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-0354-C

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This civil action for an award of attorney fees is before the court following an evidentiary hearing on a claim for attorney fees filed by plaintiffs Edie F. and Michael F. as parents of Casey F. and on his behalf pursuant to 20 U.S.C. § 1415(i)(3)(B) of the Individuals with Disabilities Education Act. Plaintiffs are seeking reimbursement of the fees they incurred in mediation sessions held with defendant after plaintiffs requested that a due process hearing be held to resolve certain differences of opinion they had with defendant River Falls School District over Casey's educational program. In an order entered on April 11, 2000, I denied plaintiffs' motion for summary judgment because I could not determine from the proposed findings of fact

whether plaintiffs' request for a due process hearing was the cause for the relief they obtained or whether defendant provided the relief gratuitously in an effort to resolve plaintiffs' complaint as part of its continuing efforts to provide appropriate services for Casey.

After hearing the evidence adduced by the parties, I conclude that plaintiffs have failed to show that they are prevailing parties in this matter. Accordingly they are not entitled to attorney fees. Although they obtained defendant's agreement to pay for an independent educational evaluation and a transition consultant, they did not achieve any change of any significance in the educational services defendant had been providing to Casey. The "relief" plaintiffs say they obtained did not produce any new directions in Casey's individualized education plan, any new insights into the nature of his disability or any identifiable changes in his transition planning.

The Individuals with Disabilities Education Act was enacted to require school systems to provide free, appropriate public education to every child, including those with disabilities. As a means of enforcing the requirement, Congress authorized courts to award attorney fees to parents who must resort to litigation to achieve an appropriate education for their children. It did not intend that fee awards would be made against school systems that do not need the threat of litigation and the involvement of counsel to carry out their duty of providing appropriate educational services. Because plaintiffs did not have to resort to litigation in order

to obtain an appropriate education for Casey, they cannot be said to be prevailing parties who obtained relief to which they were entitled under the act. Defendant's agreement to fund an independent educational evaluation and employ a transition consultant is not "relief" under the act but simply a means of determining whether the services defendant was providing were appropriate for Casey. Even if the employment of outside consultants could be said to constitute relief in certain circumstances, defendant had no legal obligation under the Individuals with Disabilities Education Act to provide such services. It acted gratuitously in an effort to reach an agreement with Casey's parents.

From the evidence adduced at the hearing, I make the following findings of fact.

FACTS

Casey F. was born on July 3, 1982. In the spring of 1996, when he was 13 and in eighth grade, defendant undertook a new evaluation of the learning disability for which Casey had been receiving special education services throughout grade school. As part of that evaluation, defendant had a psychological test administered to Casey because of its concern over Casey's increasing behavior problems, which were manifesting themselves in antisocial behavior and frequent absences from school. Defendant determined that Casey's primary learning difficulties were in the areas of math and language arts. It convened a team consisting of the school's vice-

principal, a counselor, two learning disability teachers and three regular teachers that met with plaintiffs to discuss Casey's individualized education plan. In June 1996, the parties agreed upon an individualized educational plan for Casey that would maintain him in a learning disabilities program (because he was functioning below grade level in reading and written language and needed frequent monitoring) and would not place him in an emotional disabilities program (because his emotional, social and behavioral concerns did not warrant such services). Under the plan, Casey would be in regular education classes and would have learning disabilities study halls. The plan set out specific short-term objectives for Casey, along with procedures for evaluating his progress and a schedule for those evaluations. It included a list of modifications for regular education classes, such as giving him additional time to complete assignments and tests, permitting him to have test questions read aloud and giving him instructions that were in writing and broken down into small steps.

In September 1996, shortly after school started, Casey's mother, Edie F., wrote Gerald Boock, defendant's director of special education, advising him that Casey was not doing very well and asking for a review of his individualized education plan, with the assistance of an expert in the disorders of attention deficit and hyperactivity. Boock did not respond in writing to Edie's letter until mid-October. At that time, he advised Edie that he had asked Bonnie Lynn, a learning disabilities teacher, to arrange a review of the individualized plan and that he

did not believe the assistance of an outside specialist in attention deficit-hyperactivity disorder was necessary so early in the school year, particularly when some things seemed to be going well for Casey.

A review was undertaken of the 1996-97 plan. Despite Boock's initial resistance to involving an outside specialist, he brought in a special education director from another school district to review Casey's records. This reviewer did not prepare a written report but did attend the meetings that resulted in a new 1996-97 individualized plan. Plaintiffs and defendant agreed on a revised plan under which Casey was to be given additional learning disability services in the areas of spelling, written language and math calculations amounting to three hours a day, participate in regular physical education, elective courses and required classes, have lunch with regular education peers and be eligible to participate in all extracurricular activities. Also, he was to be provided counseling to assess his social skills. In five pages of short-term objectives, the parties identified the tasks Casey was to complete and when, what assistance would be provided to him, what consequences would apply if his work was late (he was not to be given any point reductions) and what progress reports would be sent to his parents. The parties agreed that Casey was to receive appropriate disciplinary consequences that did not interfere with his academic program: morning detentions, with in-school suspensions if the detentions were not served. During the in-school suspensions he would be

offered learning disability services. No out-of-school suspensions would be considered unless Casey committed a severe rule infraction, such as carrying a weapon.

In June 1997, at the end of Casey's first year in high school, the parties approved an individualized education plan for the 1997-98 school year. It provided that Casey would receive learning disability support for math classes and intermediate biology that would include tutoring, test modification, regular home communication and a monitoring of his progress. He was to participate in regular physical education, elective courses and required classes, have lunch with regular education peers and be eligible to participate in all extracurricular activities. Casey's spelling and written language skills were assessed as below grade level and it was noted that his work habits, study skills and behavior sometimes interfered with his academic achievement. Again, short-term objectives were listed that included not missing any more than four days each term, taking his prescribed medication, decreasing the number of times that he was tardy, serving lunch detentions when he was tardy and receiving rewards for every three consecutive days on which he was not tardy, increasing the number of assignments he completed, spending more time studying at home, working on recognizing and writing complete sentences and increasing his knowledge of parts of speech, punctuation and capitalization. He was given the option of taping or dictating his answers to essay questions on tests. In an effort to find subjects that might interest Casey, the parties agreed that he would complete an interest

inventory and take a variety of courses in art, mechanics, foods or anything that interested him. In addition, the plan focused on helping Casey make the transition from school to work by offering him a course on employability, helping him find a job and, if he found one, adjusting his school schedule so that he would go to school only part of the day.

In October 1997, Casey's parents asked for a review of the plan that had been worked out the preceding spring. This review resulted in some changes in Casey's academic program. In the second term, 50% of his program would be made up of PASS programs (these appear to be programs for mastering basic skills in segments he would complete at his own pace with the help of a tutor) and supported intermediate biology; in the third term, 35% of the program would be supported integrated math; and in the fourth term, 25% of the program would be supported integrated math. Again, it was noted that Casey's spelling and written language skills were below grade level and that his attendance, attitude, work habits and study skills interfered often with his academic achievement. At his mother's request, Casey's behavior program was to include no consequences for missed time at school. Also, he was to receive ten points for every ten minutes he spent “on task,” with a bonus if he stayed on task 76 minutes out of 80, and a monetary reward from home for staying on task. (This last incentive was removed several months later at Casey's mother's request.) Casey was to enroll in driver's education, physical education, pottery, food and general mechanics throughout the year. Also, he was to take a

“hands-on” version of integrated math and word studies, supported by a special education teacher. The planners hoped that the high activity level in these classes and the fact that Casey had been involved in choosing them would help Casey's attendance, which had continued to decline. In addition, Casey was to have an evaluation with a representative from the state Department of Vocational Rehabilitation to help him with employment objectives, adult living objectives and daily living skills and perform a functional vocational evaluation.

On June 4, 1998, Casey's parents wrote to the Department of Public Instruction, asking for a due process hearing to resolve Casey's problem of non-attendance at school and defendant's failure to address the problem; to obtain an independent educational evaluation; to create an appropriate individualized educational plan to replace the ones developed earlier, which in plaintiffs' opinion lacked incentives, positive reinforcements and a specific plan to capitalize on Casey's strengths and had relied too heavily on punitive measures, particularly during the 1996-97 school year; and to have defendant hire a transition planning consultant to work with Casey.

In June 1998, the parties agreed upon an individualized educational program for the 1998-99 school year. Casey was assessed as still having deficits in spelling, written language, math calculation and reading. Defendant suggested off-site private tutoring, but Casey and his parents rejected the suggestion because Casey preferred to stay on campus with his friends.

The parties noted in the plan that Casey had earned no credits toward graduation in the preceding school year and that his behavior was continuing to impede his learning because he was not attending school regularly despite the many modifications defendant had tried, such as shortening his school days, limiting his academic work to PASS program work only, not using in-school suspensions as a disciplinary measure, finding out-of-school employment, giving credit for working and providing services from the Department of Vocational Rehabilitation. The parties agreed that Casey would continue with PASS programs, working 1½ hours a day with a certified teacher. In addition, he was to attend a physical education class for 85 minutes a day, so that his total time at school was under four hours, including lunch, and he would be able to work at a local grocery store for three hours every other day. If he failed to attend school, he would not be allowed to return to his job. Six tardies would be treated in the same way as an unexcused absence from school, resulting in the loss of his job. Casey worked at the grocery store one day before quitting. His school attendance did not approve.

After defendant learned of plaintiffs' request to the Department of Public Instruction for a due process hearing, both sides agreed to try to mediate their dispute and retained counsel to assist in that effort. After the first full day of mediation, on July 31, 1998, the parties reached agreement that defendant would pay for an independent education evaluation and agreed on the manner in which the evaluator would be chosen. Defendant was to provide

certain records to the evaluator and plaintiffs were to provide releases for Casey's medical records and other relevant records not included with the school records. Also, the parties agreed that a transition consultant would be retained to begin working immediately on Casey's transition to work. Gerald Boock was to schedule a meeting between Casey's mother and Bonnie Lynn, Casey's case manager, to consider modifying Casey's program to include a foods class, participation in a support group, assigning him a buddy to walk him to class, participation in a small group rather than in a tutoring situation and keeping close communication between school and home on Casey's attendance. Defendant agreed to make no referral for truancy against plaintiffs until the independent education evaluation had been completed and reviewed by the team that was to prepare the individualized education plan. During the same time period, defendant would take no disciplinary action against Casey if he failed to attend school or was tardy.

Gerald Boock agreed to the independent educational evaluation for three reasons: he wanted to reach an agreement with plaintiffs; he wanted to explore the possibility that matters extraneous to school might be affecting Casey's attendance; and he has learned over time that an independent educational evaluation often supports the efforts the school district has been making. He did not believe that plaintiffs had met the prerequisites for such an evaluation because they had not expressed any disagreement with defendant's assessment of Casey's

disability of attention deficit-hyperactivity disorder.

Boock agreed to the transition consultant to help reach agreement with plaintiffs, even though he believed that Casey's case manager was keeping a close tab on the services that Casey required to help him move into the workplace and he knew that Casey's case manager had found him the grocery store job. Also, as with the independent educational evaluator, Boock thought that the consultant would support the efforts defendant had been making.

The parties reached agreement on the person to serve as the independent educational evaluator. She met with Casey and prepared an extensive report that included up-to-date testing and a number of suggestions for helping Casey in school. The evaluator agreed that Casey had attention deficit-hyperactivity disorder with specific problems in the area of eye-hand coordination on writing tasks, spelling and attentional control and that those problems were interfering with his academic functioning, school attendance, community involvement and interpersonal relationships. She recommended focusing on the effective management of Casey's medication, development of an academic program predominantly outside his high school, very frequent home and school communication "focused on the goal of providing Casey with consistency, frequent feedback, and immediate and logical consequences across settings" and frequent written communication with the person managing Casey's medication. She made no comments about the use of detentions, suspensions, point reductions or other consequences as

a response to Casey's failure to attend school or his tardiness when he did attend, saying nothing about whether such measures should be continued, discontinued, used only infrequently or changed in nature.

The parties engaged in another day of mediation in February 1999, with their counsel. During this session, the parties reached agreement upon several issues, including Casey's needs, his program for the current term of school, his three-year evaluation (his last one had been conducted in May 1996), incentives for improving his attendance and school work, counseling and medication, his graduation requirements and the essential elements in any educational program that might be developed. The parties agreed to a school schedule that would begin at 9:40 (to accommodate Casey's difficulty in getting up early) and end at 2:30 and would include school work in the public library, away from the high school setting, using the PASS program materials. In addition, there would be opportunities for classes within the high school, transition planning and for work after school, realistic and measurable goals and improvement in his attendance.

On February 26 and March 12, 1999, the parties participated in individualized educational plan meetings and agreed upon a detailed plan for Casey, which incorporated a number of the specific strategies suggested by the independent educational evaluator. The plan was based in large part on Casey's asserted desire to graduate with his class in 2000 and his

parents' concerns that he become independent, that he develop strategies and skills to compensate for his deficits and that he have help with his transition to the work world. The plan was that Casey would have a one-to-one educational program off campus, that he would choose from two or three required courses each day, take short breaks as needed and move forward at his own pace. In addition, he would attend one class each day at the high school. Defendant would provide plaintiffs weekly academic and behavior reports, mid-quarter reports and quarterly reports. Casey was to complete a self-inventory and choose two or more weaknesses to work on. He was to complete job application forms, write a letter of application, visit several workplaces with a job coach and have a minimum of two successful work experiences at least two weeks in length, with support from a job coach.

The plan told Casey exactly what he would have to do if he were to graduate with his class and included sheets he could fill out to show his progress toward that goal. The March 1999 individualized educational plan was considerably longer and more detailed than any such plans prepared previously. It included no provision for detentions, suspensions or loss of points for non-attendance or tardiness but relied on positive reinforcement of good behavior and natural consequences, such as failure to graduate with his class, deficiencies in credits needed for graduation and the negative effect upon employment opportunities.

At the end of March 1999, the parties entered into a settlement agreement that

incorporated the new individualized educational plan. The plan was unsuccessful in keeping Casey in school and moving him closer to graduation. Eventually Casey took a high school equivalency examination.

OPINION

In seeking reimbursement for the attorney fees they incurred in their mediation sessions with defendant and their proceedings in this court, plaintiffs are proceeding under 20 U.S.C. § 1415(i)(3)(B), which 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 a prevailing party." Such fees are not limited to those incurred in judicial proceedings; the Individuals with Disabilities Education Act authorizes awards of fees for services rendered exclusively in a proceeding before another tribunal, see Brown v. Griggsville Community Unit School District No. 4, 12 F.3d 681, 683 (7th Cir. 1993), and, in certain circumstances, for services performed even when no proceeding takes place. See, e.g., Shelly C. v. Venus Independent School District, 878 F.2d 862, 864 (5th Cir. 1989) (awarding attorney fees for work leading to settlement of dispute after request for due process hearing had been filed but before hearing had been held). This case is like Shelly; it involves a request for fees for services performed in reaching a mediated settlement that obviated the need

for the due process hearing plaintiffs had requested.

Plaintiffs' claim is not precluded by the language of § 1415(i)D)(ii) barring an award of attorney fees "at the discretion of the State, for a mediation . . . that is conducted prior to the filing of a complaint." This statute allows a state to make provision for barring attorney fee awards for mediation. Wis. Stat. § 115.80(2) was enacted to respond to this provision. It bars fee awards only "for mediation . . . conducted before filing a request for a hearing." The parties' mediation occurred *after* the filing of their request for a hearing. Such a request is the equivalent of a "complaint," as the word is used in the act. Thus, their suit for attorney fees is not barred by this provision of the federal statute.

Courts interpret the term prevailing party under § 1415(i)(3)(B) in the same way as they interpret the term in 42 U.S.C. § 1988, under which a prevailing party may be granted attorney fees for the successful prosecution of certain civil rights actions. See Board of Education of Downers Grove Grade School, Dist. No. 58 v. Steven L. 89 F.3d 464, 468 (7th Cir. 1996). Such a party is one who "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). At a minimum, a 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." Texas State Teachers Ass'n v. Garland Independent School District, 489 U.S.

782, 792 (1989).

A plaintiff can 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). Without attacking this concept in principle, defendant argues that it is a different matter altogether to award fees to a party that has agreed to engage in mediation, both because mediation is designed to be a private, informal dispute resolution process in which all the parties are willing to compromise in order to resolve their differences and because Congress intended that the use of mediation to resolve disputes arising under the Individuals with Disabilities Education Act would "reduce the acrimony involved in those disputes and [would] save money that [had] in the past been spent on attorney fees." 143 Cong. Rec. H2534 (daily ed. May 12, 1997) (statement of Rep. Gilman). Defendant maintains that it is contrary to the whole idea of mediation for a court to parse the process to determine which side gave up more and therefore should be awarded fees. Defendant's argument raises an interesting question but one that need not be addressed in this case because plaintiffs have not shown that they prevailed.

For the purpose of deciding this case, I will assume that attorney fees can be awarded to parents who achieve substantial changes in the educational programs offered their children as a result of mediation. This assumption is bolstered by the holding in Shelly C., 878 F.2d 862 (cited in Brown, 12 F.3d at 685), that the availability of fees encourages both parents and

school districts to negotiate because the parents have no incentive to drag their feet until the due process hearing at which fees can be awarded and the school district has an incentive to settle as early as possible to avoid further costs. See id. at 864 (citing Rossi v. Gosling, 696 F. Supp. 1079, 1084 (E.D. Va. 1988)). As Brown makes clear, however, not every voluntary concession by a school system makes the parent a prevailing party within the meaning of § 1415(i)(3)(B). See Brown, 12 F.3d at 685 ("If the board changed its mind for reasons unrelated to the legal proceeding . . . the change is not aptly described as a settlement.") The determination of prevailing party depends on the particular circumstances and context of the parties' dispute and its resolution, with the plaintiff bearing the burden of proof. See Stewart v. McGinnis, 5 F.3d 1031, 1039 (7th Cir. 1993) (party seeking to obtain award of fees under 42 U.S.C. § 1988 bears burden of showing that it is prevailing party).

Plaintiffs maintain that they qualify as prevailing parties because they sought an independent educational evaluation and the appointment of a transition consultant and defendant agreed to both. Moreover, they argue, the individualized education plan prepared after the mediation, using the independent education evaluator's report, is much more detailed than any previous plans and includes provisions that had not been included in previous plans.

There are a number of difficulties in accepting plaintiffs' argument. First, the

Individuals with Disabilities Education Act is designed to insure that every child, including those with disabilities, has access to a free, appropriate and public education. That is the overriding goal and purpose of the act. The act contains many specific provisions by which that goal is to be achieved but these are essentially means to reaching the goal rather than goals in themselves. Thus, fees will not be awarded for obtaining a "stay-put" order maintaining a child's placement in a particular program if the "staying put" does not lead to ultimate relief. See Steven L., 89 F.3d at 469 (law does not regard parents as prevailing parties under § 1415(i)(3)(B) because their only ultimate victory under Individuals with Disabilities Education Act is invocation of stay-put provision); Brown, 12 F.3d at 681 (reversing award of attorney fees when facts showed other causes than parents' litigation for making placement of child that parents desired, although litigation resulted in stay-put order). Indeed, in Jodlowski v. Valley View Community Unit School District # 365-U, 109 F.3d 1250 (7th Cir. 1997), the court held that fees are not to be awarded parents who "prevail" simply to the extent of securing a school district's agreement to an independent education evaluator. Id. at 1254 ("[S]uccess in this regard would constitute no more than a species of interim relief for which attorney's fees are not permissible.") See also Hunger v. Lininger, 15 F.3d 665, 670 (7th Cir. 1994) (interim relief or "tactical victories in what turns out to be a losing war" do not entitle parents to award of attorney fees). Plaintiffs cannot be said to be prevailing parties who obtained relief under

the act simply because defendant agreed to an independent educational evaluation when that evaluation did not lead to any changes of significance in the educational program defendant had been providing to Casey.

The independent educational evaluator did not disagree with defendant's assessment of Casey's disability, did not suggest that the programs defendant had in place for Casey were inappropriate and did not suggest any changes of any significance in responding to his academic needs. As Boock had suspected, the independent educational evaluation supported the efforts defendant had been making.

Second, plaintiffs argue that if it were not for their filing of a request for a due process hearing, defendant would not have acceded to plaintiffs' requests and Casey's 1998-99 individualized education plan would not have been as comprehensive as it was. Setting aside for the moment the question whether any changes in the individualized education plan were of any significance, it is not enough for plaintiffs to show that something would not have happened "but for" the happening of something else. See Brackett v. Peters, 11 F.3d 78, 79-80 (7th Cir. 1993) ("but for" is not an adequate conception of cause). Even small children sense a lack of logic when their mothers tell them that if they had not left the table before they finished their entire meal, they would not have been in a position to be hit when the door from the kitchen opened suddenly. The question is whether the party prevailed because of the legal

proceeding and not for some other reason. See Brown, 12 F.3d at 685. See also Zinn, 35 F.3d at 276 (affirming use of two-prong "catalyst" test to insure that relief obtained was result of potential merit of plaintiff's position; test requires showing that 1) lawsuit was causally linked to relief obtained and 2) defendant did not act gratuitously, that is, lawsuit was not frivolous, unreasonable or groundless). In this case, other than showing that one event followed another, plaintiffs have not adduced any evidence that defendant would not have granted plaintiffs' request for an independent educational evaluation without the request for a due process hearing. Indeed, defendant has offered persuasive evidence to the contrary, although it does not bear the burden of proof on this point. Gerald Boock had his own interest in obtaining a thorough evaluation of Casey that explored medication levels and "any psychological, social and/or behavioral causes for his truancy." Boock had been involved in efforts to help Casey for at least four years; none of the efforts had been successful. Casey's problems had gotten worse instead of better. Casey had a triennial review coming up within a few months. There were ample reasons for Boock to agree to an independent evaluation; no due process hearing request was necessary to achieve that result. Moreover, even if he would not have agreed without the due process hearing request and the resulting mediation, his agreement was gratuitous because defendant was under no legal requirement to provide an independent evaluation. Plaintiffs had expressed no disagreement with defendant's assessment of Casey's disability. See 34 C.F.R. §

300.502(b)(1) ("A parent has the right to an independent educational evaluation at public expense *if the parent disagrees with an evaluation obtained by the public agency*.") (Emphasis added.) In seeking such an evaluation, plaintiffs' request was frivolous, although not in the usual sense in which people use that word. Plaintiffs were sincerely and justifiably concerned about their son's plight and the lack of success of any program developed to help him. Rather, the request was frivolous in the legal sense because it had no foundation in the law.

Plaintiffs have not shown that defendant had any legal obligation to respond to their request for the retention of a transition consultant. Defendant had provided Casey a number of services designed to help him make a transition into the workplace: linking him up with the Department of Vocational Rehabilitation for an evaluation and financial support of a job placement plan during the school day; finding him a job; and offering him course units in handling money, paying taxes, figuring living expenses, transportation costs and earning money. Plaintiffs never showed that the transition services defendant had provided Casey were inadequate or inappropriate or that a transition consultant could provide any services defendant was unable to provide or had refused to consider. Therefore, just as with the request for an independent educational evaluation, defendant's willingness to agree to this request by plaintiffs was gratuitous. See Hunger, 15 F.3d at 670 (courts are not to award attorney fees to plaintiff who obtains benefits to which he was never entitled so that benefits cannot be said

to be result of judgment or comparable relief through a consent decree or settlement).

Third, in asking for a due process hearing, plaintiffs represented that defendant had used punitive measures as its primary means of addressing Casey's lack of performance, "[e]specially during the 1996-97 school year." See Hrg. Exh. #13 at 2. Plaintiffs did not mention that the individualized education plan for the following year had emphasized positive reinforcements for Casey's attendance and, at his mother's request, had specified that he would receive no consequences for missed time at school. A review of this plan tends to undermine plaintiffs' position that they prevailed in the mediation because they obtained an agreement from defendant to stop "punishing" Casey for being tardy or absent from school. (Defendant argues that it never did "punish" Casey for his non-performance but that it imposed state-required consequences on Casey for his tardiness and non-attendance, but it is not necessary to decide whether defendant is correct in its definition of punishment.) It is evident from Casey's June 1998 individualized plan that defendant was amenable to exempting Casey from any of the usual consequences students suffered when they did not show up for class or showed up late. It was not necessary to have a due process hearing to reach such an agreement; it was a natural extension of the direction the planners had been heading in writing Casey's individualized education plans. I cannot say that plaintiffs would not have received this "relief" had they not requested a hearing.

Finally, although there is evidence that the individualized education plan the parties developed after mediation was longer and more comprehensive than any earlier plans, there is no evidence that any of the previous plans were inadequate or provided an inappropriate educational program for Casey. Moreover, there was no evidence that the new plan incorporated any approaches to helping Casey that defendant had not been providing him previously, with the exception of those it had offered him that he had refused. Plaintiffs called a purported expert in the drafting of individualized education plans who testified that the new plan was far more detailed than any of its predecessors but was unable to identify any specific aspects of the plan that were different in nature (and not just in details) from those that defendant had tried before or had offered to Casey. In the new plan, the parties continued to provide a shortened school day for Casey, with the majority of it devoted to individual tutoring plus one or two high activity classes. They continued to focus on efforts to prepare Casey for working after high school and to do away with negative reinforcement, such as penalties for non-attendance and tardiness, replacing those measures with positive rewards as they had done the previous year. Certainly, it is not determinative that Casey did not succeed under any of the previous plans; he did not succeed under the last one either. The Individuals with Disabilities Education Act requires school districts to provide each of their constituent students an education that is free, appropriate and public and that emphasizes special education and

related services designed to meet each student's unique needs and prepare him or her for employment and independent living, see 20 U.S.C. § 1400(d)(1)(A), but it does not and could not require school districts to achieve a successful outcome in every case. Parents and school systems can do only so much to try to help students succeed; they cannot guarantee the results. Why some children do well and others fail remains as puzzling as any other question of human motivation.

As disheartening as it must have been for Casey's parents to see no improvement in Casey's school progress as a result of the individualized education plans that they participated in and approved, it was not objectively reasonable for them to seek a due process hearing in the absence of any evidence that defendant was failing to fulfill its duties under the act. In filing such a request and retaining counsel, they injected an unnecessary adversarial element into the individualized educational planning process Congress envisioned as being a non-adversarial means of achieving consensus about a student's educational needs and programming.

ORDER

IT IS ORDERED that the request of plaintiffs Edie F. and Michael F., as parents of and on behalf of their minor child, Casey F., for an award of attorney fees incurred in challenging Casey's Individualized Education Plan is DENIED for plaintiffs' failure to show that they are

prevailing parties within the meaning of 20 U.S.C. § 1415(i)(3)(B).

Entered this _____ day of June, 2000.

BY THE COURT:

_____
BARBARA B. CRABB
District Judge