. 4, 12 F.3d 681, 683 (7th Cir. 1993) (holding that IDEA authorizes district courts to award "attorney's fees for services rendered exclusively in a proceeding before another tribunal").

The Supreme Court has defined a prevailing party as one who "obtain[s] at least some relief on the merits of his claim," such as an enforceable judgment, consent decree, or settlement. Farrar v. Hobby, 506 U.S. 103, 111 (1992). "The relief granted must 'materially alter[] the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" Board of Education of Oak Park v. Nathan R., 199 F.3d 377, 382 (7th Cir. 2000) (quoting Farrar, 506 U.S. at 112-12); see also Texas State Teachers Ass'n v. Garland Independent School District, 489 U.S. 782, 792 (1989) (holding that at minimum, plaintiff suing under § 1988 must "be able to point to a resolution of the dispute which change[d] the legal relationship between itself and the defendant"). "'[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" Farrar, 506 U.S. at 109 (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)) (discussing attorney fees under § 1988); see Board of Education of Oak Park, 199 F.3d at 382 ("The term 'prevailing party' under 20 U.S.C. § 1415(e)(4)(B) has the same meaning as the phrase does

in 42 U.S.C. § 1988.")

In 1997, Congress amended the IDEA to bar attorney fees "at the discretion of the State, for a mediation . . . that is conducted prior to the filing of a complaint." 20 U.S.C. § 1415(i)(D)(ii); see also 34 C.F.R. § 300.513(c)(2)(ii). This provision seems to indicate that attorney fees may not be awarded for a mediation conducted *before* the filing of a complaint absent authorization from the state. Wis. Stat. § 115.80(2) does not give such authorization; it bars an award of fees and costs "for mediation . . . that is conducted before filing a request for a hearing." The corollary to the bar of attorney fees for mediation conducted *prior* to the filing of a complaint is the authorization of an award of attorney fees under § 1415(i)(3)(B) for a mediation conducted *after* the filing of a complaint. Once the complaint has been filed and the chances for a simple resolution have dissipated, courts have reasoned that denying fees could protract litigation and discourage settlement because parents would "'attempt to gain the desired relief through formal proceedings'" to allow for recovery of fees. Shelly C. v. Venus Independent School Dist., 878 F.2d 862, 864 (5th Cir. 1989); see also Lucht v. Molalla River School District, 57 F. Supp.2d 1060, 1069 (D. Or. 1999) ("disallowing the recovery of attorney fees incurred in a [state complaint resolution procedure] would discourage early resolution and settlement of IDEA claims").

The Seventh Circuit has "recognized that a plaintiff may be a prevailing party . . . even

if the defendant voluntarily provides the relief rather than litigating the suit to judgment." Zinn v. Shalala, 35 F.3d 273, 274 (7th Cir. 1994). For example, in Brown, 12 F.3d at 683, the Court of Appeals for the Seventh Circuit cited Shelly C., 878 F.2d at 864, in support of its application of the IDEA's attorney fees provision in a case in which the parties settled prior to a formal due process hearing. In Shelly C., 878 F.2d 862, the parents of a disabled child requested a due process hearing in order to appeal their child's Individualized Education Program. The Court of Appeals for the Fifth Circuit examined the language of § 1415(i)(3)(D)(i) (then § 1415(e)(4)(D) of the Handicapped Children's Protection Act), which sets forth certain circumstances in which an award of attorney fees and related costs is disallowed if the services were performed *after the time* of a written offer of settlement, and concluded that the statute's implication is that attorney fees *up to the time* of the offer are recoverable. Id. at 864. The court noted that this conclusion was consistent with the legislative history of the IDEA, stating that "Congress intended prevailing parents to recover fees for 'services performed in connection with [an] administrative proceeding.'" Id. (internal citation omitted). Because "[s]ervices rendered in anticipation of a due process hearing fall within this authorization," the court held that attorney fees should be available when the plaintiff "obtains desired relief short of a formal administrative proceeding." Id. (citing Rossi v. Gosling, 696 F. Supp. at 1084). See also William H. Danne, Jr., *Who Is Prevailing Party for Purposes of Obtaining*

Attorney's Fees Under § 615(i)(3)(B) of Individuals With Disabilities Education Act (20 U.S.C.A. § 1415(i)(3)(B)) (IDEA), 153 A.L.R. Fed. 1, 109 (1999) (stating that courts have acknowledged consistently that one can be considered prevailing party if relief under IDEA is obtained through settlement or consent decree).

To be a prevailing party, the court must find that "the lawsuit [plaintiff] filed was a cause, in the same sense in which we speak of 'cause' in tort and criminal law, of the attaining of his objective in bringing the suit." Brown, 12 F.3d at 685. Courts have utilized a two-prong test (referred to as the catalyst test) to insure that the relief obtained was the result of the potential merit of the plaintiff's position. To satisfy the catalyst test, the court must determine "(1) whether the lawsuit 'was causally linked to the relief obtained'"; and (2) "whether the defendant acted gratuitously, that is, the lawsuit was frivolous, unreasonable, or groundless." Fisher v. Kelly, 105 F.3d 350, 353 (7th Cir. 1997) (quoting Gekas v. Attorney Registration and Disciplinary Comm'n, 793 F.2d 846, 849-50 (7th Cir. 1986)). Following the Supreme Court's decision in Farrar, 506 U.S. 103, courts of appeals are divided about the viability of the catalyst test. See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 120 S. Ct. 693, 711 (2000) (collecting cases). Although the Seventh Circuit has suggested that satisfaction of the catalyst test is not enough to warrant an award of attorney fees, see Brown, 12 F.3d at 684; Board of Education of Downers Grove Grade School Dist. No. 58 v. Steven L.,

89 F.3d 464 (7th Cir. 1996), the court held in Zinn, 35 F.3d at 276, that Farrar did not abrogate the catalyst test. See also Krocka v. City of Chicago, 203 F.3d 507, 517 (7th Cir. 2000) (applying catalyst test).

The first issue is whether plaintiffs' request for a due process hearing resulted in the relief provided in the mediation agreement. "A party who seeks fees under a catalyst theory must show that the relief ultimately obtained was sought (or at least easily inferable from what was sought) and refused (expressly or by fair implication) prior to the commencement of a contested hearing." State of New Hampshire v. Adams, 159 F.3d 680, 686 (1st Cir. 1998).

The only evidence plaintiffs have adduced in support of their contention that their complaint was the cause of the relief defendant provided is the chronology of events. In a letter dated June 4, 1998, plaintiffs asked defendant to pay for an Independent Educational Evaluation and a transition consultant and create an appropriate Individualized Education Program for Casey. On July 31, 1998, the parties held their first mediation session, at which defendant agreed to plaintiffs' request that it hire an Independent Educational Evaluator as well as a transition consultant and to cease disciplinary action against Casey for truancy temporarily. Except for the fact that defendant agreed to some of plaintiffs' requests two months after plaintiffs requested a due process hearing, plaintiffs have submitted no evidence to support the conclusion that their request for a due process hearing caused the relief provided

for in the mediation agreement. See Morris v. City of West Palm Beach, 194 F.3d 1203, 1209 (11th Cir. 1999) ("While chronology is a significant clue, 'chronology is not definitive because the question of causation is intensely factual.'") On the basis of the evidence presented, it is equally likely that defendant agreed to plaintiffs' requests because it is required to review and revise Casey's Individualized Education Plan each year pursuant to 20 U.S.C. § 1414(d)(4)(A).

Even if plaintiffs satisfied the first prong of the catalyst test, they have failed to present evidence to determine "whether the defendant acted gratuitously, that is, the lawsuit was frivolous, unreasonable, or groundless." See Morris, 194 F.3d at 1210 ("plaintiffs should not be deemed to be prevailing parties if their claims are objectively unmeritorious"). "'The problem with claims that are settled is that there are reasons for parties to settle that are wholly unrelated to the substance and issues involved in the litigation. A suit may be groundless, and settled for its nuisance value, or settled by a party for wholly gratuitous reasons.'" Fisher, 105 F.3d at 353 (quoting Hooper v. Demco, Inc., 37 F.3d 287, 292 (7th Cir. 1994)).

Defendant argues that it agreed to provide services for Casey that are not required by the IDEA in order to resolve plaintiffs' complaint and that it had provided or offered to provide such services in the past. Plaintiffs argue that their requests could not have been frivolous, unreasonable or groundless because defendant "agreed to do these things as a result of the settlement." Plaintiffs' conclusory assertion misses the point that the second prong of the

catalyst test is intended to determine *why* defendant provided the agreed upon relief. Plaintiffs attempt to refute defendant's contention that the Individualized Education Program resulting from the mediation contained "essentially nothing new" by discussing the length and content of the new Individualized Education Program. Plaintiffs did not propose findings of fact comparing Casey's Individualized Education Program before and after mediation. By failing to do so, plaintiffs have not shown that the old Individualized Education Program was inadequate, that the new program contained significant improvements and that such improvements demonstrate that their claim was meritorious. See Colburn v. Trustees of Indiana University, 973 F.2d 581, 593 (7th Cir. 1992) (plaintiffs cannot leave it to court to scour record in search of factual support for their claim).

C. Reasonableness of Attorney Fees

Because plaintiffs have not offered sufficient evidence that they meet the requirements of the catalyst test to qualify as prevailing parties entitled to attorney fees, I need not decide whether the amount of attorney fees they requested is reasonable.

ORDER

IT IS ORDERED that the motion of plaintiffs Edie F. and Michael F., as parents of and

on behalf of their minor child, Casey F., for summary judgment is DENIED. An evidentiary hearing will be held in this case on May 26, 2000, at 9:00 a.m.

Entered this _____ day of April, 2000.

BY THE COURT:

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BARBARA B. CRABB
District Judge