ATTORNEYS' FEES UNDER THE IDEA

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I . The Statutory Framework - 20 U.S.C. §1415(i)(3)(B); 45 C.F.R. § 300.517

(i) **In general**

In any action or proceeding brought under the IDEA, the Court[1] may, in its discretion, award reasonable attorneys' fees as part of the costs:

(I) To the prevailing party who is the parent the child with a disability;

(II) To a prevailing party who is an SEA or LEA against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) To a prevailing SEA or LEA against the attorney of a parent, or against the parent if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

Determination of the amount of attorneys' fees - (20 U.S.C. §1415(i)(3)(C))

…. shall be based on rates prevailing in the community in which the action or proceedings arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees in calculating the fees awarded….

Prohibition of attorneys' fees and related costs for certain services
(20 U.S.C.§1415(i)(3)(D))

(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceedings …for services performed subsequent to the time of a written offer of settlement to a parent if –

[1] Neither hearing officers nor the State Review Officer have authority to award attorneys' fees. 20 U.SC. § 1415 (i)(3)(B) *Murphy v. Bd. of Educ. of Arlington C.S.D.* 74 A.D. 2d 874, 426 NYS 2d 34 (2d Dept. 1980).

(I) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure[2] or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) The offer is not accepted within 10 days; and

(III) The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

NOTE: In addressing these claims, courts are not inclined to cut off fees entirely even when the relief finally obtained is only slightly more favorable than the original offer. In such cases, courts have routinely applied across the board reductions for all time billed following an offer of settlement, following a detailed analysis of the terms of settlement as compared to the relief ultimately obtained through ongoing litigation.

- A plaintiff will defeat the IDEA's settlement bar by obtaining an order that is **at all** more favorable to that plaintiff, but the amount by which the order is more favorable will affect any award of fees for work performed after the offer of settlement. *See C.G. v.. Ithaca City Sch. Dist., No. 11*–CV–1468, 2012 WL 4363738, at *3 (N .D.N.Y. Sept. 24, 2012);
- Court reduces fees requested by 50% and 70% due to the limited degree of success plaintiffs achieved by rejecting the offer of settlement and pursuing an administrative hearing instead. *S.M. v. Evans-Brant Cent. Sch. Dist.,* 09-CV-686S, 2013 WL 3947105 (W.D.N.Y. July 31, 2013).
- In light of the limited relief obtained in excess of the settlement offer, the Court reduced all hours for work performed subsequent to the offer, except work related to this fee litigation, by 50%. *S.M. v. Taconic Hills Cent. Sch. Dist.,* 1:11-CV-1085 LEK/RFT, 2013 WL 1180860 (N.D.N.Y. Mar. 20, 2013) *reconsideration denied*, 1:11-CV-1085 LEK/RFT, 2013 WL 2487171 (N.D.N.Y. June 10, 2013).
- Court ordered 60% reduction across the board. *S.M. v. Taconic Hills Cent. Sch. Dist*., 1:09-CV-1238 LEK/RFT, 2013 WL 1181581 (N.D.N.Y. Mar. 2013).
- Court awards 20% of hours expended after an offer of settlement in light of the offer's "substantial similarity" to, and therefore the

limited degree of success in, the administratively-ordered relief obtained thereafter) *C.G. v. Ithaca City Sch. Dist.*, No. 11–CV–1468, 2012 WL 4363738, at *4–5 (N.D.N.Y. Sept. 24, 2012);

- Court applies a 50% reduction across the board after determining that final relief 'just barely" beat the defendant's settlement offer; *Mrs. M. ex rel "T" v. Tri–Valley Cent. Sch. Dist*., 363 F.Supp.2d 566, 572 (S.D.N.Y.2002);
- Court cuts fees after settlement offer by 80%. *Auburn Enlarged Cent. Sch. Dist*., 2008 WL 5191703, at *15;
- Court reduces fees by 50% across the board. *Hofler v. Family of Woodstock, Inc*., 1:07-CV-1055, 2012 WL 527668 at *7 (N.D.N.Y. Feb. 17, 2012).

Exception to prohibition on attorneys' fees (20 U.S.C.§1415(i)(3)(E)).
Applies in those cases where the state or school district unreasonably protracted the final resolution of the action or proceeding or there was a violation of the IDEA.

(ii) **IEP Team Meetings**

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding, judicial action, or for mediation at the discretion of the State;

(iii) **Opportunity to resolve complaints**

A resolution meeting /session shall not be considered

- A meeting convened as a result of an administrative hearing or judicial action; or
- An administrative hearing or judicial action.

Reduction in amount of Attorneys' Fees (20 U.S.C.§1415(i)(3)(F))

(i) The parent or parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) The attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint.

Exception to Reduction in the Amount of Attorneys' Fees - (20 U.S.C. §1415(i)(3)(G)) - No reduction to fees if the court finds that the State or LEA unreasonably protracted the final resolution of the action or proceedings or there was a violation of this section.

II. **Prevailing Party Status – The Threshold**

A. Is the decision **"Judicially Sanctioned**"

1. *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001).The U.S. Supreme Court throws out the traditional "catalyst" theory adopted by the Second Circuit and several other Circuits[3] imposing a new test that requires:

(a) A party to prevail on a significant issue in the litigation that achieves some of the benefit sought in bringing the litigation,

(b) A resolution that constitutes a change in the legal relationship of the parties. *Farrar v. Hobby*, 506 U.S. 103, 111–12, (1992); *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.,* 489 U.S. 782 (1989); *G.M. ex rel. R.F. v. New Britain Bd. of Educ.,* 173 F.3d 77, 81 (2d Cir. 1999); and

(c) A decision that is "judicially sanctioned." *Id* at 605.

2. The Second Circuit – applies the *Buckhannon* rule to IDEA cases. *J.C. ex rel. Mr. & Mrs. C. v. Reg'l Sch. Dist. 10, Bd. of Educ.*, 278 F.3d 119, 123–24 (2d Cir. 2002).

3. The Second Circuit applies *Buckhannon* rule to IHO ordered relief on the merits as conferring an "administrative imprimatur "sufficient to award attorneys' fees while a settlement not so ordered by the hearing officer would effectively reinstate the catalyst theory. "[T]he combination of administrative *imprimatur,* the change in the legal relationship of the parties arising from it, and subsequent judicial enforceability, render such a winning party a "prevailing party" under *Buckhannon* 's principles." *A.R. ex rel. R.V. v. New York City Dep't of Educ.,* 407 F.3d 65, 76 (2d Cir. 2005)..

a. Rule: Regardless of the degree of success, a settlement agreement that does not provide the imprimatur of the hearing officer or the courts does not impart prevailing party status. *Id*.

B. Degree of Relief Required for Prevailing Party Status

1. Although the Second Circuit generously interprets prevailing party status in terms of the degree of relief required, a "purely technical or *de minimis'* victory, however, does not qualify. *B.W. ex rel. K.S. v. New York City Dept. of Educ., 716 F.Supp.2d 336, 345–46 (S.D.N.Y. 2010); J.G. v. Kiryas Joel Union Free Sch. Dist.*, 843 F. Supp. 2d 394, 396 (S.D.N.Y. 2012).

2. The court ruled that an order for the CSE to develop a new IEP that provided greater benefits than those proposed in the initial IEP was not *de minimis* relief so minor that it does not warrant attorneys' fees, even when the specific placement initially sought was denied. *J.S. v. Crown Point Cent. Sch. Dist.*, No. 8:06-CV-159 (FJS/DRH), 2007 WL 475418 at *1–*3, *5 (N.D.N.Y. Feb. 9, 2007).

3. In another case, the court awarded attorneys' fees where plaintiffs requested an order directing the child's placement in a general education classroom but the IHO only ordered the District to design a new IEP ao replace the deficient one. In that case, the court specifically noted that "the hearing officer's failure to make a specific directive with regard to placement did not impact the determination of whether the parents were prevailing parties. *N.S. ex rel. P.S. v. Stratford Bd. of Educ.*, 97 F. Supp. 2d 224, 240 (D. Conn. 2000). c.*f. J.G. v. Kiryas Joel Union Free Sch. Dist.,* 834 F. Supp. 2d 394, 396 (S.D.N.Y. 2012).

III. **Calculating the Reasonable Fee**

A. The Lodestar represents a reasonable attorneys' fee - The lodestar = the number hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Blum v. Stenson*, 465 U.S. 886, 887 (1984).

B. Defining the Reasonable Rate - *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany and Albany Cnty. Bd. of Elections*, 522 F.3d 182, 184 (2d Cir. 2007).

(1) In determining an appropriate hourly rate, the Second Circuit looks to factors set forth in *Johnson v. Georgia Highway Express, Inc.* to approximate the market rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."

(2) The Court will analyze the following factors to determine the " market rate"

a. The time and labor required;
b. The novelty and difficulty of the questions;
c. The level of skill required to perform the legal service properly;
d. The preclusion of employment by the attorney due to acceptance of the case;
e. The attorney's customary hourly rate;
f. Whether the fee is fixed or contingent;
g. The time limitations imposed by the client or the circumstances;
h. The amount involved in the case and the results obtained;
i. The experience, reputation and ability of the attorneys;
j. The "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and
k. Awards in similar cases.

Johnson v. Ga. Highway Express, Inc., 488 F.2d 714 (5th Cir.1974).

(3) Calculating the Community Rate:

(a) Attorneys affidavits with similar experience

(1) Exceptions: *K.F. v. N.Y.C. Dep't of Educ.*, No. 10 CIV. 5465 (PKC), 2011 WL 3586142 (S.D.N.Y. Aug. 10, 2011); *J.S. ex. rel. Z.S. v. Carmel Cent. Sch. Dist.,* No. 7:10-CV-8021(VB), 2011 WL 3251801 at *3 (S.D.N.Y. July 26, 2011). Court rejects fees when attorneys fail to demonstrate that these are fees actually paid.
(2) *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136 (2d Cir. 1983). The applicable rate is the one applicable at the time the action for fees is brought as opposed to the rate in place at the time the services were rendered.
(3) *)Weather v. City of Mt. Vernon*, No. 08 Civ. 192(RPP), 2011 WL 2119689 at *1, *4 (S.D.N.Y. May 27, 2011). Travel time is generally billed by an attorney at half the attorney's hourly rate.

(b) Recent hourly rates awarded (10/3/13) – fees awarded vary widely depending on skills, experience and reputation.

(1) S.D.N.Y. - $475 highest rate in a straight forward IDEA case where the attorney had 30 years of experience in complex civil rights litigation. *E.F. ex rel. N.R. v. New York City Dep't of Educ.*, 11 CIV. 5243 GBD FM, 2012 WL 5462602 (S.D.N.Y. Nov. 8,

2012); Another court in the Southern District of New York awarded $375 an hour for an attorney with 26 years of experience in family law and a law professor with 6 years of work in special education. *M.C. ex rel. E.C. v. Dep't of Educ. of City of New York*, 12 CIV. 9281 CM AJP, 2013 WL 2403485 (S.D.N.Y. June 4, 2013). Court awards $415 an hour to a highly experienced attorney *J.S. ex rel. Z.S. v. Carmel Cent. Sch. Dist.,* 501 F. App'x 95, 99 (2d Cir. 2012);

(2) The Second Circuit upheld an award to a highly experienced attorney in the field at $415 an hour and in another case where the court awarded of $350 an hour to a managing attorney with fourteen years of experience litigating civil rights cases . *E.S. v. Katonah-Lewisboro Sch. Dist*., 796 F. Supp. 421,430 (S.D.N.Y. 2011)**.**

(3) The Northern District recently awarded $275 an hour in an IDEA case handled by a highly experience IDEA attorney. *M.C. v. Lake George Cent. Sch. Dist*., 1:10-CV-1068 LEK/RFT, 2013 WL 1814491 (N.D.N.Y. Apr. 29, 2013) ;*G.B. v. Tuxedo UFSD*, No. 09-cv-859 (KMK) Sept. 18, 2012 which awarded another attorney in the firm with 15 years of civil rights law experience $300.

(a) In a later decision, another court found that $250 per hour remains in line with prevailing rates in the relevant community for the kind and quality of services furnished. *S.M. v. Taconic Hills Cent. Sch. Dist.*, 1:11-CV-1085 LEK/RFT, 2013 WL 1180860 (N.D.N.Y. Mar. 20, 2013) *reconsideration denied*, 1:11-CV-1085 LEK/RFT, 2013 WL 2487171 (N.D.N.Y. June 10, 2013)

(4) The Western District awards $ 295 an hour for experienced IDEA attorneys. *S.M. v. Evans-Brant Cent. Sch. Dist*., 09-CV-686S, 2013 WL 3947105 (W.D.N.Y. July 31, 2013).

C. What Constitutes Reasonable Hours?

(1) Documentation Required - The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate

hours expended," .*E.S. v. Katonah-Lewisboro Sch. Dist*., 796 F. Supp. 2d 421, 437 (S.D.N.Y. 2011); and

b. Contemporaneous Records that specifies for each attorney, the date, the hours expended, and the nature of the work done *N.Y. State Ass'n for Retarded Citizens, Inc. v. Carey*, 711 F.2d 1136, 1136 (2d Cir. 1983).

c. Fees that are vague, lacking in detail or confusing may be reduced. *G.B. v. Tuxedo UFSD*, 894 F Supp. 2d 415, 436 (S.D.N.Y.2012).

d. Excessive, redundant or unnecessary hours spent are not compensable.

a. Excessive time vague entries - Court strikes hours for general topics such as "legal research," "review of transcripts," client conferences, "work on discovery documents," and the like, without further specifics. *Starkey v. Somers Cent. Sch. Dist*. 02 CIV. 2455(SCR), 2008 WL 5378123 (S.D.N.Y. Dec. 23, 2008).

(1) Where documentation of hours is inadequate, the district court may reduce the award accordingly. *E.S. v. Katonah-Lewisboro Sch. Dist*., 796 F. Supp. 421,433 (S.D.N.Y. 2011).

(a) In such cases, a district court is authorized "to make across-the-board percentage cuts in hours 'as a practical means of trimming fat from a fee application'" and recognizes as unnecessary, under such circumstances, item-by-item accounting of the hours disallowed. *Id.*

(2) The Degree of Success Obtained - In determining the reasonable hours expended the most important factor is "the degree of success obtained" which involves an analysis of the "quantity and quality of relief obtained compared to what the parents sought to achieve as evidenced by their complaint. *J.S. ex. rel Z.S. v. Carmel Cent. Sch. Dist.*, No. 7:10-CV-8021(VB), 2011 WL 3251801 at *1, *3 (S.D.N.Y. July 26, 2011).

(a) Plaintiff successfully obtained an order for a triennial evaluation and three months of daily individual reading instruction as compensation for Defendant's failure to provide FAPE but was not successful in obtaining tuition reimbursement for parent's unilateral placement in nonpublic school. The Court awards 50%

of the billed hours and related expenses for limited success. *M.C. v. Lake George Cent. Sch. Dist.*, 1:10-CV-1068 LEK/RFT, 2013 WL 1814491 (N.D.N.Y. Apr. 29, 2013)

(3) Severability of Claims – The general rule: where a party is successful on only some claims and the failing claims are unrelated and severable, fees will only be awarded for time spent on successful claims. *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983); *Green v. Torres,* 361 F.3d 96, 98 (2d Cir. 2004); *Concerned Citizens Neighborhood Ass'n v. Cty of Albany*, 522 F. 3d 182, 190 (2d Cir. 2008).

(a) However, the courts will not reduce fee requests due to an unsuccessful claims where the successful and unsuccessful claims are inextricably intertwined and involve a common core of facts or are based upon related legal theories. *E.S. v. Katonah-Lewisboro Sch. Dist,*796 F Supp. 2d 421, 427 (S.D.N.Y. 2011).

(b) For any practical litigator, a plaintiff's various claims for relief will frequently "involve a common core of facts or will be based on related legal theories" that cannot neatly be divided. *Hensley* at 435.

(c) In a case where it was clear that the "core" of plaintiff's complaint was devoted to the IDEA claims, that those claims were predicated and ultimately rejected on the basis of legal theories (and in substantial part on facts) that were distinct from those relating to a successful due process argument, the court reduced the award by 70% of the effort expended by plaintiff's counsel on the case before the motion to dismiss was granted. *Starkey v. Somers Cent. Sch. Dist.*, 02 CIV. 2455(SCR), 2008 WL 5378123 (S.D.N.Y. Dec. 23, 2008).

D. Fee Availability

(1) **Expert Witness Fees -** IDEA does not authorize an award of expert fees. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 301, 126 S. Ct. 2455, 2462, 165 L. Ed. 2d 526 (2006).

(2) **Pendency** "[A] favorable judicial statement of law in the course of litigation. awarding a TRO enforcing pendency that results in judgment against the plaintiff does not suffice to render him a 'prevailing party.' *Christopher P. by Norma P. v. Marcus,* 915 F.2d 794, 805 (2d Cir. 1990).

(3) **Multiple Attorneys** "Efficient staffing of a case may mean that more than one lawyer is utilized to represent a client. There is nothing remarkable or unusual in

the practice, which often leads to lawyers with lower billing rates completing tasks rather than a more senior lawyer with a higher rate. Nor is it per se unreasonable for two or more lawyers to participate in a trial of a case." *N.Y.S. Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1146 (2d Cir.1983). The district court should make an 'assessment of what is appropriate for the scope and complexity of the particular litigation.'" *Id.*

Rejecting the argument that two attorneys were necessary to facilitate note taking and communication with the parent was rejected, the court found it unreasonable to bill for two lawyers to appear together at the administrative hearings. Consequently, the court excluded all hours billed for travel and attendance at the hearing billed by the less-experienced lawyer. *K.F. v. N.Y.C. Dep't of Educ.*, No. 10 Civ. 5465, 2011 WL 3586142, at *7 (S.D.N.Y. Aug. 10, 2011); see also *S.M. v. Taconic Hills Cent. Sch. Dist.*, 1:11-CV-1085 LEK/RFT, 2013 WL 1180860 (N.D.N.Y. Mar. 20, 2013).

Travel The court excluded all time and mileage billed for for commuting from Auburn or Ithaca N.Y to Brooklyn and back as unreasonable. *K.F. v. New York City Dep't of Educ.*, 10 CIV. 5465 PKC, 2011 WL 3586142 (S.D.N.Y. Aug. 10, 2011) *adhered to as amended*, 10 CIV. 5465 PKC, 2011 WL 4684361 (S.D.N.Y. Oct. 5, 2011).

(4) **Time Spent Prior to Filing Complaint -** Courts in this circuit typically award attorneys' fees for pre-filing preparations. *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist.*, 894 F. Supp. 2d 415, 438 (S.D.N.Y. 2012).

(5) **Clerical Work -** Clerical and secretarial services are part of overhead and are not generally charged to clients. Preparation of trial exhibits is more akin to work properly performed by paralegals and is reimbursable as such. *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist.*, 894 F. Supp. 2d 415, 439 (S.D.N.Y. 2012).

(6) **Time on Motions Never Filed – C**ompensation denied for work done on motions never filed. *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist*., 894 F. Supp. 2d 415, 438 (S.D.N.Y. 2012).

(7) **Quarter Hour Billing Accepted -**Court recognizes that small firms often record their time in quarter hour increments and concludes that such billing is no more likely to result in over-billing than billing in six minute increment. *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist.*, 894 F. Supp. 2d 415, 441 (S.D.N.Y. 2012).

(8) **Filing Fees and Service of Process is Recoverable** The costs which Plaintiff paid for filing and for service of process are recoverable. *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist.*, 894 F. Supp. 2d 415, 443 (S.D.N.Y. 2012).

E. What Constitutes the Presumptively Reasonable Fee?

l. "It is the duty of the fee applicant to exercise good faith billing judgment to 'adjust for inefficiencies prior to making a request for attorneys' fees.' Therefore, where the 'fee applicant's own billing adjustments are adequately documented and sufficiently substantial" to account for the……inefficiency, the Court need not make additional substantial reductions. Consequently, fee applications that reflect sound billing judgment from the inception tend to be viewed favorably and serve to substantially reduce fee litigation." *M.C. ex rel. E.C. v. Dep't of Educ. of City of New York*, 12 CIV. 9281 CM AJP, 2013 WL 2403485 (S.D.N.Y. June 4, 2013).

2. The Relationship between Retainers and Attorneys' Fees

Nothing in law requires that potential plaintiffs become actually liable for the fees associated with IDEA cases "The criterion for the court is not what the parties agree but what is 'reasonable' The "fee is not contingent on the agreement between the prevailing party and her attorney. Instead, it simply must be 'reasonable. No more and no less' is required." (Internal citations are omitted. *S.M. v. Evans-Brant Cent. Sch. Dist*., 09-CV-686S, 2013 WL 3947105 (W.D.N.Y. July 31, 2013).

> **Note**: Defendant (school district) lacks standing to raise issues involving retainer agreements and alleged violations of the New York Rules of Professional Conduct. *S.M. v. Taconic Hills Cent. Sch. Dist.*, No. 1:09–CV–1238 LEK/RFT, 2012 WL 3929889 (N.D.N.Y. Sept.10, 2012); *S.M. v. Evans-Brant Cent. Sch. Dist*., 09-CV-686S, 2013 WL 3947105 (W.D.N.Y. July 31, 2013

3. In determining a reasonable fee – the Second Circuit reminds courts to … "bear in mind that a reasonable paying client wishes to spend the minimum necessary to litigate the case effectively." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany and Albany Cnty. Bd. of Elections*, 522 F.3d 182, 184 (2d Cir. 2007).