

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

SOUTH KINGSTOWN SCHOOL :  
COMMITTEE, :  
Plaintiff, :  
 :  
v. : C.A. No. 13-127ML  
 :  
JOANNA S. as Parent of P.J. S., :  
Defendant. :

**REPORT AND RECOMMENDATION<sup>1</sup>**

Patricia A. Sullivan, United States Magistrate Judge

The Individuals with Disabilities Education Act (“IDEA”) provides that “the court in its discretion, may award reasonable attorneys’ fees” to a prevailing party. 20 U.S.C. § 1415(i)(3)(B)(i). In this case, the mother, Joanna S., is the prevailing party with respect to one of four requests connected with one of two issues addressed in a due process hearing initiated on October 30, 2012: the unchallenged finding of the hearing officer that the educational evaluation of the South Kingstown School Committee (“School Committee”) was not appropriate. Since that favorable decision of the hearing officer, from which the School Committee did not appeal, her litigation efforts in this Court and in the Court of Appeals have been entirely unsuccessful. The First Circuit remanded the case for this Court “to consider whether the mother deserves attorneys’ fees for her success in securing” the educational evaluation. S. Kingstown Sch. Comm. v. Joanna S., 773 F.3d 344, 346 (1st Cir. 2014).

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<sup>1</sup> Although this matter was referred to me for determination, motions for attorneys’ fees under the Individuals with Disabilities Education Act (“IDEA”) are addressed in this Circuit by report and recommendation. See, e.g., Claudia C-B v. Bd. of Trs. of Pioneer Valley Performing Arts Charter Sch., 539 F. Supp. 2d 474, 476 (D. Mass. 2008); Bristol Warren Reg’l Sch. Comm. v. DaSilva, No. CA 04-521ML, 2007 WL 951570, at \*1 n.1 (D.R.I. Mar. 27, 2007); cf. Doe v. Bos. Pub. Sch., No. 1:13-CV-13155-DPW, 2015 WL 313943, at \*8 (D. Mass. Jan. 23, 2015) (“An IDEA claim for attorneys’ fees is essentially an independent cause of action employing *de novo* fact finding”).

Joanna S.'s motion (and supplemental motion) for attorneys' fees are presently before this Court. She seeks a total of \$122,781.50 in fees and costs, which includes all of the fees associated with the administrative proceeding and more than one-third of the fees associated with the unsuccessful litigation in this Court and at the Court of Appeals. ECF Nos. 32, 36.

## I. BACKGROUND<sup>2</sup>

### A. Travel of the Case

Joanna S. is the mother of P.J., a disabled child with dual diagnoses of emotional disturbance and an autism spectrum disorder. S. Kingstown, 773 F.3d at 346; H.O. Dec. at 15. P.J. currently attends a private school at the expense of the School Committee. S. Kingstown, 773 F.3d at 346. The instant dispute derives from the principle that evaluations are integral to IDEA to "assist in determining . . . [t]he content of the child's" Individualized Education Program or IEP. Id. at 346-47. What evaluations should have been performed in connection with the development of P.J.'s IEP is at its crux. The contentiousness of this issue has been exacerbated by the School Committee's difficulty in evaluating P.J. because of his negative reaction to the evaluative process.

The relevant history began in February 2012, when Joanna S. brought a due process complaint seeking eight evaluations and a private school placement for P.J. In April 2012, the parties entered into a binding settlement agreement by which the School Committee agreed to perform four new evaluations and to place P.J. at the Wolf School; Joanna S. agreed to relinquish her request for other evaluations for the 2011-2012 and 2012-2013 school years. S. Kingstown Sch. Comm. v. Joanna S., No. CA 13-127 ML, 2014 WL 197859, at \*14 (D.R.I. Jan. 14, 2014),

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<sup>2</sup> These facts are drawn from the opinions of this Court and of the Court of Appeals. S. Kingstown Sch. Comm. v. Joanna S., No. CA 13-127 ML, 2014 WL 197859 (D.R.I. Jan. 14, 2014), aff'd and remanded, 773 F.3d 344 (1st Cir. 2014). I also rely on the underlying administrative record: the hearing officer's decision is cited as H.O. Dec. at \_\_; each volume of the hearing transcripts are cited as Tr. Vol. \_\_ at \_\_; and the hearing exhibits are cited as Ex. \_\_\_\_.

aff'd in relevant part, 773 F.3d 344; Ex. 2. The School Committee also agreed to pay Joanna S.'s attorneys' fees in connection with that proceeding.

In compliance with the settlement agreement, the School Committee performed the four evaluations in late April 2012. P.J.'s negative reaction to being evaluated posed challenges for all of the examiners. However, the educational evaluation, which was commenced on the heels of the completion of another evaluation, was interrupted twice by the student's departure from the testing room. When testing was resumed on another day, P.J. was "more visibly anxious than for the previous session." H.O. Dec. at 19. Ultimately, the examiner left the student alone with his mother and, when the shouting became audible, suspended the evaluation. Id. At the due process hearing, the educational examiner testified that the scores "may not be a true indication of the Student's current levels of functioning." Id. The School Committee decided not to attempt to continue the educational evaluation because it was so stressful for the student. P.J. entered the Wolf School without completing the educational evaluation. Id.

Joanna S. was dissatisfied with the appropriateness of all four of the evaluations done pursuant to the settlement agreement, including the educational evaluation. Further, despite the lack of changed circumstances, she did not want to be limited by the settlement agreement.<sup>3</sup> Accordingly, on October 22, 2012, Joanna S. sent a letter to the School Committee requesting ten new evaluations. Pursuant to 34 C.F.R. § 300.502(b) and 21-2-54 R.I. Code R. § 300.502(b), which mandate that the parent may procure an independent evaluation at public expense if the agency's evaluation is not "appropriate," she asked that the four that had been performed

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<sup>3</sup> The First Circuit found that the settlement agreement relieved the School Committee from having to conduct new evaluations for the time period covered by the agreement, except to the extent that the need for additional evaluations is supported by changed circumstances. S. Kingstown, 773 F.3d at 354. Because Joanna S. did not sufficiently identify changed circumstances, this Court's determination that the settlement agreement was a binding agreement that barred the hearing officer from ordering the School Committee to perform the psychoeducational evaluation was affirmed. Id. at 355.

pursuant to the settlement agreement be done over by an independent evaluator of her choosing. In addition, she asked for six others. On October 30, 2012, the School Committee declined to perform any additional evaluations and initiated another due process proceeding.

In advance of the second due process hearing, the hearing officer divided the case presented into two major issues. First, she directed the parties to focus on whether the four evaluations performed by the School Committee pursuant to the settlement agreement were “appropriate.” Second, she addressed the request for the six new evaluations, an issue that required consideration of the impact of the settlement agreement.

To resolve the first issue, the hearing officer heard evidence and performed an analysis of each of the four evaluations, including an individualized examination of the credentials of each examiner, the methods used for each evaluation and whether each examiner was able to complete the evaluation. She found that the School Committee sustained its burden of proving that two of the four were appropriate, but that the occupational therapy evaluation was not sufficiently comprehensive, while the educational evaluation was incomplete. H.O. Dec. at 22-25. The evidence pivotal to Joanna S.’s prevailing party status on the latter evaluation was the examiner’s decision to stop the testing because it was too stressful for the student. The hearing officer found that the “examiner made a valiant effort to move forward to assess the Student, but her effort failed.” H.O. Dec. at 24.

The second issue focused on whether additional evaluations should be required, notwithstanding the settlement agreement. Consideration of this issue focused on testimony from the teachers and professionals from the Wolf School, as well as from South Kingstown, regarding P.J.’s school performance, but principally on the testimony from Joanna S. regarding her longstanding desire for independent evaluations. Noting in her decision that Joanna S. “has

been requesting independent evaluations for some time,” H.O. Dec. at 26, the hearing officer decided to ignore the settlement agreement and ordered the School Committee to perform a new “psychoeducational evaluation.” While leaving unclear whether the new testing should be done by the School Committee’s evaluators or by a series of independent evaluators, or both, she specified that the comprehensive “psychoeducational evaluation” must comprise a set of assessments in a wide range of areas, which the Court of Appeals found reflective of the mother’s original request for six new evaluations. S. Kingstown, 773 F.3d at 356 & n.6.

After the due process hearing ended, the mother sent a letter to the School Committee, claiming entitlement to reasonable attorneys’ fees as a prevailing party in the amount of \$36,675. ECF No. 32-2 at 2. The School Committee did not respond. Instead, on February 20, 2013, the School Committee filed its complaint in this Court, appealing from the hearing officer’s findings regarding the occupational therapy evaluation and the psychoeducational evaluation. It did not challenge the hearing officer’s finding that an independent educational evaluation was required, making the mother a prevailing party as to that element of her claim. Joanna S. answered the complaint, arguing that the hearing officer’s decision on those two issues should be sustained, and counterclaimed for her attorneys’ fees as a prevailing party.

On the parties’ cross motions for summary judgment, this Court found that the hearing officer’s rejection of the occupational therapy evaluation was based on error. This Court further found that the settlement agreement barred the hearing officer from ordering new evaluations. With respect to attorneys’ fees, Joanna S. represented in her summary judgment brief that she would apply separately for reimbursement of attorneys’ fees and costs based on her status as a prevailing party; otherwise, neither party addressed attorneys’ fees. ECF No. 13-1 at 21. At oral argument on the summary judgment motions, this Court confirmed that the fee issue was not yet

framed for decision and that a separate motion would be required. Based on that colloquy with counsel, this Court's decision on summary judgment did not address the mother's entitlement to attorneys' fees. At the conclusion of proceedings in this Court, Joanna S.'s counsel sent a second letter to the School Committee, again demanding attorneys' fees for the full amount incurred in connection with the due process hearing (\$36,675). ECF 32-3 at 2. Again, the School did not respond. Instead of filing her fee motion, Joanna S. chose to proceed with her appeal.<sup>4</sup>

On appeal, the First Circuit affirmed the District Court's decision in favor of the School Committee. With respect to attorneys' fees, the matter was remanded for a determination "in the first instance whether and to what extent attorneys' fees should be ordered" based on Joanna S.'s status as a prevailing party on the portion of her claim that resulted in the hearing officer's finding that the educational evaluation was not appropriate. S. Kingstown, 773 F.3d at 356.

### **B. Legal Team**

Joanna S. was primarily represented by Attorney Christine Barrington, an attorney based in Connecticut but admitted to practice in Rhode Island. She is an experienced attorney with a practice particularly focused on the law of education and schools. Although Attorney Barrington's usual hourly rate is \$420, the mother's motion included an affidavit from an experienced local attorney, which established that hourly rates of between \$250 and \$300 per hour are usual and customary in Rhode Island for experienced attorneys handling special education litigation at the administrative level and hourly rates between \$250 and \$350 are

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<sup>4</sup> The School Committee does not argue that Joanna S.'s failure to move for fees before filing her notice of appeal waived her right to seek them now. In IDEA cases, courts generally agree that a prevailing party can wait until the substantive litigation is concluded before prosecuting a claim for fees. See McCartney C. ex rel. S. v. Herrin Cnty. Unit Sch. Dist. No. 4, 21 F.3d 173, 175 (7th Cir. 1994) ("Until the . . . decision in the parent's favor becomes final upon exhaustion of all judicial remedies by the school district, the parent does not know whether she has any claim to attorney's fees. So the filing of a lawsuit to obtain those fees would be premature until then."); Pagan-Melendez v. Puerto Rico, No. CIV. 14-1495 SEC, 2014 WL 4702613, at \*3 (D.P.R. Sept. 19, 2014) (attorneys' fee claim timely after decision becomes final).

customary for experienced attorneys handling such litigation in federal court. ECF No. 32-4 at 2-3. Attorney Barrington's affidavit indicates that her fee agreement with Joanna S. required payment at the rate of \$300. ECF No. 32-8 at 4. The motion asks for reimbursement for all of her work at \$300 and the School Committee does not object to the reasonableness of this rate.

For the litigation work done in this Court, and to a limited extent in the Court of Appeals, Attorney Barrington was assisted by Attorney Gregory Mancini. A Rhode Island attorney admitted to practice in this Court since at least 2000, he also has extensive experience in the area of education law. Attorney Mancini's usual hourly rate is \$275, which is well within the rates established as reasonable by the affidavit from the experienced local attorney; it is also consistent with his fee agreement with Joanna S. The motion asks for reimbursement for all of his work at \$275 and the School Committee does not object to the reasonableness of this rate.

### **C. Attorneys' Fees and Costs**

Over the course of the lengthy litigation of this matter, before discounts, Joanna S.'s legal team expended a total of over \$380,000 in attorneys' fees;<sup>5</sup> in terms of time invested, Attorney Barrington spent 122.25 hours<sup>6</sup> on the administrative proceeding that resulted in the partially favorable decision, while the two attorneys spent 316.80 hours unsuccessfully litigating the matter in this Court and a whopping 514.25 hours on the unsuccessful appeal in the First Circuit. Reflecting the limited nature of her success, Joanna S. is not seeking close to the full amount.

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<sup>5</sup> This total is based on all of the time spent by Attorney Barrington at her usual rate of \$420, plus all of the time spent by Attorney Mancini at his usual rate of \$275.

<sup>6</sup> There appears to be a discrepancy of one-quarter of an hour between Attorney Barrington's time sheet and her affidavit, in that the affidavit reflects a total 122.5 hours while the time sheet adds up to 122.25 hours. Compare ECF No. 32-6 at 2, with ECF No. 32-8 at 6. Nevertheless, in both documents, she claims that the value of her time is \$36,675, which is derived from the hourly rate of \$300 times 122.25 hours. Because the difference is de minimis and because \$36,675 is what she has requested for reimbursement since she first made the claim, I use 122.25 in this report and recommendation.

For the administrative phase of the proceeding (the due process hearing), which lasted for four hearing days and involved preparation, briefing and the examination of sixteen witnesses, the mother is seeking full reimbursement; she asks the Court to award \$36,675. This request encompasses only time spent by Attorney Barrington (122.25 hours) at the \$300 rate and does not include “associated costs for copying, mailing, subpoenas and associate work product . . . as a good faith measure.” ECF No. 32-2 at 2; see also ECF No. 32-1 at 9-10. The School Committee does not dispute the efficiency or appropriateness of the hours expended on the due process proceeding, contending only that the award should be limited to the issue (the educational evaluation) as to which the mother prevailed.

In recognition of her lack of success, for the work in this Court and the Court of Appeals, Joanna S. agrees that she is entitled to recover only one-third of the time spent by Attorney Barrington and only 40% of the time spent by Attorney Mancini.<sup>7</sup> Based on these agreed-upon reductions, her attorneys argue that they are entitled to an award of \$84,181.50 for the work in this Court and in the Court of Appeals. Finally, Joanna S. seeks \$1925 for the prosecution of this motion for attorneys’ fees; this is 50% of the total spent (\$3850). In all, she seeks a total of \$122,781.50.

The School Committee does not dispute that Joanna S. is a prevailing party as to the educational evaluation. Rather, it argues (as clarified at the hearing)<sup>8</sup> that a fair award would

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<sup>7</sup> Attorney Mancini reduced his fee request by eliminating “time he spent researching and briefing his material . . . [and] time spent preparing Respondent’s motion to proceed anonymously.” ECF No. 32-1 at 10. Further, he added an appropriate across-the-board reduction of 5% to eliminate any time that may have been unproductive, duplicative or unnecessary. See Mass. Dep’t of Pub. Health v. Sch. Comm., 841 F. Supp. 449, 458 (D. Mass. 1993) (noting appropriateness of good faith reduction of fee request by 5%). Overall, these reductions brought the request down to 40% of his total hours. In addition, his application includes costs in the total amount of \$519.95. ECF Nos. 32-9 at 3, 32-10 at 5.

<sup>8</sup> The School Committee originally argued that this Court should exercise its discretion to deny Joanna S. any award of attorneys’ fees because she unnecessarily protracted the litigation. Under IDEA, if the court finds that a fee applicant has “unreasonably protracted the final resolution of the controversy,” the court “shall reduce, accordingly,

reimburse her for 25% of the work done in connection with the due process hearing (\$9,187.50), plus a small award (approximately \$1,000) in connection with Joanna S.'s motions for attorneys' fees. To sustain its burden of showing the basis for its position regarding the segregability of the administrative work resulting in the proposed discount of 75%, the School Committee points to the transcripts of the due process hearing where the witnesses who testified about each of the four challenged evaluations presented discrete facts and the mother prevailed only as to one of four. Otherwise, it contends, none of the work is intertwined with the issue on which she is a prevailing party and no other compensation is appropriate. The School Committee points out that it did not challenge the hearing officer's determination that an independent educational evaluation had to be performed. It appealed to this Court only from the hearing officer's determination that other evaluations were necessary, as to which it prevailed.

## **II. STANDARD OF REVIEW**

IDEA grants the court the authority and discretion to award reasonable attorneys' fees to a prevailing party who is the parent of a child with a disability. 20 U.S.C. § 1415(i)(3)(B)(i). To establish status as a prevailing party, the party must demonstrate that she obtained relief on a significant claim, which effected a material alteration in the legal relationship that is not merely technical or de minimis; a party need not prevail on every claim to be deemed a prevailing party. See Kathleen H. v. Mass. Dep't of Educ., 154 F.3d 8, 14 (1st Cir. 1998). However, the "finding that a party is a prevailing party only makes him eligible to receive attorneys' fees under the

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the amount of attorneys' fees awarded." 20 U.S.C. § 1415(i)(3)(F). While "dogged pursuit of [a] meritless enforcement action" can constitute protraction, N. Kingstown Sch. Comm. v. Justine R., No. CA 13-601 S, 2015 WL 1137558, at \*2 (D.R.I. Mar. 12, 2015), when the litigation is lengthy but the issues are complex, the mere fact that the student is not ultimately successful is not evidence of protraction. Cf. Heath v. Peoria Unified Sch. Dist. No. 11, No. CV-08-1300-PHX-GMS, 2008 WL 5274571, at \*4 (D. Ariz. Dec. 18, 2008) (court discounts for unsuccessful claims but declines to reduce based on unreasonable protraction). In light of my finding that Joanna S. pursued arguments that were neither frivolous nor malicious, see *infra*, if the School Committee had not abandoned this argument at the hearing, I would not find unnecessary protraction in this case.

IDEA; it does not automatically entitle him to recover the full amount that he spent on legal representation.” Jason D. W. v. Hous. Indep. Sch. Dist., 158 F.3d 205, 209 (5th Cir. 1998). Hensley lays out a two-step inquiry to determine whether attorneys’ fees should be awarded to a partially-prevailing plaintiff: first, the reviewing court considers whether the plaintiff did not prevail on claims unrelated to those on which she succeeded; and, second, the court considers the level of success achieved, including whether the success obtained is proportional to the efforts of counsel. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983); Westenfelder v. Ferguson, No. CA 97-478L, 2000 WL 303301, at \*5 (D.R.I. Feb. 17, 2000). “[T]he most critical factor is the degree of success obtained.” Farrar v. Hobby, 506 U.S. 103, 114 (1992) (quoting Hensley, 461 U.S. at 436). Courts base the award on a lodestar calculation – the product of a reasonable number of hours spent multiplied by a reasonable hourly rate for an attorney in the field with the applicant’s level of expertise. See Hensley, 461 U.S. at 433-34. Fees awarded are to be based on the prevailing hourly rates in the community in which the action arose or took place. 20 U.S.C. § 1415(i)(3)(C).

When an IDEA litigant has achieved partial success, prevailing on some, but not all, of her claims, the court may limit or eliminate reimbursement for time spent litigating failed claims. L.P. v. Longmeadow Pub. Sch., No. 10-40190-FDS, 2012 WL 5200078, at \*2 (D. Mass. Oct. 18, 2012). If failed claims are unrelated to successful ones, fees should not be awarded for work on the failed claims. Lipsett v. Blanco, 975 F.2d 934, 940-41 (1st Cir. 1992). On the other hand, “if the losing claims included ‘a common core of facts’ or were ‘based on related legal theories’ linking them to the successful claim, a court may award compensation for work on both the failed and successful claims.” Longmeadow Pub. Sch., 2012 WL 5200078, at \*2 (citing Lipsett, 975 F.2d at 940); see Hensley, 461 U.S. at 434-35 (when claims arise from a common core of

facts or related legal theories, a reduction in fees for partial success may not be warranted). Once “the fee-seeker properly documents her claim and plausibly asserts that the time cannot be allocated between successful and unsuccessful claims, it becomes the fee-target’s burden to show a basis for segregability.” Lipsett, 975 F.2d at 941. Nevertheless, the fee applicant ultimately bears the burden of establishing entitlement to an award and providing sufficient documentation of the appropriateness of the hours expended. Hensley, 461 U.S. at 437; Davis v. Dist. of Columbia, No. 13-1852 (AK), 2014 WL 5293594, at \*4 (D.D.C. Oct. 16, 2014) (IDEA plaintiff has burden of establishing reasonableness of fee request).

To determine whether claims can be untangled so as to justify separate treatment for attorneys’ fees purposes, or whether they are so intertwined that the award must compensate for the entire matter, the court should examine whether the time spent by counsel is readily divided on a claim-by-claim basis. Mass. Dep’t of Pub. Health v. Sch. Comm., 841 F. Supp. 449, 457 (D. Mass. 1993) (citing Hensley, 461 U.S. at 435). Thus, when the facts give rise to closely related statutory claims, each a path to achieve the same goal, the district court is warranted in its discretion to award fees for time spent on all aspects of the case. Id. However, a fee applicant arguing that the common core facts are inextricably intertwined may not rest merely on the nature of special education cases. Jason D. W., 158 F.3d at 211 (student prevailed on one of nineteen issues; district court properly cut fees in half because more than half of work was on unsuccessful placement issue, and in half again to reflect limited success on other issues). Rather, she must document the link between the work directly resulting in success and the work on the “common core” of facts before the burden shifts to the agency to demonstrate segregability. Longmeadow Pub. Sch., 2012 WL 5200078, at \*4-5 (applicants failed sufficiently to demonstrate which “core facts” or issues are so intertwined with issue on which they prevailed

as to justify fee award based on non-segregability). On the other hand, when the successful and unsuccessful claims each rest on very different factual and legal analyses, the award may be limited to the former without consideration of the “common core.” See L.P. v. Longmeadow Pub. Sch., No. 10-40190-FDS, 2012 WL 3542581, at \*20-21 (D. Mass. Feb. 24, 2012).

In Longmeadow Public Schools, the prevailing party’s only success was a favorable ruling by the hearing officer on one discrete component of the claim at the due process phase; the appeal to the district court was entirely unsuccessful except for the motion for attorneys’ fees. As a result, the court awarded nothing for the unsuccessful work in the district court litigating cross-motions for summary judgment. Id. (separate decision setting amount of fee award). To analyze the time invested in the administrative hearing, the district court noted that the successful issue focused on whether the services proposed in the last accepted IEP were actually provided, while the unsuccessful issue focused on whether the contents of the IEP were appropriate. Longmeadow Pub. Sch., 2012 WL 5200078, at \*3-5. Finding that the work directly related to proving implementation for compensatory services amounted to approximately \$13,000, and that the applicant had not established that the remainder of the work (approximately \$29,000) contributed to the award of compensatory services, the fee award was limited to the time spent proving implementation of services. Id. at \*5. The request for a fee award for tasks allegedly involving a common set of core facts was denied. Id.

The request for attorneys’ fees should not open the door to a second major, though collateral, litigation. Hensley, 461 U.S. at 437. Further, the district court should not be required by a fee motion to engage in an hour-by-hour analysis of the request. United States v. Metro. Dist. Comm., 847 F.2d 12, 16 (1st Cir. 1988). Nor should the court attempt to parse out work on unsuccessful claims. Alfonso v. Aufiero, 66 F. Supp. 2d 183, 194 (D. Mass. 1999).

### **III. ANALYSIS**

The School Committee does not dispute that Joanna S. prevailed at the due process hearing with respect to the educational evaluation. It does not dispute that \$300 is a reasonable hourly rate for Attorney Barrington or that \$275 is a reasonable rate for Attorney Mancini. It does not nit-pick their time entries by attacking either the adequacy of the presentation or the reasonableness of individual tasks. Rather, the School Committee contends that the mother has failed to demonstrate that fees should be awarded for the time at the due process hearing spent developing issues on which she did not succeed and that no award should be made for the litigation in this Court and in the Court of Appeals based on the lack of any success.

#### **A. Fees for Administrative Proceeding**

To determine whether Joanna S. should be awarded fees for just some or for all of the time invested in the due process hearing at which she prevailed on some issues, this Court must examine what was in issue during that proceeding, whether successful issues are related to unsuccessful issues and what degree of success was achieved. Hensley, 461 U.S. at 434-36. As the hearing officer made clear in her decision, the due process proceeding divided into two major issues: first, the appropriateness of the four evaluations done by the School Committee; and, second, whether new evaluations were needed, implicating the enforceability of the settlement agreement. The decision itself establishes that these issues involved factually and legally discrete questions.

The appropriateness of the educational evaluation legally turned on the applicability of 21-2-54 R.I. Code R. § 300.303(a-c), while the hearing officer's factual analysis was based entirely on the testimony of the educational examiner regarding her difficulty in completing the evaluation. H.O. Dec. at 18-19, 21-22, 24. The hearing officer referred to no other witness as

having provided testimony material to her decision that the educational evaluation was not appropriate because it was never completed. Id. The only other potentially material witnesses were Joanna S.'s expert, Dr. Imber, who opined on the appropriateness of the incomplete educational evaluation, as well as Joanna S. herself and the South Kingstown Director of Special Education, both of whom testified substantively about the educational evaluation, among many other matters. Tr. Vol. I at 27-121; II at 85-117; III at 107-58; IV at 46-101.

In contrast, the factual support for the second issue – whether new evaluations would be necessary – required detailed development of P.J.'s educational history and the procedural background culminating in the settlement agreement, testimony from Joanna S. regarding her concerns and longstanding desire for more evaluations and extensive testimony from all of the educators at both the South Kingstown School and the Wolf School regarding whether additional evaluations were needed and, if so, in what areas. The request for new evaluations presented complex legal issues entirely different from the simple legal principle that an inappropriate evaluation gives rise to the parent's right to a do-over by an independent evaluator. See S. Kingstown, 2014 WL 197859, at \*14-18.

Like the courts in Longmeadow Public Schools and Jason D. W., I find that the two issues addressed by the hearing officer constituted distinct matters based on separate legal principles and proven by discrete facts, with Dr. Imber, the parent's expert, Joanna S. and the Director of Special Education the only overlapping witnesses. I also find that the first issue, the appropriateness of the four evaluations, further divides neatly into the testimony of each of the four examiners, buttressed by the same common testimony. Accordingly, I find that Joanna S. has failed plausibly to assert that the time cannot be allocated between successful and

unsuccessful claims, as she must to shift the burden to the School Committee to show a basis for segregability. Lipsett, 975 F.2d at 941.

Turning to Attorney Barrington's imprecise time entries, I find that Joanna S. has not presented sufficient detail to permit the Court to identify, for example, whether each email sent (with a time entry of one-quarter hour for each) related to the incompleteness of the educational evaluation or to some other issue or to both. None of her time entries informs the Court what aspect of the case she was focused on, whether she was drafting written argument, preparing a witness or communicating with her client or opposing counsel. ECF No. 32-6 at 2-3. As the School Committee argues, the only data points that may be developed with precision come from the hearing transcripts: they establish that the testimony of the educational examiner, Dr. Imber, Joanna S. and the South Kingstown Director of Special Education consumed slightly less than half of the total hearing time. This analysis permits the conclusion that, at most, half of the testimony at the hearing was related to or intertwined with, the issue on which the mother prevailed, while the other half is unrelated. The remainder of the administrative time is unallocable because of the imprecision of the time entries (spent drafting briefs, preparing unnamed witnesses, on phone conferences with the hearing officer and in communication – mostly email – with the client and opposing counsel); this non-hearing administrative time totals 98.25 hours.

While Hensley discourages district courts from resorting to a mathematical calculation based on the number of successful issues divided by the number of issues presented, Hensley, 461 U.S. at 435 n.11, when lack of success also reflects the lack of a significant change in the child's education, the court may reduce the hours claimed by an overall percentage to reflect that the party only partially prevailed. Bristol Warren Reg'l Sch. Comm. v. DaSilva, No. CA 04-521

ML, 2007 WL 951570, at \*9 (D.R.I. Mar. 27, 2007) (when unsuccessful effort may have contributed to success and it is not practical to separate them out, across-the-board reduction of 60% appropriate); Davis, 2014 WL 5293594, at \*7 (based on Hensley directive to focus on “degree of plaintiff’s success [as] critical factor,” hours reduced by 30%); A.B. ex rel. Holmes-Ramsey v. Dist. of Columbia, 19 F. Supp. 3d 201, 210 (D.D.C. 2014) (after deletion of clearly unrelated work, balance of time reduced by 60% based on limited results in relation to litigation as whole). The use of a global discount percentage is particularly appropriate when the time entries make it impossible to separate out the hours billed into legal work pertaining to issues on which the claimant did and did not prevail. Davis, 2014 WL 5293594, at \*7; DaSilva, 2007 WL 951570, at \*9; see Zayas v. Puerto Rico, 451 F. Supp. 2d 310, 317 (D.P.R. 2006) (“Faced with the fact that from Plaintiffs’ time sheets we cannot ascertain what amount of work was dedicated to those unsuccessful claims, we are forced to make a global discount.”). To determine what portion of the unallocable time is reimbursable, this Court must select a discount that both eliminates reimbursement for unrelated work and reflects the degree of success in the case.

In evaluating the degree of Joanna S.’s success, I do not credit her unsupported argument that the educational evaluation was the jewel in the crown of what she was seeking to achieve for her child. I focus instead on the hearing testimony of the educators from the Wolf School that no more evaluations were necessary and of the mother’s expert, Dr. Imber, that the Wolf School (to which the School Committee had agreed in the settlement agreement) was “a good placement” and that the new evaluations were needed only for “fine tuning the program.” S. Kingstown, 2014 WL 197859, at \*17. Further, this Court cannot ignore the reality that the mother’s initial demand was for ten evaluations and that she ultimately prevailed in procuring one. If the six new evaluations she requested are conflated into the “psychoeducational” evaluation ordered by

the hearing officer, the Court alternatively may view it as success on one of five. This relatively limited result requires that this Court apply a steep discount.

To break the logjam, I recommend that the Court award attorneys' fees based on half of the work done during the administrative phase of this matter. This recommendation is on the high side when one examines the relatively limited degree of success achieved by comparison to Joanna S.'s original request. It relies more on the division of the work into what was successful and what was unsuccessful based on the percentage of the hearing time spent examining the witness who was directly material to the decision regarding the appropriateness of the educational evaluation (the educational examiner) and the other three witnesses who testified substantively regarding the educational evaluation among other issues (Dr. Imber, Joanna S. and the South Kingstown Director of Special Education). Employing this rubric, I find that 50% is an appropriate discount and that all the hours invested at the administrative level should be reduced by fifty percent to reflect the fact that Joanna S. is a partially prevailing party. See Davis, 2014 WL 5293594, at \*7; A.B. ex rel. Holmes-Ramsey, 19 F. Supp. 3d at 210. Accordingly, I recommend that she be awarded attorneys' fees of \$18,337.50 for the administrative phase of this matter.

**B. Fees for Appeal to District Court and Court of Appeals**

The fee request seeking recovery of one-third of Attorney Barrington's time and 40% of Attorney Mancini's time (and expenses) for the litigation in this Court and in the Court of Appeals is a different matter. Except for the fee application itself, which I address separately, this effort was entirely unsuccessful. The School Committee's decision not to challenge the hearing officer's adverse determination on the educational evaluation renders this work entirely distinct in all respects and unambiguously inappropriate for any fee award. Hensley requires that

all of this aspect of Joanna S.'s fee request be denied. Hensley, 461 U.S. at 434-35; see Davis, 2014 WL 5293594, at \*7 (first prong of Hensley involves determination whether unsuccessful claims are unrelated to successful claims; when plaintiff has not prevailed on a distinct claim, all time spent on it must be excluded from fee award). I so recommend. Oviatt ex rel. Waugh v. Pearce, 954 F.2d 1470, 1483 (9th Cir. 1992) (no fees for unsuccessful cross-appeal); N. Kingstown Sch. Comm. v. Justine R., No. CA 13-601S, 2014 WL 8108411, at \*18 (D.R.I. June 27, 2014) (no fees awarded for unsuccessful appeal).

### **C. Fees for Fee Application**

The last leg is the work done on the fee application itself. The request is for \$1925, which is half of Attorney Mancini's time since February 20, 2015. ECF No. 36. Apart from a reprise of its riposte that the time spent in this Court and in the Court of Appeals should not be compensable, the School Committee does not mount an argument against recovery for this work and acknowledges that a small award would be appropriate; further, there is no question that time spent on a fee application is compensable under IDEA to the extent that it is derived from the party's status as a prevailing party. Maria C. ex rel. Camacho v. Sch. Dist. of Phila., 142 F. App'x 78, 82 (3d Cir. 2005); Mass. Dep't of Pub. Health, 841 F. Supp. at 462. I also find that Attorney Mancini short-changed himself – his detailed time entries allow the Court to add the time he spent writing the original fee motion (8.25 hours), which resulted in a brief that was well researched and very helpful to the Court's evaluation of the claim. See ECF No. 32-9 at 2 (Attorney Mancini's time records). At his unobjected-to hourly rate of \$275, this amounts to \$2,268.75 in potentially compensable time. Using the factor of 50%, as the mother proposes, I recommend that this Court award a total of \$3,059.38<sup>9</sup> for the time spent on the fee application.

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<sup>9</sup> To be clear, this figure is the sum of \$1,925, which is half of the time spent after February 20, 2015, plus 50% of \$2,268.75, for the time spent in December 2014 on drafting the fee application.

#### **D. School Committee's Fee Request**

Tying up a final loose end, I address the School Committee's request in passing for recovery of its fees. ECF No. 37 at 2. This request may be denied simply because of the School Committee's failure to develop the argument beyond a single sentence at the end of its opposition to the supplement to the fee motion. Further, had it been argued on the merits, I would recommend that it should be denied because, although Joanna S. did not ultimately prevail on most of her claims, her arguments were neither frivolous nor malicious. Longmeadow Pub. Sch., 2012 WL 3542581, at \*21. To the contrary, the unsettled state of the law regarding the enforceability of the settlement agreement posed a challenge to the hearing officer and to this Court, which has now been clarified by the decision of the Court of Appeals. Further, the mother prevailed before the hearing officer with respect to the occupational therapy evaluation, establishing the potential merit of those arguments. I recommend that the School Committee's prayer for recovery of its attorneys' fees be denied. See 20 U.S.C. § 1415(i)(3)(B)(i)(III) (fees awarded to school only if parent's complaint presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation); Doe ex rel. Doe v. Attleboro Pub. Sch., 960 F. Supp. 2d 286, 302-04 (D. Mass. 2013).

#### **IV. CONCLUSION**

For the reasons stated, I recommend that Defendant Joanna S.'s motion and supplemental motion for attorneys' fees (ECF Nos. 32 and 36) be granted and that this Court award her attorneys' fees in the total amount of \$21,396.88.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72d. Failure to file specific objections in a

timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan  
PATRICIA A. SULLIVAN  
United States Magistrate Judge  
March 30, 2015