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

RICHMOND DIVISION

MICHAEL "GLENN" WHITE, *et. al.*	)	
Plaintiffs	)	
	)	
v.	)	**Case No. 3:00CV386**
	)	
VIRGINIA BOARD OF EDUCATION; *et. al.*,	)	
Defendants.	)	

PLAINTIFF'S BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE

On December 18, 1999, the plaintiff, through this counsel, requested a special education due process hearing against the Virginia Department of Education and the Virginia Board of Education. Briefs were filed, facts were stipulated to, and oral argument was held on January 17, 2000. On February 7, 2000, the Administrative Hearing Officer issued a ruling in favor of the plaintiffs. As a matter of law, the plaintiffs are entitled to reimbursement of their attorney's fees. The defendant has refused to consider reimbursement arguing that fees are barred pursuant to the Eleventh Amendment. A "Complaint and Petition for Attorney's Fees" with an itemized detailed accounting of such fees was subsequently filed in this Court. The defendants have not objected to the amount, rate, kind and quality of services, but have asserted that the Eleventh Amendment bars the claim.

STATEMENT OF FACTS

On November 19, 1975, Public Law 94-142 was enacted. It was known as the Education for All Handicapped Children Act of 1975. It has been renamed several times and is now as Individuals with Disabilities Education Act. It provides a comprehensive set of procedural safeguards to protect the rights of children with disabilities.

Litigation between parents of children with disabilities and school districts is initiated pursuant to a due process hearing. When a parent prevails against a school district and a Hearing Officer or Review Officer awards relief, the Virginia Board of Education and Virginia Department of Education (hereinafter, the "State") are responsible for the enforcement of the ruling. In the twenty-five years since the enactment of the Act, the State has never required a school district to implement an adverse ruling so long as that district simply expressed an intent to appeal. The actual filing of an appeal could be delayed for up to two years. Regardless of the damage these delays caused a child and parents, the Virginia Board of Education and Virginia Department of Education protected the school districts and did not require that the Orders of the Hearing Officers and Review Officers be implemented. All other states require the implementation of such rulings, regardless as to whether a decision is appealed.

Virginia has argued that the law does not apply to a "Commonwealth." Virginia is unique and special, it is a "Commonwealth."

On July 10, 1998, the parents prevailed in special education litigation against Henrico County Public Schools. The Decision directed that Glenn White be educated at The New Community School (TNCS). Henrico refused to pay the tuition and refused to implement the Decision. The State became responsible. After correspondence and pressure from these plaintiffs,

the State directed Henrico to implement the decision. Henrico refused. The State, without explanation, legal justification or excuse, reversed themselves.

The Code of Federal Regulations (34 C.F.R. § 300.514(c)) mandated that Glenn's "current educational placement" was at TNCS and that his tuition must be paid by either the County or the State.

When the State failed to require the County to obey the law, the State became responsible for paying Glenn's tuition. The State refused.

On December 18, 1999, the plaintiff, through this counsel, requested a special education due process hearing against the State to force payment of Glenn's tuition.

Pleadings were filed by the parties with the Hearing Officer. Facts were stipulated and oral argument was held on January 17, 2000. The defendants argued that Virginia, as a "Commonwealth" is unique, special, and, unlike individual States, does not have authority over local school boards.

> The Virginia constitution vests primary authority for education in local school boards.
> . . .
> But in Virginia, by the constitution, Article 8 of the constitution, the authority for running the local public schools and providing a free education is the responsibility of the local school divisions. . . (Transcript of January 17, 2000 Oral Argument, page 50, attached to initial Complaint as Exhibit I.)

The defendants argued that the established universal caselaw and federal regulation were invalid and that the United States Department of Education exceeded their authority in regard to the regulation. The State argued:

> . . . I submit that the new federal regulation (34 C.F.R. § 300.514) exceeds the statutory authority granted to the United States Department of Education under the IDEA.
> . . .
> U. S. Department of Education's promulgation of Section 300.514(c) exceeded the statutory authority by providing an alternative process by which to establish a stay-put placement that is not found in the IDEA and contradicts the governing statute. Therefore,

> the regulation should not be applied to this case and the parents' request for funding of the stay-put placement should be denied. (Exh. I, pages 50-52)

The Administrative Hearing Officer ruled against the State and directed the payment of Glenn's tuition at TNCS until a "final determination" was made in *White v. Henrico County*, a case that is pending in the Virginia Court of Appeals.

The plaintiff is the prevailing party in the litigation against the Virginia Department and Virginia Board of Education and is entitled to an award of attorney's fees. The defendants' refusal to pay attorney's fees is the basis and cause of this instant litigation.

The State answered the Complaint by asserting that:

> 1. The Eleventh Amendment to the Constitution of the United States bars the plaintiff's claims for attorneys' fees against any of the defendants.
>
> . . .
>
> 3. The plaintiffs are not legally entitled to attorneys' fees.

The defendants have not objected to the amount, rate, kind and quality of services, but have simply responded that the Eleventh Amendment bars the claim.

ARGUMENT AND DISCUSSION

The Individuals with Disabilities Education Act, at 20 U.S.C. § 1415(i)(3)(B) and (C) states that:

> (B) Award of attorneys' fees.--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.
>
> (C) Determination of amount of attorneys' fees.--Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

Hearing Officer Davis found that the plaintiffs "have substantially prevailed herein." (Exhibit 1, paragraph 9, page 11.)

The plaintiff is the prevailing party and, pursuant to 20 U.S.C. § 1415(i)(3)(B), is entitled to an award of fees.

A detailed statement of the billing entries and fees was attached to the initial Complaint and identified as Exhibit P. The amount sought for the earlier litigation was $13,419.00.

Eleventh Amendment

The State filed an Answer asserting that "The Eleventh Amendment to the Constitution of the United States bars plaintiffs' claim for attorneys' fees against any of the defendants."

The Individuals with Disabilities Education Act states that:

> A state shall not be immune under the eleventh amendment of the Constitution of the United States from suit in Federal court for a violation of this Act. (20 U.S.C. § 1403(a))

IDEA is neither ambiguous or unclear. The State, despite being a "Commonwealth," is not cloaked with a special immunity. Perhaps the State was not familiar with Section 1403.

In *Gadsby v. Grasmick,* the Fourth Circuit held that a State Educational Agency may be liable under the IDEA.

> Our conclusion that an SEA may be held liable under IDEA where the state fails to provide a free appropriate public education to a child with a disability is buttressed by the legislative history of § 1412(6). This legislative history indicates that § 1412(6) was included in the statute to "assure a single line of responsibility with regard to the education of handicapped children." S. REP. NO. 94-168, at 24 (1975). Therefore, we hold that the SEA is ultimately responsible for the provision of a free appropriate public education to all of its students and may be held liable for the state's failure to assure compliance with IDEA. *Gadsby v. Grasmick*, 109 F.3d 940, 25 IDELR 621, 628, (4th Cir. 1997)

The defendant, by inference, asks this Court to overrule the Fourth Circuit and presumably find that 20 U.S.C. § 1403 is unconstitutional. Perhaps the state was unfamiliar with the holding of *Gadsby.* The defense is without merit and contrary to established caselaw.

Plaintiff's Prevailed

The defendant's second assertion is that the plaintiffs are not legally entitled to attorneys' fees. Tthe defendants assert that the plaintiffs were not the prevailing party in the earlier administrative special education due process litigation. The special education hearing officer was neither confused nor mistaken when he wrote, in paragraph nine, page eleven of his decision:

9. That the parents have substantially prevailed herein.

If the hearing officer was not sufficiently clear to the State in paragraph nine, his "ORDER" at the end of page eleven, establishes that the parents did prevail in their request to require the Virginia Department of Education to pay for Glenn White's tuition at The New Community School.

The final paragraph of the Hearing Officer's decision states that:

> Therefore, in light of all of the foregoing, it is hereby ORDERED that the Virginia State Department of Education shall reimburse, or cause to be reimbursed, the parents of Glenn White for the tuition expense (upon the parents presentation of proof of cost) at the New Community School for the school year of 1999-2000 and shall pay, or cause to be paid, the tuition for any future school year that Glenn White attends that school, until such time as the appropriate Virginia or federal court makes a final determination of the rights and responsibilities of the parties in *White V. Henrico County Public Schools*, currently pending with the Circuit Court of Henrico County, Virginia. (Attached hereto as Exhibit 1.)

The State did not want to pay Glenn's tuition. The State was ordered to pay. The plaintiff prevailed.

CONCLUSION

The defendants have asserted two affirmative defenses. They allege that the Eleventh Amendment bars the claim, despite clear law to the contrary. Second, they assert that the plaintiff is not legally entitled to an award of fees. The statute is also clear that prevailing parties are

entitled to an award of their attorney's fees. The State has adopted a frivolous defenses sole for the sake of delay.

The plaintiffs respectfully request that this Court make a finding that the State has advanced frivolous defenses either out of abject ignorance or for the sake of delay. The plaintiffs further request that this Court award the plaintiffs their attorney's fees and costs in the amount of $13,419.00, plus interest, for the earlier litigation during the administrative proceeding, and an additional award of fees and costs for the action in this Court.

MICHAEL "GLENN" WHITE, *et. al*.
By Counsel

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CERTIFICATE

I, Peter W. D. Wright, hereby certify that on this 3rd day of February, 2001, I mailed a copy of this Brief to the office of Joan Murphy, counsel for the defendants.

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Peter W. D. Wright