

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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S.W., et al.,

Plaintiffs,

REPORT AND
RECOMMENDATION

- against -

CV 2009-1777 (ENV)(MDG)

CITY OF NEW YORK, et al.,

Defendants.

- - - - - X

In this action brought under 42 U.S.C. § 1983, plaintiffs, who were classified as special needs children, assert federal and pendant state law claims against the City of New York (the "City") and the New York City Administration for Children's Services ("ACS") (collectively the "City defendants"), and against several foster care agencies (the "Agency defendants"). Plaintiffs allege that they were subject to severe abuse inflicted upon them by Judith Leekins, their foster care mother, with whom they had been placed by defendants. In the fall of 2012, plaintiffs reached an agreement to settle their claims against the City defendants for \$9.7 million and moved for court approval of the proposed settlement. By memorandum and order filed on December 19, 2012, the Honorable Eric N. Vitaliano approved the amount of the settlement and the amount of attorneys' fees but referred to me for report and recommendation the reasonableness of the costs sought by plaintiffs' counsel. See DE 385. After plaintiffs later reached a settlement agreement with the Agency defendants for \$17.5 million,

Judge Vitaliano approved the amount of the second settlement and attorneys' fees and referred to me for report and recommendation the amount of costs incurred and the proper allocation of costs to be borne by each plaintiff. See DE 421.

PRIOR PROCEEDINGS

The two settlements reached in this case have resulted from years of contentious litigation.¹ The first settlement with the City defendants was negotiated after almost three years of intensive fact and expert discovery. The second settlement was reached two years later with the Agency defendants only after completion of more discovery and disposition of a voluminous summary judgment motion filed by the Agency defendants. Suffice to say, the parties expended substantial resources and efforts prior to reaching the two settlements. Nonetheless, review of the costs claimed is appropriate given the magnitude of costs claimed.

Unfortunately, the determination of reasonableness of the costs sought and the proper allocation of costs among the plaintiffs has not been an easy task because of the submissions made. In their motion for approval of the first settlement with

¹ Besides vigorously contesting the claims brought by the plaintiffs, the City and Agency defendants filed cross claims against each other, as well as third party complaints against Judith Leekins and other persons they claimed, inter alia, assisted Ms. Leekins in perpetrating a fraud against the respective sets of defendants. See DE 36, 87. Both the City defendants and the Agency defendants later advised the Court that they would not pursue their third party claims. See DE 486, 487.

the City defendants for \$9,700,000.00. plaintiffs' counsel sought reimbursement of costs totaling \$1,714,287.60. See DE 383. This amount was not clearly set forth in the motion, but, instead, was mentioned as part of one-page summary of the settlement monies buried in Exhibit 12, one of 17 exhibits attached to the 555 page motion for approval. See DE 383-12 at 35. The settlement summary listed the settlement amounts received by each plaintiff, the total costs claimed by various attorneys and entities, and the amounts to be disbursed to each plaintiff after deduction of costs and attorneys' fees pro rata according to the settlement amounts each plaintiff received. Id. There was no itemization of costs and the summary, as well as subsequent submissions, contained a number of computational or typographical errors.² At this Court's request, plaintiffs' counsel submitted cost statements identifying the types of expenses incurred and agreed in their submission to waive retention of a \$100,000 advance against future costs, which was included as part of the original amount of costs requested, thereby reducing the requested costs to \$1,614,287.60. See DE 384.

In his order approving the settlement reached between the plaintiffs and the City defendants, Judge Vitaliano found that the

² For example, after deducting \$1,714,287.60 in claimed costs from the settlement amount, counsel allocated \$5,323,834.89 of the remainder for payment to the plaintiffs and \$2,661,877.51 for fees. See DE 383-12 at 35. However, the correct amounts based on a 2/3 and 1/3 division should have been \$5,323,808.27 and \$2,661,904.13. Although a minor computational error, this error and the many other similar errors have contributed to the confusing record presented for review.

settlement reached and the proposed allocation of costs in proportion to amounts received by each plaintiff was both fair and reasonable and in the best interests of the incapacitated plaintiffs. DE 385 at 3. He also found that the attorneys' fees sought by plaintiffs' counsel based on 33-1/3% of the settlement, after deduction of costs, was appropriate. See DE 385 at 4-5. However, because he found that the costs requested by counsel, which amounted to over 16% of the total settlement, "particularly large both in magnitude and in proportion," he referred the question of the reasonableness and propriety of the requested costs for a report and recommendation. Id. at 5. Judge Vitaliano also ordered that the amount of fees as requested by plaintiffs be disbursed to counsel, along with one-third of the \$100,000 advance for costs that counsel had waived. Id. He required that the remaining amount of settlement proceeds claimed as costs by counsel be held in escrow pending report and recommendation by this Court of the appropriate amount to award for costs. Id. at 6. Any amount of disallowed costs would be distributed "two-thirds to the plaintiffs pro rata in the approved proportion and one-third to counsel for attorneys' fees." Id. Following this order, the proceeds of the settlement should have been distributed as follows: \$1,614,287.60 held in escrow for costs, \$5,390,474.93 paid to plaintiffs and \$2,695,237.47 for counsel's fees.³

³ Because the plaintiffs have been neither consistent nor clear
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At a conference held on January 8, 2013, this Court requested specific documentation on the claimed costs. See Minute Entry for conference held on 1/8/2013 requiring counsel to supplement submissions. Plaintiffs' counsel subsequently submitted a large binder of documents to support their claimed costs. In the course of further discussions with my chambers, plaintiffs' counsel agreed to drop their claim for costs of \$19,129.43, thereby reducing the total costs requested to \$1,595,158.17. See DE 497 at 1.

On May 7, 2013, Judge Vitaliano filed an order allowing disbursement of 75% of the settlement funds held in escrow pending determination of the reasonableness of the costs, but requiring the remainder to continue to be held in escrow. See DE 421. As he noted, he authorized the partial release of funds after further consideration and discussions with the undersigned. Id. As I discussed with Judge Vitaliano, plaintiffs' counsel undoubtedly would be entitled to recoupment of a substantial amount for costs in this contentiously litigated case, and, in any event, would be entitled under their retainer agreement to one-third of any costs disallowed. The partial release of funds would afford plaintiffs' counsel access to monies that were likely to be approved for costs, but still sufficiently protect the interests of plaintiffs. As contemplated in the order, release of 75% of the escrow should have

³(...continued)
in their submissions as to the amounts held in escrow, this report discusses the amounts that should have been deposited or distributed pursuant to orders of the Court.

resulted in a disbursement of \$1,196,368.63 ($\$1,595,158.17 \times 0.75$) to counsel for costs, leaving a balance of \$398,789.54 in escrow, not including any interest accrued thereon.⁴

Following the settlement with the City defendants, the Agency defendants conducted further discovery, but, also proceeded with a motion for summary judgment on the plaintiffs' claims. See DE 434. On January 17, 2014, Judge Vitaliano granted in part the motion of the Agency defendants for summary judgment, dismissing the claims of L.J. and J.G., but denying the motion as to the claims of the other plaintiffs. See DE 475.

The plaintiffs and Agency defendants then agreed to submit to private mediation and reported at a conference on June 25, 2014 that they had reached an agreement to settle. See minute entry dated 6/25/2014. As set forth in plaintiffs' subsequent motion for approval, the Agency defendants agreed to pay a total of \$17.5 million to be paid in varying amounts to the plaintiffs, except for L.J. and J.G. See DE 490. On September 11, 2014, Judge Vitaliano approved the amount of the second settlement and attorneys' fees and again referred to me for report and recommendation the amount of costs incurred, which amount would be held in escrow pending

⁴ According to plaintiffs in their letter dated October 31, 2014, there was \$997.52 in interest earned on the escrow. DE 497. Given the relatively small amount of interest involved and the fact it pertains to amounts escrowed for costs that was, or is, likely to be paid in large part to counsel, I have not included any discussion of interest earned on the escrow and recommend that all interest be released to counsel.

approval of the amount of costs by the Court. See DE 493 at 7. Judge Vitaliano also referred for report and recommendation the amount of costs to be allocated among the plaintiffs, noting that L.J. and J.G. bore a disproportionately larger amount of the costs because they received larger settlements amounts in the settlement with the City defendants, but no share of the settlement with the Agency defendants. Id. at 6-7.

In their motion for approval of the settlement with the Agency defendants (the "second motion"), plaintiffs' counsel seek reimbursement of additional costs incurred since the costs claimed with respect to the first settlement which they set forth in charts in the "attached composite Exhibit H" to the motion. See DE 490 at ¶ 6; DE 490-8. Since the first chart in Exhibit H lists total claimed costs of \$341,947.54, see DE 490-8 at 3, the total costs claimed by plaintiffs' counsel in both motions for approval is \$1,937,105.71. However, as discussed, plaintiffs' counsel are not consistent in discussing the costs incurred, particularly as to the claimed costs under the first settlement (\$1,595,158.17). Nor are they consistent or clear in discussing categories of expenses and in providing supporting documentation.⁵

⁵ For example, the total costs set forth summaries attached to plaintiffs' motion with respect to the second settlement appear to be slightly higher than \$341,947.54 based on the summary of costs presented by the four sets of plaintiffs' counsel. See DE 480-8 at 3, 27, 105 and 110 (sum of total costs amounting \$350,191.13). Also, the amounts listed in the summaries are not always supported by documentation or logs. However, since plaintiffs' counsel seek
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Plaintiffs also seek reallocation of the costs among the plaintiffs under the first settlement, which were allocated pro rata according to amounts each was to received under the first settlement agreement. DE 490 at ¶ 3. Such a reallocation is required because J.G. and L.J., who each received \$3,000,000 under the first settlement and were assessed over 62% of the costs under the first settlement,⁶ did not receive any monies from the second settlement. DE 490 at ¶ 3. The reallocation is in accordance with agreements plaintiffs made following the first settlement that costs would be readjusted pro rata based on the total settlement amounts received by each plaintiff, in the event of a settlement

⁵(...continued)
only \$341,947.54 in additional costs, I will use that amount for purposes of this report.

⁶ Plaintiffs refer to charts in Exhibit J of their motion for the amounts J.G. and L.J. were each assessed under the first settlement which should be reallocated. DE 490 at ¶ 3, referencing DE 490-10 at 3, 4. The charts indicate that both plaintiffs each paid \$529,342.40 in costs for the first settlement. Id. However, that figure bears no relation to other numbers submitted. Under their motion for approval of the first settlement, counsel indicated that J.G. and L.J. were each allocated 30.9278351% of costs. However, plaintiffs claimed in their first motion total costs of \$1,714,287.60, and claimed that J.G. and L.G. each was responsible for \$530,192.04 in costs. DE 383-12 at 35. However, in Exhibit B to the motion for approval of the second settlement, counsel indicates in the chart entitled "Prorata Share - Original" that the "[a]ctual disbursed amounts of the first settlement" totaled \$1,711,540.44 and that J.G. and L.G. each were responsible for \$529,342.40 of total costs. DE 480-2. The total costs claimed to have been incurred should not have been \$1,711,540.44, since the \$1,714,287.60 in costs that plaintiffs' counsel originally sought included a \$100,000 advance for future costs that counsel had agreed not to seek. If actual costs sought under the first settlement were for costs paid of \$1,614,287.60, the pro rata share of J.G. and L.J. should have been \$499,264.20.

with any remaining defendant. Id. at ¶ 3 and 480-4 (copies of agreements).

In proposing reallocation of costs, plaintiffs' counsel provide information regarding the specific costs chargeable to each plaintiff and the general costs, which would be allocated pro rata among the plaintiffs according to settlement amounts received. While differentiating between client specific costs and general costs is appropriate (though not previously done as to the first settlement), the figures used by plaintiffs are not consistent. In their charts with proposed reallocation of costs filed as Exhibit J to the motion, DE 490-10, plaintiffs list \$1,203,452.92 as the total general costs with respect to the first settlement and \$358,613.26 as client specific costs, for a total of \$1,562,066.18. See DE 490-10 at 3, 4 and 5. This sum is described in column for "Actual Costs" in the first chart entitled "Settlement 1 Reconciliation - Leekin Client Summary."⁷ Id. at 3. However, \$1,562,066.18 is less than any amount plaintiffs previously claimed for costs, and \$31,091.99 less than the \$1,595,158.17, which is the amount reduced, per counsels' agreement, from the \$1,714,287.60 originally claimed.

Counsel also state in the motion for approval that because no

⁷ The column for "Actual Costs" in is preceded by a column described as "Costs Paid" which lists a total sum of \$1,714,287.60, the amount originally sought by plaintiffs in their first motion for approval. See DE 490-19 at 3 and DE 480. As discussed in fn. 7, this \$1,714,287.60 figure included a \$100,000 advance against future costs.

recovery was made on behalf of plaintiffs J.G. and L.J. under the second settlement, they would not seek reimbursement of the client specific costs attributable to J.G. and L.J. set forth in Exhibit "I." Id. at 7, referring to DE 490-9. The client specific costs in Exhibit I for J.G. and L.J. total \$20,553.85 -- \$9,845.19 as to L.G. and \$10,708.66 as to J.G. These amounts are not included in the total client specific costs of \$201,249.04 claimed by counsel. See DE 490-8 at 3, DE 490-10 at 4.

In discussing the funds escrowed with respect to costs claimed under the first settlement, counsel state in the second motion that the "Court approved costs in the amount of \$1,172,091.22, which represented 75% of the costs expended by Plaintiffs' counsel" and that "\$390,697.07 was retained in the trust account of the undersigned Plaintiffs' attorneys." DE 480 at ¶ 2. However, as discussed above, because \$1,595,158.17 should have been held in escrow and \$1,196,368.63⁸ should have been released pursuant to Judge Vitaliano's order, the balance held in escrow should have been \$398,789.54.

In response to my continued concerns regarding the magnitude of costs sought, plaintiffs' counsel subsequently revised their request for reimbursement of costs in an amended motion to approve costs and withdrew their request for \$280,354.41 in expenses. See

⁸ If, as plaintiffs' counsel claim, the \$1,172,091.22 released constituted 75% of the amount escrowed, then the amount held would have been \$1,562,788.29, \$32,369.88 less than what should have been maintained.

DE 496. Specifically, counsel withdrew all requested charges for coding (\$71,039.85), document research by Lansler, Kutischek and Schaffer (\$13,509.85), Federal Express charges (\$11,896.46), copies (\$62,967.95), paralegal costs (\$2,396.31) and long-distance telephone charges (\$1,359.04); and 50% of charges for travel (\$103,429.28) and online research (\$13,755.67). See DE 497 at 2. Plaintiffs also confirmed that under Judge Vitaliano's order for partial release of escrowed funds, the amount that should have been released was \$1,196,368.63, "which constitute[d] 75% of the \$1,595,158.17 previously requested as costs[,] leaving a balance in the Plaintiffs' attorneys' trust account of \$398,789.54." DE 497. Id. at 3. However, in their amended motion, plaintiffs' counsel mistakenly stated that they are requesting an additional \$462,252.00 in costs as to the second settlement and request that "the Court approve costs in the amount of \$581,684.65." DE 496 at 4. Plaintiffs subsequently explained in their letter filed on October 31, 2014 that the amended motion contained a number of "scrivener's errors" and that DE 490-8 (Exhibit H) "accurately reflects the costs associated with the second settlement, \$341,947.54." DE 497. Plaintiffs also confirmed that the correct number for the funds remaining in escrow for the first settlement costs should have been \$398,789.54.⁹ Id.

⁹ Unfortunately, the letter of plaintiffs' counsel correcting the prior errors also contains a typographical error and wrongly refers to plaintiffs' proposed cost reduction of \$281,354.41, instead of
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As a result counsel's agreement to reduce their request for costs by \$280,354.41, the amount of additional costs requested with respect to the second settlement is reduced from \$341,947.54 to \$61,593.13, and the total costs requested for both settlements is \$1,656,651.31. In response to plaintiffs request for a further partial release of the escrow, by order filed July 8, 2015, this court authorized release of \$280,354.41 to plaintiff's counsel. DE 514. Thus, the total amount in the escrow for costs should be \$460,382.67, not including any accrued interest.

Annexed as Appendix A is a chart setting forth the disbursement of the proceeds of both settlement discussed above, including the amounts that plaintiffs counsel claimed for costs, the reductions in requested costs made, the amounts authorized to be distributed, and the amounts that should be held in escrow.

DISCUSSION

Local Civil Rule 83.2 provides that an action on behalf of an infant or incompetent may not be settled without leave of court. "The Court shall authorize payment to counsel for the infant or incompetent of a reasonable attorney's fee and proper disbursements from the amount recovered in such an action . . . and shall

⁹(...continued)
\$280,354.41. DE 497 at 2. This typographical error was repeated in counsel's subsequent submission, and counsel again referred to having proposed a reduction in costs of \$281,354.41 and claimed costs of \$460,380.19 as to the second settlement. See DE 505.

determine the said fee and disbursements, after due inquiry as to all charges against the fund." Local Civil Rule 83.2. In determining whether to recommend approval of a proposed compromise, the Court's "sole duty is to exercise the most jealous care that no injustice be done to the infant." Anderson v. Sam Airlines, 1997 WL 1179955, at *8 (E.D.N.Y. 1997) (internal quotation and citation omitted). As mentioned in plaintiffs' motions for approval, J.G., L.G., R.E., S.B. and S.W. are under guardianship, and their settlements, as well as the reallocation of costs, are subject to the Court's approval. See DE 383, 499 at ¶ 5.

As Judge Vitaliano recognized, the costs originally requested in connection with the settlement with the City defendants amounted to more than 16% of the total settlement. If the full amount of the costs sought were allowed, plaintiffs would have received only 50% of the settlement after deduction for fees. However, in light of the additional funds available under the second settlement and costs claimed, as reduced by counsel's agreement, the total costs requested by plaintiffs' counsel is now \$1,656,751.73, which is approximately 6.09% of the total settlements. Counsel thus now seek release of \$180,028.26 from the \$461,380.19 that should still be held in escrow.

As a preliminary matter, this Court notes that reallocation of all the claimed costs among the plaintiffs is appropriate, even though the bulk of the costs claimed were incurred prior to the first settlement. The work performed by plaintiffs' counsel which

led to the settlement with the City defendants was critical to plaintiffs for the rest of the case, particularly in defending against the summary judgment motion of the Agency defendants, which facilitated settlement discussions with these defendants. In addition, the Court is mindful of the fact that plaintiffs' counsel diligently litigated this case for more than five years and expended significant resources to help plaintiffs who were unable to protect themselves. Besides opposing the summary judgment motion of the Agency defendants, plaintiffs' counsel engaged in extensive discovery, including conducting over 140 depositions, retaining numerous experts, litigating many discovery disputes, and analyzing volumes of documents.

Amount of Reasonable Costs

In reviewing the reasonableness of the claimed costs, I will analyze the total costs claimed for both settlements together. Counsels' agreement to withdraw their claim for \$280,354.41 in costs is significant. However, I briefly discuss why I had previously questioned the propriety of a number of those claimed costs.

Coding, Electronic Research. Plaintiffs' counsel sought reimbursement of \$71,039.85 for "coding" documents, a cost primarily for inputting data which counsel explains was necessary to enable management and use of the voluminous materials produced in discovery. Costs for data inputting should ordinarily be

treated as office overhead. Cf. United States v. City of New York, No. 07 CV 2067 (NGG)(RLM), 2013 WL 5542459, at *26 (E.D.N.Y. Aug. 30, 2013) (finding that word processing is part of routine overhead); Mendez v. Radec Corp., 907 F. Supp. 2d 353, 359-60 (W.D.N.Y. 2012) (treating as overhead cost of temporary or contract workers); In re Bausch & Lomb, Inc. Sec. Litig., 183 F.R.D. 78, 90 (W.D.N.Y. 1998) (reducing word processing charges by 50% as overhead expense).

In fee shifting cases where an attorney fee award is based on the number of hours spent working on a case, disbursements that save counsel time should be balanced by the savings achieved in the amount of attorneys' fees. Here, however, since counsel have received over \$8.5 million in fees, the cost of measures that save counsel time should, in fairness under the circumstances, be included as a part of counsel's fees rather than charged separately to the client. Similarly, research conducted by attorneys in another firm for work that plaintiffs' counsel would have otherwise performed should not be claimed as a cost and costs for paralegals, which ordinarily are recoverable as part of attorneys fees, should not now be permitted as a cost.

In addition, in this district, costs for electronic research are "routinely disallowed" and found to be "recoverable as a portion of attorney's fees rather than as costs." U.S. v. City of New York, WL 5542459 at *12-13 (citations omitted); Chinatrust Bank (U.S.A.) v. Pinter, 2008 WL 2987152, at *3 (E.D.N.Y. July 31, 2008)

(disallowing recovery of electronic research costs).

Copying Costs: Plaintiffs' counsel are withdrawing their claims for all copying costs, which amount to \$62,967.95. As the supporting documents submitted in connection with the first settlement reveal, photocopying costs amounted to over \$45,000, with Babbitt, Johnson, Osborne and LeClainche, P.A. charging \$0.35 per black and white page and \$0.75 per color page, and Colodny, Fass, Talenfeld Karlinsky, Abate & Webb charging photocopies at a rate of \$0.25 per page. The going rate for copying charges in this Circuit is 10-15 cents per page. See United States v. City of New York, 2013 WL 5542459, at *27; Torres v. Gristede's Operating Corp., 2012 WL 3878144, at *5 (S.D.N.Y. 2012); Febus v. Guardian First Funding Group, LLC, 870 F. Supp. 2d 337, 341-42 (S.D.N.Y. 2012); Robinson v. City of N.Y., 2009 WL 3109846, at *11 (S.D.N.Y. 2009). A reduction is appropriate, even though this court would not have recommended complete disallowance of such costs.

Travel costs and meals. Plaintiffs' counsel agree to waive \$103,429.28 in travel costs, which they claim represents 50% of all travel costs.¹⁰ Plaintiffs were represented by four law firms, three of which are located in Florida and one of which is located

¹⁰ From review of the submissions, this court finds that counsel actually claimed travel costs of \$246,526.10 - - \$194,949.00 based on the "categorical summaries" submitted by the four plaintiffs' firms and supporting documentation with respect to the first settlement and \$51,577.12 with respect to the second settlement. See 490-8. Thus, the amount waived by counsel is approximately 41.9% of total travel costs claimed, which may be closer to an appropriate reduction for such expenses.

in New York. Some of the costs clearly were necessary, but a large portion of the costs incurred resulted from overstaffing for attendance at court conferences and depositions. For example, with respect to the first settlement, Florida counsel made at least at least 12 trips which involved between 4 and 6 attorneys traveling.

This court also expressed concern over expenses unrelated to out-of-town travel of approximately \$7,500 claimed by Children's Rights Inc. for local cab fare and meals for late or weekend work, and for travel within New York City for court appearances or meetings. Courts routinely do not permit recovery of local transportation and meal costs and require such costs to be treated as part of overhead. See Merck Eprova AG v. Brookstone Pharmaceuticals, LLC, No. 09 Civ. 9684 (RJS), 2013 WL 3146768, at *6 (S.D.N.Y. June 10, 2013); D.G. v. Yarbrough, 2012 WL 7829602, at *11 (N.D. Okl. 2012), rejected in part on other grounds, D.G. ex rel. Strickland v. Yarbrough, 2013 WL 1343151, at *7-9 (N.D. Okl. 2013) (denying expenses to Children's Rights for meals and taxis for local travel); L.V. v. New York City Dep't of Educ., 700 F. Supp. 2d 510, 528 (E.D.N.Y. 2010) (meals); Kenny A. v. Perdue, 454 F. Supp. 2d 1260, 1292 (N.D. Ga. 2006) (denying Children's Rights' request for reimbursement for meals), vacated on other grounds by 616 F.3d 1230 (11th Cir. 2010); Aiello v. Town of Brookhaven, No. 94-CV-2622 (FB)(WDW), 2005 WL 1397202, at *8 (E.D.N.Y. June 13, 2005) (meals).

Experts: By far the largest expense claimed by plaintiffs'

counsel is for expert fees, approximately \$830,000¹¹ with respect to the first settlement and an additional \$155,000 for the second settlement. This Court had previously expressed concern as to the magnitude of fees paid to certain experts, some of whom have prior relationships with counsel. Plaintiffs' counsel do not include in their proposed reduction of \$280,354.41 any amount for expert expenses. Instead, counsel point to the difficulty and complexities of the litigation and the fact that defendants' experts charged considerably more. See 490 at 5-6.

Notwithstanding the disparity in available resources, plaintiffs' attorneys nonetheless have a obligation to their clients to insure that the amounts charged by experts are reasonable, particularly in this case where the costs for experts would not be recoverable, notwithstanding the fact that attorneys' fees are under 42 U.S.C. § 1988 for cases brought under Section 1983. See Davis v. City of New York, No. 10 Civ. 699 (SAS), 2011 WL 4946243 at *7 (S.D.N.Y. 2011) (expert witness fees are not recoverable in § 1983 cases because "[p]ursuant to section 1988, courts only have the discretion to tax expert fees as costs in actions brought under 42 U.S.C. §§ 1981 and 1981a, not section 1983").

¹¹ This figure is based on the itemized entries in the "categorical" summaries submitted in support of the motion as to the first settlement. Although the Babbitt firm states in its summary that expert expenses amounted to \$499,716.65, the separate amounts listed for each expert totals \$547,484.27. Notably, this court found that the supporting documentation for some of the experts does not correspond to the amounts claimed.

While this Court understands that counsel need to insure they have good working relationships with their experts, review of billings should not undermine professional relationships. In fact, some of plaintiffs' experts reduced their charges, including Golda Zimmerman who cut her time charges from \$123,960 to \$75,000 and Dr. Geoffrey D.P. Kantar, a neuropsychologist who cut his fee from \$47,000 to \$25,000. Other experts apparently were paid by counsel based on invoices sent. This is, of course, an appropriate practice, but since there was no client independently scrutinizing costs here, I discuss some examples of charges that seem to be high for the services billed.

Plaintiffs' counsel seek recovery of expert fees paid to Paul M. Deutsch, Ph.D, CRC, CCM, CLCP, FIALCP, for evaluating the past and future needs of the plaintiffs based on their individual emotional, psychological, psychiatric, behavioral, educational and social damages. Dr. Deutsch billed for over 500 hours of work at the rate of \$350 per hour for testing, reviewing records, and evaluating each plaintiff and \$300 per hour for work to "Review & Summarize Medicals," "Nursing Research" and "Medical Research." He charged approximately \$155,000¹² prior to the first settlement and an additional \$20,000 for work through the second settlement. Plaintiffs' counsel has used Dr. Deutsch's services in other cases.

¹² Plaintiffs' counsel state in their categorical summary that the amount sought for Dr. Deutsch is \$113,085.98, but the invoices submitted total \$155,175.

Setting aside whether there should have been some costs savings by virtue of the fact that Dr. Deutsch produced ten reports for the plaintiffs, some of whom had similar conditions or needs, the time claimed by Dr. Deutsch seems excessive in a number of respects. For example, Dr. Deutsch conducted testing of the plaintiffs at a hotel where he and staff stayed in Port St. Lucie, Florida from September 1, 2008 through September 6, 2008. He requested reimbursement for his time for a trip of 300 miles¹³ and charged a total of 15 hours of travel time, pro rated at 1.5 hours among each plaintiff, all at the \$350 rate. This is too high for the distance traveled. Also, since Doctor Deutsch billed for over 25 hours of time on September 2 and 15 hours on September 4, 2008, Dr. Deutsch clearly did not perform all the work billed. There is no indication who performed the work and whether the work billed for services rendered by persons other than Dr. Deutsch was properly billed at a \$350 rate. In addition, the costs billed for photocopying on the separate invoices for each plaintiff were often billed at the same flat rate. The invoices for seven plaintiffs billed on or before October 7, 2008 each contained a charge of \$50 for photocopying and subsequent invoices for the same plaintiff or other plaintiffs contained additional or higher charges. Since

¹³ Mileage of 300 miles for round trip travel is consistent with my independent research that Port St. Lucie is approximately 130 miles from Dr. Deutsch's office in Oviedo.

photocopying charges were substantially more than \$100 for almost all the plaintiffs, aggregate charges for photocopying were high.

Mark E. Safarik, a retired FBI agent with the Behavioral Analysis Unit, was retained as a rebuttal expert witness who submitted invoices total \$59,865.00, including expenses (though plaintiffs claim that they paid Mr. Safarik \$59,665.50). In any event, Mr. Safarik billed for 172.5 hours of work at \$350 per hour, except for travel time which was billed at \$275 per hour. Besides billing primarily in increments of an hour or quarter of an hour (as did a number of other if plaintiffs' experts), Mr. Safarik billed 33 hours to prepare for his eight hour deposition and an additional eight hours to review the transcript of his deposition. This amount of time seems high, particularly for someone who undoubtedly has had experience and training in testifying.

Henry Gunn, III was retained as an expert on child welfare systems and conducted an analysis of policies and practices of the New York City child welfare system from 1984-1999. Counsel paid Mr. Gunn \$92,475 for 616.5 hours at the rate of \$150 per hour. However, there is no description contained in Dr. Gunn's invoices describing what he did for those 616.5 hours charged. Absent such an explanation, the Court cannot make any meaningful determination whether the amount sought is reasonable.

Peg Hess was retained as an expert to conduct an analysis of the plaintiffs' case records and the laws, regulations and standards of care applicable to the New York City foster care and

adoption system during the relevant time period. Plaintiffs seek reimbursement of \$134,495 for approximately 772.50 hours out of 838.5 hours she charged for her time and 465 hours for her research assistant. While this court is hesitant to criticize a clearly qualified expert for having expended too much time on a complex report requiring review of vast amounts of material, the hours spent for the time period involved seem high, particularly for some of the work billed. For example, in addition to the 66 hours for which counsel are not seeking reimbursement for preparation by Ms. Hess for her deposition in December 2011, Ms. Hess billed 63 hours for preparing for her deposition in February deposition and 30 hours for one in March 2012.

There may very well be a adequate explanation for all the charges billed by plaintiffs' experts. However, on the record presented, this court cannot be confident that plaintiffs' counsel, who were in the best position to review the invoices of their experts, sufficiently monitored the bills with the interests of plaintiffs in mind. Likewise, this court cannot be certain, given the many discrepancies in the numbers presented by plaintiffs' counsel, what amounts were actually incurred.

One notable discrepancy is the lower claim for costs as to the first settlement reflected in the charts plaintiffs' counsel presented in proposing the reallocation of costs. See DE 490-4, 490-10 at 3-5. As discussed, in segregating general from client specific costs for each plaintiff, plaintiffs' counsel claim

general costs of \$1,203,452.92 and client specific costs of \$358,613.26 with respect to the first settlement. Id. The sum of these two numbers is \$1,562,066.18, which is \$31,091.99 less than the adjusted amount of \$1,595,158.17 previously claimed. Since the plaintiffs' counsel presumably reviewed all of the client specific and general costs in compiling the numbers reflected in the charts, this court assumes that the charts reflect counsel's latest assessment of costs incurred. Thus, I recommend that the Court accept the lower number of \$1,562,066.18 for costs incurred as to the first settlement.

This recommended reduction of \$31,091.99, together with the \$280,354.41 in costs that counsel agreed to waive, total \$311,446.00. Such a reduction is approximately 16% of the \$1,937,105.71. Based on my review of the records presented, I find that such a reduction would sufficiently address the concerns over costs discussed above. Thus, I recommend that this Court award plaintiffs' counsel total costs of \$1,625,659.31 calculated as follows:

Claimed Costs: Settlement 1	\$1,595,158.17
Claimed Costs: Settlement 2	<u>+ 341,947.54</u>
Total Costs Claimed	1,937,105.71
Partial waiver of costs	(280,354.41)
Additional recommended reduction	<u>(31,091.99)</u>
Recommended Costs to Award	\$1,625,659.31

Since \$1,476,723.04 should have already been distributed to counsel for costs, counsel are entitled to receive an additional

\$148,936.27 in costs from the escrow. The \$311,446.40 remaining in escrow should be divided between counsel and the plaintiffs in accordance with the retainer agreements signed -- \$103,815.47 to counsel and \$207,630.93 to the plaintiffs, pro rata according to total settlements amounts to be received.

Reallocation of Costs

I set forth in Appendix B a chart of the costs that should be allocated to each plaintiff and amounts distributed to plaintiffs and counsel based on the foregoing recommendation. In this Appendix B, I have utilized the client specific costs for the first and second settlements presented by plaintiffs (\$358,613.26 and \$201,249.04, respectively). Because of the recommend reduction in total allowable costs, the total general costs on the chart is \$1,065,797.01, which represents the difference between the recommended amount of allowable costs of \$1,625,659.31, less the client specific costs claimed of \$559,862.30.

Last, given the proposed reallocation of costs, I recommend, should the Court accept this report and recommendation, that plaintiffs' counsel be required to file a further report regarding the disposition of all the settlement funds to insure and payments are properly made and costs are properly allocated among the plaintiffs. I do not make any recommendations in Appendix B as to actual amount of the costs to be reallocated among plaintiffs given the uncertainties discussed above regarding the amounts actually

held in escrow and distributed. The corrections made by counsel as the amounts that should be in escrow is troubling, since the determination of the amount in escrow should be a straightforward task.

In this regard, I note a further discrepancy and error in the submissions as to the amounts of funds paid to each plaintiff in the first settlement which likely stem from counsel's use of the original amount of costs claimed of \$1,714,287.60, rather than the reduced claim, which does not include the advance for future costs previously discussed. In the charts concerning reallocation, plaintiffs' counsel indicates that \$1,647,388.28 was the "Actual (amount) Paid" to J.G. and L.G. based on \$1,714,287.60, see DE 490-10 at 4, while plaintiffs' earlier chart in the motion for approval of the first settlement indicates that the disbursement amount for these plaintiffs is \$1,646,546.87. Thus, I recommend that plaintiffs' counsel be required in their report to provide an accounting of all the settlement funds, including the amounts held in escrow, the distributions made to each plaintiff and counsel, and a proper calculation of the amounts of costs and settlement proceeds to be reallocated to each plaintiff.

CONCLUSION

For the foregoing reasons, I respectfully recommend that the Court award plaintiffs' counsel total costs of \$1,625,659.31 and that settlement proceeds be distributed between plaintiffs and their counsel as set forth in Appendix A. I further recommend approval of the reallocation of costs among plaintiffs in proportion to their pro rata share of the settlement as set forth in Appendix B. Assuming that the principal amount of funds held in escrow is \$460,382.67 and that funds were released as contemplated, counsel are entitled to receive a payment from the escrow of \$148,936.27 as costs and that the \$311,446.40 remaining in escrow should be divided between counsel and the plaintiffs in accordance with the retainer agreements signed - - \$103,815.47 to counsel and \$207,630.93 to the plaintiffs, pro rata according to total settlements amounts to be received. I further recommend that any interest earned on the escrow be released to counsel. Last, I recommend that counsel be required file a report regarding the distribution of settlement funds within two weeks of disposition of this report and recommendation.

Copies of this report and recommendation will be filed via Electronic Case Filing ("ECF") on this date. Any objections to this Report and Recommendation must be filed with the Court by February 20, 2017, and courtesy copies be provided to Judge Vitaliano. Failure to file objections within the specified time

waives the right to appeal. See 28 U.S.C. § 636(b)(1);
Fed. R. Civ. P. 72(b).

SO ORDERED.

Dated: Brooklyn, New York
February 5, 2017

_____/s/_____
MARILYN D. GO
UNITED STATES MAGISTRATE JUDGE