Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

J.L. and M.L., and their minor daughter, K.L., Plaintiffs, v. MERCER ISLAND SCHOOL DISTRICT, a municipal Washington corporation, Defendant.	NO. 2:06-cv-00494-MJP PLAINTIFFS' MOTION FOR ATTORNEY FEES Note on Motion Calendar: January 5, 2007

MOTION

Plaintiffs were determined to be the prevailing party in this action and entitled to an award of attorneys fees pursuant to 20 U.S.C. § 1415(i)(3)(B) of the Individuals With Disabilities Education Act (IDEA), in the Order on Petition for Judicial Review, dated December 8, 2006. The Plaintiffs move for an order requiring the Plaintiff Mercer Island School District (District) to pay attorney's fees in the amount of $121,792.50. This request is supported by the Declaration of Howard Powers, itemizing all attorneys fees for which an award is sought, the Declarations of David Girard, Charlotte Cassady and William L.E. Dussault, and the following brief.

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BRIEF

A. Plaintiffs Are the Prevailing Party

The District has asked the court to reconsider its determination that Plaintiffs are the prevailing party and entitled to an award of attorney's fees, because Plaintiffs have yet to be awarded some form of relief, citing Hewitt v. Helms, 482 U.S. 755, 107 S. Ct. 2672 (1987). The District asks the court to postpone consideration of fees until the ALJ makes a specific determination of the relief to which the Plaintiffs are entitled. Plaintiffs will fully respond to the motion if the court decides to consider it and orders a response. Following is a brief explanation of why the District's motion should be denied.

The plaintiff in Helms sought only damages, obtaining no relief because of official immunity. As the Court notes, he obtained only an interlocutory ruling and no injunction or declaratory judgment was entered in his favor. The Parents obtained a final determination that the District denied K.L. a free appropriate public education under the IDEA for 7th and 8th grade, failed to develop an appropriate IEP for the 10th grade (identifying specific areas that were omitted), and that K.L. is entitled to reimbursement[1] and some form of compensatory education. While the specific nature of this relief will be determined on remand, under this court's order, Plaintiffs are assured of receiving some relief resulting from the District's denial of a FAPE.[2] The amount of reimbursement or the form of any compensatory relief the Plaintiffs obtain does not effect their right to recover attorney's fees. Farrar v. Hobby, 506 U.S. 103, 113-14, 113 S.Ct. 566, 574 (1992) ("we hold that the prevailing party inquiry does not turn on the magnitude of the relief obtained.") This was reaffirmed in Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001), defining a prevailing party as,

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[1] Plaintiffs base the assertion that reimbursement is a component of remedies on the court's statement of its intent set forth in the order on the Plaintiffs' motion for reconsideration.

[2] Even if Landmark School were determined to be entirely inappropriate for K.L. and the Plaintiffs recovered no costs relating to K.L.'s placement there, the District would still be responsible for some alternative form of compensatory education. *See* Order, p. 13, lines 3-4, stating, "Based on the Court's analysis and findings, some form of compensatory educational relief is owed to Parents and the minor student."

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> [a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded.....This view that a 'prevailing party' is one who has been awarded some relief by the court can be distilled from our prior cases.
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> ..... We have held that even an award of nominal damages suffices under this test. See *Farrar v. Hobby*, 506 U. S. 103 (1992).

The Court further noted that favorable judgment need not be entered "on all (or even the most crucial) of .... claims." Ibid. In a case involving the IDEA, the Ninth Circuit held that,

> a party may be accorded prevailing party status by being awarded 'some relief by the court,' even if only an award of nominal damages. *Buckhannon*, 532 U.S. at 603-04; see also *Me. Sch. Admin. Dist. No. 35*, 321 F.3d at 15 (stating that a prevailing party must 'succeed on the merits of a claim or defense,' but that 'a party may be considered 'prevailing' even without obtaining a favorable final judgment on all (or even the most crucial) of her claims).

Shapiro v. Paradise Valley Unified School Dist., 374 F.3d 857, 865 (9th Cir. 2004).

For IDEA claims, monetary relief is not a prerequisite to prevailing party status. The IDEA expressly entitles parents "to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. §1415(b)(6). Each of these matters affect a school district's legal obligations and student rights and a successful challenge confers prevailing party status. Pasatiempo v. Aizawa, 103 F.3d 796, 805 (9th Cir. 1996) (Attorney's fee awarded when only relief obtained was a determination that parents must be notified of and allowed to be involved in decisions about whether to evaluate their children for special education eligibility); Borengasser v. Arkansas Bd. of Educ., 996 F.2d 196 (8th Cir.1993) (Citing Abu-Sahyun v. Palo Alto Unified School Dist., 843 F.2d 1250 (9th Cir. 1988), in holding that a parent whose sole relief was an order enforcing a prior agreement requiring an IEP conference to be held before, rather than after, the start of the school year, was a prevailing party); N.S. v. Stratford Board of Education, 97 F.Supp.2d 224, 229 (D.Conn. 2000) (Relief involved blocking the district's plan to have the student placed in its preferred program and a determination that the district's IEP was deficient. The parents recovered no money and did not obtain placement in their preferred school. [citing G.M. v New Britain Board of Educ. 173 F.3d 77 (2d Cir. 1999]).

Nor does the relief obtained need to be the same as that initially sought. Krichinsky v. Knox

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Cty Schools, 963 F.2d 847, 850 (6th Cir. 1992) (Fees awarded for securing only a slight increase in speech therapy, despite failure to obtain their primary goal of residential placement, or secondary goals of at-home behavior and extended school day programs; Noting that Hensley v. Eckerhart "rejects the central issue test" in favor of a "generous formulation" for prevailing party status); and Mitten v. Muscogee County School Dist., 877 F.2d 932 (11th Cir. 1989) (Parents who obtained determination that District program plan was inappropriate were prevailing party even though they failed to achieve their objective of placing their child in local school system).

The recently-decided Park Ex Rel. Park v. Anaheim Union High School, 464 F.3d 1025, 1034-37 (9th Cir. 2006) demonstrates the Plaintiffs' contentions concerning their prevailing part status, holding that: (1) District courts have narrow discretion to deny fees when "parents have been forced to litigate for years against school districts to obtain all or even part of what the Individuals with Disabilities Education Act requires in the first place;" (2) Plaintiffs need only succeed on any significant issue, which can include a determination that a district denied a student a FAPE for a period of time; (3) The prevailing party inquiry does not turn on the magnitude of the relief obtained (The only compensatory remedy ordered was a small amount of training of the student's teacher–no services to the student or recovery of costs were ordered); (4) A prevailing party must succeed on the merits of a claim or defense, but a party may be considered "prevailing" even without obtaining a favorable final judgment on all (or even the most crucial) of her claims; and (5) Hewitt v. Helms is no bar to prevailing party status,

> Because [parents] chose to exercise their rights under the Individuals with Disabilities Education Act, the District was forced to reassess the objectives and plan for [student]'s education and to provide for compensatory education to remedy its failure to provide a free and appropriate public education during several months of his education.
>
> Nor are the issues on which Appellants prevailed merely technical; rather, they go to the very essence of the Individuals with Disabilities Education Act. The determination by the Hearing Officer and the district court that [student] was denied a free and appropriate public education for the 2001-2002 extended school year and for September 2002 through November 2002--even setting aside the other issues on which Appellants prevailed--is the most significant of successes possible under the Individuals with Disabilities Education Act. At the heart of the Act are the requirements that all disabled children receive 'a free appropriate public education . . . designed to meet their unique needs and prepare them for further education,

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> employment, and independent living,' 20 U.S.C. § 1400(d)(1)(A), and that the education provided is effective in 'ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities,' id. § 1400(c)(1), (d)(4).

Plaintiffs recognize that they will need to seek further recovery of attorney's fees for time involved in obtaining a final ruling on the exact form of reimbursement/compensatory education. However, this does not mitigate their right to recover fees based on the current Order. Deferring recovery of fees to which the Plaintiffs are already entitled is an unnecessary hardship on them. Finally, Plaintiffs are unaware of a settlement proposal that could have any bearing on the amount of their fee recovery. If Defendant believes otherwise, it should produce it so the court can determine if it provides any possible basis to defer ruling on fees.

B. The IDEA Entitles Prevailing Parents to Recover Fees for Work Their Attorney Performed During All Phases of These Proceedings

The IDEA, 20 U.S.C. § 1415(i)(3), provides for an award of attorneys fees to the parents of a child with a disability who is the prevailing party, based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. Attorneys' fees may be awarded for all work claimed, starting from before the administrative hearing through the completion of proceedings in this court, including preparation of this fee claim. McSomebodies v. San Mateo City School Dist., 886 F.2d 1559, 1560 (9th Cir. 1989) (Concerning fee awards under the IDEA, the court held, "The overwhelming majority of cases now support fees from bottom to top. We decline to follow any of the minority."); Barlow-Gresham Union High School District No. 2 v. Mitchell, 940 F.2d 1280, 1286 (9th Cir. 1991) (Fees awarded for pre-hearing work and in connection with the fee application.). Attorneys fees for work starting from the time of initial representation through work on the fee petition were awarded and affirmed in Seattle School Dist., No. 1 v. B.S., 82 F.3d 1493 (9th Cir. 1996).[3]

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[3] As this court recognized in setting another attorney's fee award, time spent prior to the actual request for a due process hearing is consistent with the statutory scheme of the IDEA. The Act mandates considerable pre-hearing consultation by its requirement that the parents, in conjunction with the District, develop educational and placement plans that involve complex legal procedures and educational issues. Actions taken during this developmental phase are highly determinative of the outcome of the hearing, and special education

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C. The Parents Are Entitled to Recover All Attorney's Fees Incurred.

In Hensley v. Eckerhart, 461 U.S. 424, 430, 103 S.Ct. 1933, 1938 (1983), the Supreme Court held that "the level of a plaintiff's success is relevant to the amount of fees to be awarded."[4] However, success is not measured merely by dollars. Id., 103 S.Ct. at 1940. The Supreme Court identifies as "the relevant indicia of success -- the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served." Farrar, 506 U.S. at 122. Plaintiffs prevailed on every claim, although the extent to which costs of Landmark School may be recovered has yet to be decided. The fact that the Court's decision did not rely on every contention or basis the Plaintiffs put forth to support the inappropriateness of the District's programs and IEPs does not warrant a fee reduction.[5] In Hensley, 461 U.S. at 435, 103 S.Ct at 1940, the Court recognized that commonly,

> the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discreet claims.
>
> ...In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.

The Court held that, "a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." 461 U.S. at 435, 103 S.Ct at 1940. The Plaintiffs obtained relief that materially altered the legal relationship between them and the District. The District must provide K.L. some form of compensatory relief. The determinations that the District denied K.L. a free appropriate public education for a period of time and failed to properly formulate her IEP affect the District's legal responsibilities to K.L. and her rights, and serve an important public purpose by clarifying public school district duties pertaining to

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[3](...continued)
attorneys are required to begin preparations in advance of the due process hearing request. Furthermore, awarding such fees provides a strong incentive to resolve conflicts prior to initiating such a hearing.

[4] The Ninth Circuit confirmed that the Hensley analysis applies to IDEA fee claims in Aquirre v. Los Angeles Unified School District, 461 F.3d 1114 (9th Cir. 2006). In the experience of Plaintiffs' counsel, this has always been assumed to be the case.

[5] Plaintiffs note that none of the Court did not reject any of the Plaintiffs' contentions, while those adopted provided ample basis to support the conclusions reached.

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these matters.

The starting point of determining a reasonable fee is the number of hours reasonably expended multiplied by a reasonable hourly rate. A reduction from this calculation should be made only if documentation of hours is inadequate or for excessive or redundant hours. Hensley, 103 S.Ct. at 1939.

D. The Requested Attorney's Fees Are Reasonable in Amount

The attorney's fee award sought in this matter is reasonable based on the factors set forth in Kerr v. Screen Extras Guild, 526 F.2d 67, 70 (9th Cir. 1975).

Time and labor required. The time and attorney's fees attributable to various phases of this matter, itemized in the time sheet contained in the Appendix, are as follows:

Phase of proceedings	Time	Fee
Prior to drafting/filing hearing request (6/12/04 - 5/18/05)	34.60	7,785.00
Administrative hearing (5/26/05 - 12/1/05)	279.65	62,696.25
Appeal/federal district court (1/17/06 - 12/12/06)	211.80	47,655.00
Attorneys fee motion/brief (12/13/06 - 12/21/06)	16.25	3,656.25
Total:	541.30	$ 121,792.50

[Declaration of Powers, p. 2] Time spent before the filing of the hearing request includes counsel becoming familiar with K.L.'s service and school history, her previous evaluations and IEPs, and other pertinent facts, advocacy efforts to ensure K.L.'s IDEA rights were protected, including her right to an independent educational evaluation, and efforts to determine whether the parties agreed on K.L.'s program needs. The Plaintiffs have not sought attorney's fees for time relating to the IEP meeting of March 2005 (the only IEP meeting counsel attended), which are not recoverable under 20 U.S.C. § 1415(i)(3)(D)(ii); or to revising the Plaintiffs' opening brief (and related motions), which inadvertently exceeded page limits. The twelve-day administrative hearing in this matter is the longest in which Parents' counsel has ever been involved in many years of handling such cases.[6] As the

[6] The hearing decision lists 11 hearing dates, but omits October 26, 2005, the 12th day (see hearing

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comparisons below demonstrate, Plaintiffs' attorney worked very efficiently during all stages of these proceedings, without any duplication of effort. *[Declaration of Powers, pp. 2-3]*

Novelty and difficulty of the questions involved. This case involved difficult questions concerning K.L.'s language, neuropsychological and educational disabilities and needs. It involved numerous, difficult legal issues relating to procedures, definitions, legislative/statutory history, and remedies under the IDEA. The case necessarily involved time consuming presentation of K.L.'s lengthy history of specialized educational services. *[Declaration of Powers. p. 3]*

Skill required to properly perform the legal services properly. Substantial expertise and skill was required to coherently present the factual and legal issues in this case. Adequate representation required a sufficient understanding of principles of education, neuropsychology, language pathology and testing methodology to sort out the facts, conduct meaningful direct and cross-examination of expert witnesses and to articulate in writing the substance of the evidence. Mastery of the pertinent legal principles required an in-depth understanding of comprehensive federal and state statutes, regulations and policy rulings, as well as an ever-growing body of case law unique to the area of special education. Few attorneys in the area possess the requisite expertise to perform this work well. *[Declarations of Powers. pp. 3-4; Girard, p. 3; Cassady, p. 2, and Dussault, p. 3]*.

Preclusion of acceptance of other employment. The Parents' attorney is a solo practitioner who was precluded from accepting other employment requiring more than a limited commitment for a substantial portion of the time during the administrative hearing and work on briefing filed before this court. *[Declaration of Powers, p. 4]*. *See*, Shapiro v. Paradise Valley Unified School Dist., 374 F.3d at 866 (Fact that, "as a solo practitioner, [attorney] was limited in his ability to accept other employment," identified as a consideration in the amount of fees awarded).

Reasonableness of the hourly rate sought/customary fee. The hourly rate of $225 is reasonable for an attorney with more than thirty years of experience and unique expertise in a specialized area of practice. Plaintiffs contractual rate for work through the administrative hearing

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[6](...continued)
transcript, Vols. XIV & XVIII).

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phase of the case (entries dated June 12, 2004 - December 1, 2005) was at the hourly rate of $200, and the hourly rate for work on the appeal was $225 (entries dated January 17, 2006 - present).[7] Plaintiff attorney's current rate is $225, which will be increased in 2007 to $250. *[Declaration of Powers, p. 4]* This rate is consistent with the customary fee in this geographical area for attorneys experienced in disability education law. *[Declarations of Girard, p. 4, Cassady, p. 3; and Dussault, p. 2]*. Plaintiffs are entitled to recover fees at their attorney's currently effective rate, rather than a lower rate initially charged. P.L. v Norwalk Board of Educ., 64 F.Supp.2d 61 (D.Conn. 1999) ("Inasmuch as this case is only two years old, and due to the paucity of special education attorneys in this state, the Court orders that the attorneys be compensated at the current, not historical, rate."); Mr. and Mrs. R. v. Maine School Administrative District No. 35, 295 F. Supp. 2d 113 (D. Me. 2003) ("the Court finds that an adjustment to reflect the current hourly rate is appropriate.") Compensation at currently effective rates also assists Plaintiffs' counsel in his ability to represent low-income clients pro bono. This has increased in importance since fee recovery for cases settled short of judicial order has become more limited, which makes pro bono representation more costly on the whole. *[Declaration of Powers, p. 4]*

Amount involved and results obtained. As noted above, the precise amount of money and/or other form of compensatory education the Plaintiffs will ultimately receive is not yet known. However, IDEA cases, like other types of "civil rights" actions, often involve important rights and remedies that do not focus on large sums of money. The relief obtained vindicates important and valuable federal statutory rights.

Experience and ability of the attorney. Parents' attorney is experienced and capable. He has successfully litigated numerous IDEA cases. He is repeatedly asked to be a faculty at continuing legal education programs sponsored by the State Bar Association and the University of Washington and has been recognized by peers as an accomplished attorney in the area of education. *[Declarations of Powers. pp. 1, & 4; Girard, p. 3; Cassady, p. 3; and Dussault, p. 2]*.

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[7] Plaintiffs' attorney's hourly rate was increased to $225 soon after being engaged by the Plaintiffs, but he continued to bill at the lower rate through the completion of work on the hearing.

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Undesirability of the case. Parents' attorney did not view this case as undesirable. However, the lack of a sufficient numbers of attorneys in the area who are willing to accept IDEA cases due to their difficulty, and the time, labor and specialized expertise required, indicates that attorneys generally do not view cases of this nature as being particularly desirable. *[Declarations of Powers, p. 4; Cassady, p. 2; Dussault, p. 3]*.

Awards in other IDEA cases. The Plaintiffs' claim for attorney's fees is reasonable when compared to fees awarded and recovered in other IDEA cases in which the Plaintiffs' attorney has been involved. In Seattle School District v. B.S., et al, Cause No. C93-1759 (W.D.Wa. 1994), fees for 597 hours of work through the administrative and district court appeal phase of the proceeding (involving significantly fewer hearing days than this case) were awarded and upheld by the Ninth Circuit on appeal. Seattle School Dist., No. 1 v. B.S., 82 F.3d 1493 (9th Cir. 1996). In S.A. v. Seattle Sch. Dist. No. 1, C01-143R, counsel was awarded fees for 571 hours of work on the administrative hearing and a district court appeal heard solely on the record.

In S.A. v. Seattle School District No. 1, Cause No. C98-1136Z (not the same case as above), the District agreed to pay fees for 309.15 hours of work through the administrative proceedings after the parents filed a complaint seeking fees upon the District's initial refusal to pay. In Issaquah School District, Spec. Ed. Cause No. 2000-SE-0008 (Wa. 2001), the school district paid attorneys fees for 410 hours of work through the decision in an IDEA administrative hearing with no appeal. In Pamela B. v. Longview School Dist., Cause No. C90-5256B (W.D.Wa. 1992), the court awarded fees for 210 hours of work on briefing in the district court stage of an appeal heard solely on a significantly smaller administrative hearing record than that in this case. *[Declaration of Powers. pp. 4-5]*.

Fees recovered by other local attorneys are comparable to or exceed those claimed here. In the Matter of: Federal Way School District, Spec. Ed. Cause Nos. 97-13 & 61 (Wa.), the school district paid attorneys fees in excess of $85,000 for work on the administrative hearing. In Leetag v. Seattle School District, Cause No. C00-0419R, the school district paid in excess of $60,000 in attorneys fees for work through the completion of an IDEA administrative hearing. *[Declaration of Dussault, pp. 2-3]* See also, Spec. Ed Cause Nos. 2000-SE-0127 (256.6 hours spent on 6-day

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administrative hearing), and 1999-SE-34 ($43,513 recovered for 3-day administrative hearing). *[Declaration of Cassady. p. 3]*

Reported IDEA cases further demonstrate the reasonableness of the Plaintiffs' fee claim:

Fees before administrative hearing held: Doucet v. Chilton County Board of Education, 65 F.Supp.2d 1249, 1260 (M.D.Ala 1999) (Fees awarded for 152 hours expended for case settled before hearing held, and for 90 hours of work on fee claim in district court).

Fees through administrative proceeding: In P.L. v Norwalk Board of Educ., 64 F.Supp.2d 61 (D.Conn. 1999), attorneys fees were awarded for 447.4 hours of work on an administrative proceeding with no district court appeal. *See also*, Smith v. Roher, 954 F. Supp. 359, 362 (D.D.C. 1997) (Attorneys fees in the amount of $82,663.44 awarded for work on administrative hearing through dismissal of school district's appeal as moot); Arunim D. v. Foxborough Public Schools, 970 F.Supp. 51, 55 (D. Mass. 1997) (Attorneys fees in the amount of $60,550.91 awarded in fee claim action after parents prevailed at administrative level); C.G. v. New Haven Bd. of Educ., 988 F.Supp. 60, 67 (D. Conn. 1997) (Attorneys fees in the amount of $60,000 awarded after parents prevailed at administrative level, plus $7,000 in fees for work on the fee claim); and Mass. Dept. of Public Health v. School Committee, 841 F.Supp. 449, 463 (D.Mass. 1993) (Attorneys fees in the amount of $131,520 awarded for work including an administrative hearing and motions filed in the district court appeal, in a case settled before trial in district court).

Fees for the district court phase of the proceedings: In Yaris v. Special School Dist. of St. Louis County, 661 F.Supp. 996, 1002 (E.D.Mo. 1987), the court awarded $124,635.50 in attorneys fees for work in obtaining injunctive relief in district court, involving no fee claim for administrative proceedings); *See also*, Westendorp v. Independent School District No. 273, 131 F.Supp. 2d 1121 (D. Minn. 2000) (fees of $111,450 awarded for 445.8 hours of work solely in the federal court stage of an IDEA claim).

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CONCLUSION

The Supreme Court described the underlying congressional purpose of fee award statutes in civil rights actions as being to "encourage compliance with and enforcement of the civil rights laws." Washington v. Seattle School District No. 1, 458 U.S. 457, 102 S.Ct. 3187, 3204, n. 31, 73 L.Ed.2d 896 (1982). *See also* Barlow-Gresham Union High School D. 2 v. Mitchell, 940 F.2d at 1286 ("Attorney fees awards are not designed to penalize defendants, but are rather to encourage individuals to seek judicial relief."). The fee award sought in this motion is reasonable and fosters the intended purposes of the IDEA's fee shifting statute.

Dated this 21st Day of December, 2006

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