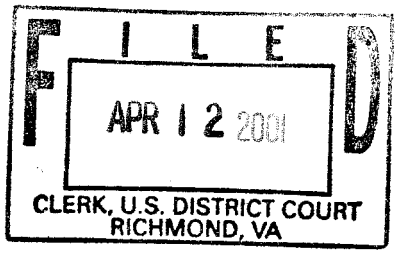
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division



MICHAEL "GLENN" WHITE, a minor, by and through his parents, and next friends, Steven W. White and Janet A. White,	)	
Plaintiff,	)	
v.	)	**Civil Action 3:00CV00386**
VIRGINIA BOARD OF EDUCATION, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the Court by consent of the parties pursuant to 28 U.S.C. § 636(c)(1) on cross motions for summary judgment as to the sole issue of whether the Plaintiff should be awarded attorney's fees and costs in the total agreed-upon amount of $13,419.00 for efforts expended during part of the administrative phase of the case. The Defendants, state entities, assert that the Eleventh Amendment prohibition on bringing suit against a state in federal court (except under narrow circumstances) precludes any relief and, alternatively, the Plaintiff cannot be viewed as the prevailing party as required in any event so as to justify an award.

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Factual and Procedural Background[1]

Steven W. and Janet A. White (parents) placed their minor son, Michael "Glenn" White, in a private school after an Individual Educational Plan (IEP) was devised by a local public school system (Henrico County, Virginia) in response to various educational issues. The IEP provided for implementation of the Plan within the public school system, but the parents chose a private program for their son before the proposal could be initiated. Thereafter, the parents sought reimbursement from the county school system for the private tuition involved, but a local hearing officer found in favor of the county and denied reimbursement for what by then had become an amount representing two years of charges. However, the parents thereafter succeeded on appeal before a State Level Review Officer and the school system was ordered to reimburse the full amount. The school system resisted and thereafter pursued an appeal in state court.

While the matter was pending review on appeal in the lower state court, the parents pursued a parallel administrative process which ultimately resulted in a decision requiring the school system to make the reimbursement pursuant to recently-enacted federal guidelines (so-called "stay put" provisions) that were intended to preserve the *status quo* of the most recent determination pending any review. However, upon protest by the school system (on the basis that the new regulatory dictate should not be applied retroactively), the Defendant agency

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[1]The procedural history of the situation is convoluted at the very least and it would have been helpful for the parties to have complied with Local Rule 56(B) by clearly identifying the undisputed facts involved, including the sequence of events, aside from the specific allegations of the Amended Complaint filed on behalf of the Plaintiff. As a consequence, the Court has had to fashion its own narrative summary without specific reference to the voluminous record. In doing so, it has primarily relied on the detailed Findings of Fact made by the Hearing Officer who rendered the decision on which the requested relief is based. The Court's ultimate conclusion is based on the same source in any event so that it is of no consequence if its placement in the sequence of events is incorrect.

reversed itself and rescinded its prior order of reimbursement pending resolution of the appeal in state court. The parents then sought and obtained review of that agency decision through a separate administrative due process hearing in which they sought reimbursement for all past and future tuition costs. The Hearing Officer involved in that administrative proceeding again ruled in the Plaintiff's favor, but only for reimbursement of tuition costs since the implementation of the new federal regulation on July 1, 1999. The Hearing Officer required the reimbursement to continue until such a time as a state or federal court finally resolved the relevant issues. The agency did not appeal and complied with the decision. Thereafter, the state court reversed the original administrative finding in favor of the Plaintiff and the Plaintiff filed yet another appeal in the Virginia Court of Appeals which remains pending.

Standard of Review

The standard of review in evaluating a motion for summary judgment relief is well-known. Summary judgment is only appropriate when there is no genuine dispute as to any issue of material fact when all justifiable inferences are drawn in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322 (1986). The court must decide if the evidence when viewed in such light "presents a sufficient disagreement to require submission to the [factfinder[] or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986).

Analysis[2]

Any lingering debate on the issue of whether the provision of the governing federal statute, the Individuals with Disabilities Education Act (IDEA), is unconstitutional as violative of the Eleventh Amendment has been firmly resolved in this federal circuit by Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997), and in several other circuits by consistent holdings.[3] IDEA specifically abrogates state immunity and the recent Supreme Court decision in Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. ____ (2001), does not alter the conclusion of constitutionality because of the specific Congressional finding in §1400 of "irrational state discrimination against the disabled" and the §1403 requirement that state immunity be waived to receive federal funding. (20 U.S.C. §1400-1403).

The remaining issue therefore is whether the Plaintiff was a "prevailing party" to a sufficient extent to permit the Court to award fees and costs within its discretion as provided for in the statute.[4] (20 U.S.C. § 1415(e)(4)(B)). The issues are the same as in Title VII cases.

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[2]There is no need to address any issue related to the necessary deference to be given state resolution of special education issues, including the requirement for explicit findings to support any reversal, because the issue of attorney's fees was not raised in the state proceedings. *See* Doyle v. Arlington County Sch. Bd., 953 F.2d 100 (4th Cir. 1991).

[3]*See* Mauney v. Arkansas Department of Education, 30 IDELR 668 (8th Cir., June 14, 1999); Bradley ex rel. Bradley v. Arkansas Dept. of Educ., 189 F.3d 745 (8th Cir. 1999); Board of Educ. Of Oak Park v. Kelly E. by Nancy E., 32 IDELR 62 (7th Cir. Mar. 24, 2000); John T. by T. and Joan T. v. Delaware Co. Intermediate Unit, 32 IDELR 142 (E.D. Pa., May 8, 2000).

[4]The Defendants do not challenge the amount claimed and therefore it is not necessary to analyze the situation according to the factors set forth in Johnson v. Georgia Highway Express, Inc. and its progeny. 488 F.2d 714, 717-719 (5th Cir. 1974). *See* Paramount Industrial Cos., Inc. v. Furniture & Carpetland, Inc., 1988 WL 92878, at **2-3 (4th Cir. Sept. 6, 1988)(unpublished). The Court otherwise concludes that the requested rate of $225/hour is consistent with the prevailing rate of the area and the level of expertise involved.

Combs v. School Bd. of Rockingham Co., 15 F.3d 357, 360 (4th Cir. 1994). To be a "prevailing party," a party must be successful in obtaining enforceable relief. Farrar v. Hobby, 506 U.S. 103, 111 (1992). However, it is not necessary to be successful in all efforts.

During the course of representation, the Plaintiff, through counsel, succeeded in getting the state sovereign to at least temporarily change long-standing policy and order relief pending appeal. Moreover, the state ultimately adopted its own version of the corresponding federal regulation whose applicability had long been advocated by the Plaintiff. The Plaintiff and counsel "prevailed" not just once, but twice on the administrative level, and yet the instant request for fees and costs relate only to the most recent success. It is also worthy of note, especially when exercising one's judicial discretion, to observe that the Defendants have forced the Plaintiff to initiate this action and pursue the matter to conclusion, but no evidence has been offered as to any additional amount for fees and costs as it was in regard to the base amount and the Court is therefore unable to consider any additional award.[5] Finally, an aspect of the matter is still pending in state appellate court (pre-1999 reimbursement), but it appears that the Defendants did not appeal that issue on which the Plaintiff last prevailed (post-1999 reimbursement) and for which payment of fees and costs is now sought. (Pl.'s Brief in Opp.'n to the Def.'s Mot. for Summ. J. at 17).

Although, as argued by the Defendants, the Hearing Officer's favorable ruling was based in large part on the application of the federal regulation to the facts of this case, it still altered the

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[5]The request for fees includes the suggestion that a "multiplier" of the base amount be utilized because of what is asserted to have been egregious conduct on the part of the Defendants, but the governing statute specifically prohibits use of such a factor and the Court therefore concludes it is precluded from such a consideration. (20 U.S.C. § 1415(I)(3)(c)).

legal relationship of the parties by requiring the Defendants to do at least in part what they had previously refused to consider. The Plaintiff has therefore prevailed in every sense of the term as specifically concluded by the Hearing Officer. (Complaint, Ex. A, ¶ 9 at 11). It is therefore also appropriate, especially in light of the firm case law rejecting the Defendants' Eleventh Amendment argument and the corresponding loss of use of the amount involved for the time period involved, to award prejudgment interest at the prevailing state rate as of the date of the favorable Hearing Officer's decision of February 7, 2000.[6]

Conclusion

For the reasons stated, the Plaintiff's motion for summary judgment is GRANTED, the Defendants' motion for summary judgment is DENIED, and judgment in the agreed-upon amount plus interest will therefore be entered in favor of the Plaintiff against the Defendant state agency, the Virginia Board of Education.

An appropriate Order shall issue.

Dennis W. Dohnal
United States Magistrate Judge

Richmond, Virginia
Date: 12 APR 2001

[6]Although 28 U.S.C. § 1961 mandates the calculation of interest from the date of judgment, case precedent confirms it does not preclude the award of prejudgment interest in the court's discretion. *See e.g.*, Quesinberry v. Life Ins. Co. of North America, 987 F.2d 1017, 1030 (4th Cir. 1993)(where a statute does not provide an award of prejudgment interest, it is within the discretion of the court to award such interest at a rate it deems appropriate). Furthermore, the Court concludes that fixing the prejudgment rate of interest at the higher state rate of 9% (Va. Code § 6.1-330.5) is appropriate because the state as the liable party should not be heard to complain about a rate its own legislative body presumably established to be fair and reasonable.