STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

**,

Petitioner,

vs. Case No. 16-7021E

BROWARD COUNTY SCHOOL BOARD,

Respondent.
_____/

ORDER ON ATTORNEY'S FEES

By Final Order dated April 18, 2017, Petitioner was awarded attorney's fees as the prevailing party in the underlying proceeding. Jurisdiction was reserved to determine the amount of attorney's fees should the parties be unable to agree on such. The issues presented at the hearing were: whether the student was denied a free and appropriate public education (FAPE) and whether all team members were present for an Individualized Education Plan (IEP) team meeting. In the Final Order, the undersigned found that the student was provided FAPE, and that the School Board committed a procedural violation by conducting an IEP meeting without parental input in November of 2016. Since an IEP was created and implemented despite this procedural error, the undersigned awarded 9.5 hours of language services, which was the total amount of hours of language services the Student had not received since the implementation of the newly drafted IEP.

The parties were unable to agree on the amount of attorney's fees; consequently, on June 1, 2017, Petitioner filed a Motion for Attorney's Fees and Costs (Motion). Petitioner attached two affidavits from two practicing attorneys who provided support for the amount of fees requested. Subsequently, on June 12, 2017, the School Board filed a memorandum opposing Petitioner's Motion. The School Board's response consisted of two arguments; first and foremost, that the undersigned has no authority to award attorney's fees and costs. Secondly, and in the alternative, that Petitioner was not actually a prevailing party and that the relief awarded was less than what was offered to Petitioner in a settlement offer made 11 days before the due process hearing; thus, no attorney's fees should be awarded. On June 15, 2017, Petitioner requested leave to file a reply, which was granted on that same day. On June 26, 2017, Petitioner filed a reply to the School Board's objection to the award of attorney's fees and costs. A telephone conference was held to determine if the parties had any other arguments or evidence to present, whether in writing or at an evidentiary hearing. Both parties agreed that no further evidence or arguments would be presented.

Both parties' written pleadings were considered in preparing this Order on Attorney's Fees. Finally, for stylistic convenience, male pronouns are used when referring to the

Student. The male pronouns are neither intended, nor should be interpreted, as a reference to the Student's actual gender.

As indicated, the Final Order in the underlying action awarded reasonable attorney's fees to Petitioner. The School Board has taken the position that the undersigned has no jurisdiction to award attorney’s fees and costs in a due process hearing. This Order will first address the undersigned’s jurisdiction, and next will turn to the issue of calculating the award.

Authority to Award Attorney’s Fees and Costs

The undersigned’s jurisdiction to award attorney’s fees to a parent who is a prevailing party is not found in the Individuals with Disabilities Education Act (IDEA), which is a comprehensive federal statutory scheme governing the manner in which states provide special education and related services to students with disabilities. Rather, it is found in Florida state law, which is authorized by the federal Department of Education, and explained as follows:

> Based on the absence of consensus, the Department will continue to allow maximum flexibility to States for structuring the process by which parents who are prevailing parties under Part B of the Act may request attorney's fees reimbursement . . . . States could choose as a matter of State law to permit hearing officers to award attorney's fees to parents who are prevailing parties under Part B of the Act, and not require that they do so, or imply that IDEA would be the

> source of the authority for granting hearing officers that role. If a State allows hearing officers to award attorney's fees, requirements regarding training on attorney's fees would be a State matter.

64 Fed. Reg. 12,615 (Mar. 12, 1999). The State of Florida, thus, has the authority to grant administrative law judges (ALJs) the permission to award attorney's fees to parents who are prevailing parties in a due process hearing, and has conferred that authority to the ALJs in Florida Administrative Code Rule 6A-6.03311(9)(x)1, which reads as follows:

> **In any due process hearing** or subsequent judicial proceeding brought under this rule, the court, in its discretion, may award reasonable attorney's fees as part of the costs to:
>
> a. The prevailing party who is the parent of a student with a disability.

(emphasis added). Later in the same rule, in rule 6A-6.03311(9)(x)3, the following is stated:

> b. Attorney’s fees may not be awarded and related costs may not be reimbursed **in any due process hearing or judicial proceeding** for services performed subsequent to the time of a written offer of settlement to a parent if the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure **or, in the case of a due process hearing**, at any time more than ten (10) days before the hearing begins; the offer is not accepted within ten (10) days; and **the court or ALJ** finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(emphasis added). The above cited language is taken from the current rule, effective on December 21, 2008. A prior version of the attorney's fees rule, in effect from September 20, 2004, through December 21, 2008, stated as follows:

> (a) **A district court of the United States or a state circuit court** may award reasonable attorney's fees as part of the costs to the parents of a child with disabilities who is a prevailing party in a due process hearing or in a subsequent judicial proceeding.

(emphasis added). Prior to 2008, the State of Florida did not authorize Division of Administrative Hearings ALJs to award attorney's fees to parents who were prevailing parties in a due process hearing.[1/] As evidenced by the distinct change in language, the current rule provides ALJs the authority to do so. It is worth noting that as of the date of this Order, rule 6A-6.03311(9)(x) has not been invalidated or challenged via the administrative process; thus, it remains a rule that the undersigned has no discretion to ignore.

Calculation of Award

The reasonableness of attorney's fees is determined based on the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Jackson v. Dist. of Columbia, 696 F. Supp. 2d 97, 101 (D.D.C. 2010). This "lodestar" analysis requires the plaintiff to establish the reasonableness of the hourly rate and the reasonableness of the number of hours

spent on a particular task. In re North, 59 F.3d 184 (D.C. Cir. 1995). Ultimately, a reasonable fee takes into account the time it should take a competent attorney to perform the necessary work upon which the client's successful result is predicated.

To establish the reasonableness of Petitioner's counsel's hourly rate, Petitioner must establish "the attorney's billing practices; the attorney's skill, experience, and reputation; and the prevailing market rates in the relevant community." Covington v. Dist. of Columbia, F.3d 1101, 1107 (D.C. Cir. 1995). See also Nat'l Assn. of Concemed Veterans v. Sec. of Def., 675 F.2d 1319, 1325 (D.C. Cir. 1982). A court may also consider other factors in determining an attorney's reasonable hourly rate, including the novelty and difficulty of the questions involved and the skill required. Hensley v. Eckerhart, 461 U.S. 424 (1983); Gaines v. Douglas Cnty. Sch. Dist., 53 IDELR 88 (D. Nev. 2009).[2/] In essence, the lodestar analysis is intended to "produce an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." Perdue v. Kenny A., 559 U.S. 542, 551 (2010).

In this case, Petitioner's counsel is requesting an hourly fee of $300.00 an hour for 59.7 hours expended (for a total of $16,706.00), and $429.95 in costs. A brief review of the

timeline of events is necessary at this juncture, to provide a framework for the award of attorney's fees and costs.

The request for a due process hearing (Complaint) was filed by the student's parent on November 30, 2016, without the assistance of legal counsel. In the Complaint, the parent alleged that the district had failed to provide a proper education, and that an IEP had been created without her input on November 10, 2016. The parent requested "intensive remediation," which the undersigned considered as a request for compensatory education. The School Board filed a timely response to the Complaint on December 9, 2016, which contained an admission that an IEP meeting had been convened (just one month before) without the parent being present, and that the School Board was offering to convene the IEP team once again, to properly consider and address the parent's input.

On December 15, 2016, the School Board filed a Motion to Dismiss stating that the School Board agreed to reconvene the IEP team, but that Petitioner was refusing to attend.

On February 8, 2017, counsel for the School Board sent Petitioner a letter, stating:

> I have spoken with Ms. Laldaya Johnson, your son's teacher, and a number of other members of District staff, including Ms. Samuels, and have confirmed that your concerns regarding who actually was present at the IEP meeting on November 10, 2016 are valid . . . . The District is willing to correct these issues

> as well as address other concerns you may have about [**]'s placement.

The evidence demonstrated that Ms. Langer was retained on or about February 12, 2017, which was over two months after the request for due process hearing (Complaint) was filed by the parent in this case, and only three weeks prior to the due process hearing, which lasted nine hours. Ms. Langer did not seek to amend the original Complaint, and at the hearing admitted that she knew, prior to the start of the hearing, that the School Board had conceded the procedural error that had occurred on November 10, 2016.

On February 16, 2017, the School Board sent a settlement letter to Ms. Langer, attaching the February 8, 2017, letter to the parent, offering to vacate the November 10, 2016, IEP, and offering once again to hold a new IEP meeting and draft a new IEP with all appropriate team members present. The School Board, however, denied the request to provide any compensatory education.

Ms. Langer's presentation at the due process hearing was understandably focused on the alleged denial of FAPE and the student's placement, since the School Board had already conceded a procedural error. As to the decrease in language services, only the parent testified as to the student's language challenges. The School Board presented no evidence to support

its decision to reduce language services in the IEP that was drafted without parental input.

The School Board argues that the amount of time devoted to the issue for which relief was awarded was minimal, and that Petitioner is not a prevailing party. The undersigned finds that Petitioner is a prevailing party; without moving forward to the due process hearing, Petitioner would not have received compensatory education. Ms. Langer reasonably billed for research, drafting, communications, review, and preparation, as well as for time she spent in hearing. The issues raised regarding the student's placement and the provision of FAPE before and after the November 2016 IEP were interrelated to the extent they cannot be separated for attribution of time spent by Ms. Langer. Therefore, the undersigned is not reducing the amount of hours based on this factor. As such, her request for reimbursement for the 59.7 hours of time she spent preparing for the hearing and presenting the case to the undersigned is reasonable based on the complexity of the case, and the skill required to bring it to hearing.

Ms. Langer has extensive litigation experience, specifically in the area of special education law. Her skill, experience, and reputation are further corroborated by the affidavits of Maria Cammarata, Esquire, and Omar Ortega, Esquire, who are familiar

with Ms. Langer's work experience, skill, reputation, and the complex nature of special education law.

In this case, the best and only evidence on counsel's hourly rate is found in the affidavits provided by the two practicing attorneys, who both found the request for attorney’s fees and costs at an hourly rate of $300 to be reasonable; Ms. Cammarata has experience in the field of special education law, and Mr. Ortega has experience in general commercial litigation. Notably, the School Board does not contest the hourly rate. Given these facts, Ms. Langer's rate of $300 an hour is reasonable and appropriate based on her billing practices; her skill, experience, and reputation; and the prevailing market rates in the relevant community. Therefore, the amount of $16,706.00 is awarded for counsel's attorney's fees.[3/] Petitioner is also awarded $3,629.00 in costs, which the School Board did not object to.

The School Board also raises the argument that pursuant to rule 6A-6.03311(9)(x)3, Petitioner should not be awarded attorney’s fees and costs because Petitioner did not secure relief greater than what was offered by the School Board 11 days before the hearing. This argument is unpersuasive, given that the School Board, in the settlement offer, refused to provide any compensatory education despite its admission that it conducted an IEP meeting without the presence of the parent.

Additionally, time was expended to defend and prove the amount of fees that should be paid. Petitioner is requesting reimbursement for $3,200 for the amount spent to retain Mr. Ortega and Ms. Cammarata, who provided affidavits in support of the Motion for Attorney's Fees and Costs. The School Board has not objected to this request. Petitioner is entitled to be reimbursed for the expenses made to obtain the fees. See Diaz v. Santafe Healthcare, 642 So. 2d 765, 1994, Fla. App. LEXIS 5952, 19 Fla. L. Weekly D 1370 (Fla. 1st Dist. Ct. App. 1994); Souza v. Southworth, 564 F.2d 609 (1st Cir. 1977); Panior v. Iberville Parish Sch. Bd., 543 F.2d 1117 (5th Cir. 1976); Hairston v. R & R Apartments, 510 F.2d 1090 (7th Cir. 1975); Knight v. Auciello, 453 F.2d [*54] 852 (1st Cir. 1972); Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976), aff'd, 182 U.S.App.D.C. 322, 561 F.2d 320 (1977); Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D.Cal. 1974), aff'd, 550 F.2d 464 (9th Cir. 1977); and Prandini v. National Tea Co., 585 F.2d 47 *, 1978 U.S. App. LEXIS 10051, 18 Fair Empl. Prac. Cas. (BNA) 700, 18 Empl. Prac. Dec. (CCH) P8764 (3d Cir. Pa. 1978).

ORDER

Based on the foregoing it is ORDERED that Petitioner's Motion for Attorney's Fees is partially granted; the amount of attorney's fees and costs is reduced to a total amount of $16,706.00 in attorney's fees, plus costs of $3,629.95.

DONE AND ORDERED this 7th day of September, 2017, in Tallahassee, Leon County, Florida.

JESSICA E. VARN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of September, 2017.

ENDNOTES

[1/] The School Board's reliance on cases interpreting the rule prior to 2008 are inapplicable. The current version of the rule has not been addressed by any appellate court.

[2/] The Supreme Court, in Hensley, set forth 12 factors to be considered: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client of the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 461 U.S. at 429 n.3. Of these factors, the only one argued by the School Board is number (8), the amount involved and the result obtained.

[3/] Ms. Langer has also requested "anticipated" fees, for IEP meetings she plans to attend in the future. The School Board has objected to "anticipated" fees, and the undersigned agrees that attorney's fees are properly awarded for work that has been

completed, and not for work that may or may not be performed in the future.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

This decision is final unless, within 90 days after the date of this decision, an adversely affected party:

a) brings a civil action in the appropriate state circuit court pursuant to section 1003.57(1)(c), Florida Statutes (2014), and Florida Administrative Code Rule 6A-6.03311(9)(w); or

b) brings a civil action in the appropriate district court of the United States pursuant to 20 U.S.C. § 1415(i)(2), 34 C.F.R. § 300.516, and Florida Administrative Code Rule 6A-6.03311(9)(w).