

ORIGINAL

FILED IN CLERKS OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Appeal No. 98-1244

STATE OF NEW HAMPSHIRE, ET AL
Plaintiff - Appellees

v.

MARC ADAMS
Defendant - Appellant

On Appeal from the United State Court
For The District of New Hampshire

BRIEF OF MARC ADAMS AS APPELLANT

Jon Meyer, Esquire
Backus, Meyer, Solomon
Rood & Branch
116 Lowell St., PO Box 516
Manchester, NH 03105
(603)668-7272

Peter S. Smith, Esquire
Disabilities Rights Center
18 Low Ave., PO Box 3660
Concord, NH 03302-3660
(603)228-0432
Counsel for Defendant Appellant

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BRIEF OF MARC ADAMS AS APPELLANT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had federal question jurisdiction of the State's appeal of the administrative hearing officer's decisions entered under the Individuals with Disabilities Education Act (IDEA) pursuant to 20 U.S.C. § 1415. This court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. Defendant appeals from a final order denying his Motion for Attorney's Fees entered on January 21, 1998. Judgment was entered on January 22, 1998. The Notice of Appeal was filed on February 19, 1998.

STATEMENT OF ISSUES

Whether the district court erred in ruling that the defendant was not a prevailing party entitled to attorneys' fees.

STATEMENT OF THE CASE

This is an appeal from the denial of a Motion for Attorney's

Fees and Costs filed on behalf of a party who alleged a violation of his rights under the IDEA. Marc Adams is an individual with learning and emotional disabilities incarcerated in the New Hampshire State Prison. An administrative hearing officer ruled that his right under the IDEA to a free and appropriate public education (FAPE) had been violated by the State following his transfer to the Prison's special housing unit (SHU), and ordered a remedy including compensatory education.¹ Upon the State's appeal to the district court, the hearing officer's decisions were vacated, but the court directed the parties to come up with a revised individual education program (IEP) even though the two year term of the original IEP had concluded. In settlement for his claims, Adams was able to negotiate a second IEP including two years of post-secondary education and counseling by a private psychologist.

Adams was incarcerated at the New Hampshire State Prison on July 19, 1991. App. 163. In February 1992, he notified the Manchester School District (MSD) where he resided, that he requested a due process hearing pursuant to the IDEA 20 U.S.C. §1415 because he was not receiving a FAPE. The Commissions of the Department of Corrections and Education were subsequently added

¹ Compensatory education is a judicially formulated doctrine designed to insure compliance with the IDEA by not permitting school districts and other entities required to provide special education from escaping their federal obligation to do so simply by delaying the delivery of those services until the child is no longer statutorily eligible due to his age or having received a bona fide high school diploma. See Pihl v. Massachusetts Dept. of Education, 9 F.3d 184, 188, (1st Cir. 1993).

as parties. The parties subsequently agreed to an IEP, App. 244-250, which was signed on February 4, 1993 and incorporated into the final order of the hearing officer dated December 16, 1992. App. 14-17. This plan required 5.25 hours of daily instruction plus additional related services of counseling toward the goal of a high school diploma.

After the settlement, there were four instances between August 1993 and May 1994 in which Adams was transferred for disciplinary reasons from the general population to SHU for a total time in SHU of approximately 18 weeks. App. 163. While Adams was in SHU, the Prison provided him with minimal educational services, principally some correspondence school materials. App. 165. Beginning in August of 1993, the attorneys for Adams attempted to negotiate a voluntary agreement with the State Prison to increase the amount of services that Adams was receiving at SHU. Affidavit of Peter Smith, App. 158-160, ¶10-14.² Only after it became clear that those efforts would not be successful did Adams through his attorneys on December 22, 1993 file a request for a due process hearing. App. 167-168.

There was a nine day administrative hearing preceded by a pre-trial conference on February 7, 1994 and concluding with an order on remedy on October 6, 1994. Adams requested that either the educational services provided for in his IEP be delivered to him at SHU or that he be permitted to attend the previous

² To avoid confusion, it should be noted that the principal attorneys for both sides have the last name of Smith: Peter for Adams and Nancy for the State.

programs he had participated in when he was in the general population, and that he be given compensatory education both for the time he did not receive a FAPE in SHU, and also for the disruption to his educational progress caused by those interruptions. App. 174-177.

In the first phase of the administrative hearing, the State presented evidence relevant to the security needs of the Prison and the nature of the educational programming that Adams had received during the period of his incarceration. At the conclusion of that testimony, the hearing officer entered a directed verdict in favor of Adams and MSD, that the State had not provided the agreed upon IEP and Adams had not received a FAPE while in SHU. App. 185. The hearing officer designated as the remaining issues 1) whether Adams IEP could be carried out while he was in SHU, 2) if the answer to the first question is no, whether the State should be ordered to allow Adams to attend classes in the general education center, and 3) what compensatory education Adams was entitled to. In his second decision, App. 208, the hearing officer concluded that Adams IEP could be carried out in SHU if the Department of Corrections made the necessary changes, that if the Department did not make those changes it would be ordered to permit Adams to attend programs at the adult education center, and that Adams was entitled to two years of compensatory education and an agreed upon additional period of compensatory education beyond that. By this time, only the compensatory education issue had any practical significance

for Adams since he had remained in the general population continuously since June 6, 1994.

The State then appealed to the district court designating Adams and MSD as defendants. App. 1. MSD then filed a Motion for Summary Judgment in which Adams joined, App. 54, and the State filed a cross-motion. App. 63. On March 21, 1996, the district court entered an order, App. 67, denying MSD's motion for summary judgment and granting the State's motion but only to the extent that it vacated the hearing officer's orders. App. 93. The court ruled that the hearing officer failed to defer to the security interest of the State Prison in determining that Adams' IEP did not need modification. App. 82.

The court did not, however, reject the hearing officer's determination that Adams had not received a FAPE while at SHU or that Adams was entitled to additional compensatory education. Even though the two years under his IEP had expired and he had been able to complete all the requirements for high school graduation, the court ordered the parties "to engage in good faith efforts to develop appropriate modifications to Adams' current IEP", App. 92., and stated that it would retain jurisdiction until a modified IEP was prepared either by agreement or court order. App. 92. It determined that an award of attorneys' fees was not appropriate at that point but it would re-evaluate the attorneys' fees issue after a final resolution on the merits. App. 93.

After the district court's order, the parties engaged in

extensive negotiations in an attempt to reach settlement without going to trial. See App. 94-135. Finally, in December of 1996, an agreement was reached which was incorporated into a new IEP for Adams. App. 140. This second IEP had a two-year term with the stated goal of enabling Adams to take accredited post-secondary education courses for academic credit that would culminate in a post-secondary degree and provided that Adams would receive regular therapy through a licensed clinical and/or certified school psychologist who was not employed by or on the staff of New Hampshire Department of Corrections or the New Hampshire Department of Education. Vocational and other services were also provided. App. 141.

Adams subsequently filed his petition for attorney's fees and costs. The parties court agreed that all issues relating to the amount of the fees would be deferred pending a determination as to whether Adams was a prevailing party entitled to fees. At the oral argument on Adams' fee petition, the State conceded that it was motivated to agree to the second IEP in order to avoid the uncertainty and expense associated with a trial on whether or not Adams had received a FAPE and, if not, what he was entitled to by way of remedy. App. 299-301.

SUMMARY OF ARGUMENT

The district court correctly relied upon the decisions of other circuits holding that the term "prevailing party" has the same meaning under the IDEA, 20 U.S.C. §1415(e)(4)(B) as under 42 U.S.C. §1988, and that the applicable legal standard is whether

the party seeking fees secures relief which "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Add. at 2-3, quoting Farrar v. Hobby, 506 U.S. 103, 111-112 (1992). The district court incorrectly concluded that because it granted in part the State's Motion for Summary Judgment vacating the decisions of the administrative hearing officer that Adams was not a prevailing party. It failed to properly assess the benefit secured by the defendant, improperly discounted the State's opposition to compensatory education, and engaged in the clearly erroneous assumption that he could have achieved the same level of benefit without initiating administrative proceedings. This assumption ignores the substantial nature of the benefit actually secured by the defendant, his attempt to secure a resolution prior to initiating administrative proceedings, the State's consistent refusal to offer any meaningful settlement until after its appeal to the federal court, and the State's concession at oral argument that its willingness to agree to the settlement IEP was motivated by its desire to avoid the risks, and expenses of a trial on whether Adams' FAPE had been violated. The mistakes of fact and assumption made by the district court, primarily involving the administrative phase of the case, precluded it from being able to properly exercise its judgment.

ARGUMENT

I. THE STANDARD OF REVIEW

The determination of the district court denying fees was a mixed ruling of law and fact. Those elements of the court's decision based upon legal conclusions should be subject to de novo review. Williams v. Hanover Housing Authority, 113 F.3d. 1294, 1296 (1st Cir. 1997). The district court's factual findings should be subject to review for clear error. Soto v. United States, 11 F.3d 15, 17 (1st Cir. 1993).

II. THE DISTRICT COURT ERRED IN HOLDING THAT ADAMS WAS NOT A PREVAILING PARTY

The district court's denial of fees was premised upon its conclusion that Adams was not "the prevailing party". Add at 10. Although this was a case involving multiple issues, the district court's prevailing party analysis falsely assumed that there was only one issue -- the decision whether or not to vacate the orders of the hearing officer -- and therefore failed to consider that Adams could be a prevailing party on certain issues and not on others.

The two principal questions in controversy in this case were whether Adams' right to a FAPE was violated while he was in SHU, and if so, what was he entitled to by way of remedy. Although the court below ruled that Adams was not entitled to the extent of the remedy ordered by the administrative hearing officer, it incorporated in its ruling by implication the finding of the hearing officer that Adams did not receive a FAPE at SHU, and was accordingly entitled to compensatory education. This paved the

way for the ultimate settlement. In its ruling on Adams' application for attorney's fees, however, the district court incorrectly assumed that there had been agreement between the parties about Adams' right to a remedy and that the sole controversy had been about its extent.

The administrative proceedings that initiated this case were commenced in December of 1993. The second IEP which constituted its settlement was not completed until December of 1996. App. at 163. In the three years between the request for an administrative hearing and the final IEP, there were two critical developments which impacted the remedy. First, on June 6, 1994, Adams was returned to general population and remained there throughout the balance of the litigation. App. 163. Accordingly, the initial issue in controversy before the hearing officer about what educational opportunities he was entitled to while at SHU no longer had any immediate significance for him. Secondly, Adams completed his secondary school academic requirements which was a principal objective of his original IEP. App. at 244-250. The district court predicated its opinion denying fees upon the premise that Adams' entitlement to a FAPE was never in dispute. Add. at 7. This is accurate only in the limited sense that the State agreed that Adams was entitled under the final order approving the settlement in the first administrative proceeding to two years of compensatory education leading up to a high school diploma. App. at 14-16. However, that two year period terminated in March of 1995 by which time

Adams had completed his secondary school academic requirements. Even excluding from this time frame the 18 weeks that Adams spent at SHU, his two years of entitlement expired as of July 1995. The State never conceded that Adams was entitled to any compensatory education under the IEP after that. It consistently argued against it.

The State's opposition to compensatory education was supported by a variety of arguments. It claimed that the correspondence classes he received in SHU satisfied his educational rights. During the later stages of the case, it argued that he was not entitled to additional education because he had received his high school diploma, had already been given two full years of education, even subtracting the time he was in SHU, and was over 21. In its opinion, the district court claimed that these arguments were not made until after the hearing officer ordered the State to deliver the full IEP at SHU, and were a fall back position to Adams' "patently unreasonable demand". Add. at 14. In fact, the hearing officer did not render a decision relative to remedy until October 6, 1994. App. at 208. Well prior to that, throughout the administrative proceeding, the State argued that Adams was not entitled to compensatory education for the time that his IEP was not implemented in SHU. See excerpt from the State's Memorandum of Law contained at App. 170-172.³ Its second line position was

³ The full text of this memorandum is in the original record at Docket No. 56.

that if Adams was entitled to any compensatory education, it should only be for the 138 days he was at SHU. In its appeal to the district court, the State listed as one of the issues it was presenting:

Whether Marc Adams is entitled to any further award of compensatory education as he has earned an adult high school diploma and any right to special education under the settlement agreement does not extend past graduation. ¶ 62. App. at 11.

It asked the court to: "declare that Marc Adam's [sic] entitlement to special education has ceased as he has earned and received an adult high school diploma." App. at 12.

Although the district court's ruling on the summary judgment motions vacating the decisions of the hearing officer was a technical victory for the State, its practical implications favored Adams. The question addressed by the district court -- whether an IEP should be subject to modification if the inmate is transferred to a different level of confinement -- had no practical application to Adams since he had been in the general population for almost two years by the time the opinion was rendered. That part of the court's opinion could only affect him should he be reclassified to SHU in the future. What the district court did not do was of more significance to Adams: although it vacated the decisions of the hearing officer, it did not rule that Adams had received a FAPE in SHU. To the contrary, the district judge specifically denied the State's Motion for Summary Judgment except insofar as it sought to vacate the hearing officer's decisions. App. at 93. Thus, the order did

not negate Adams' claim to compensatory education by embracing the State's position that he had received a FAPE while at SHU. Although the court did not explicitly find that Adams' right to a FAPE had been violated, its direction to the parties to "develop appropriate modifications to Adams' current IEP", App. at 92, necessarily implied that Adams was entitled to additional education since his two years under the original agreement had long since expired. As outlined infra, this opinion led the State to agree to a settlement entitling Adams to two years of post-high school education rather than taking the risk that at a trial the district court would find that Adams' FAPE had been violated.

Although the district court vacated the allegedly unreasonable remedy ordered by the hearing officer, the State did not drop its stated objection to additional compensatory education. In its Motion to Continue Pretrial and Trial Scheduled [sic] and Request Expedited Ruling, App. at 94, which was filed more than four months after the summary judgment order, the State characterizes its position on compensatory education as follows:

For example, the State has raised two issues in the appeal in this action: whether Marc is entitled to any further services under an IEP since the goal of a high school diploma for Marc has already been achieved and the issue of the amount (length) of compensatory education to which Marc is still entitled under the settlement agreement in light of the services already provided under the earlier IEP. The State has not pursued these issues in the good faith attempt to negotiate an IEP acceptable to all parties. ¶ 3. App. at 95.

It further observed that "as Marc Adams (DOB 7/19/71) is now 25 years old, he is not currently entitled to a free appropriate public education under the IDEA." Id. at ¶ 4 (emphasis in original). In its status report to the court filed on October 11, 1996, App. at 99, the State reported that:

For purposes of negotiation of this IEP only, the State is willing to use a two-year period. However, the State does not waive its right to assert that some lesser period of compensatory education is all that Adam's [sic] is entitled to based on the State's prior provision of services under the preceding IEP. ¶ 7. n.3. App. 102.

In oral argument before the district court on the defendant's fee request, the State acknowledged that its ultimate agreement to the second IEP was motivated not by agreement that Adams was entitled to it but by a concern about going to trial on the issue of whether Adams had been denied a FAPE:

Ms. Smith: I would just like to remind the court that it will be our position that after the court's order we would then have been in a position to resolve this question of going back and having a trial either before this court or somewhere else as to whether what we did in SHU was adequate. And whether our faith [FAPE] was in fact provided before we could resolve the question of whether additional compensatory education would be an entitlement. We had to have that tried, because in good faith, as the court instructed us to do and what was negotiated, we came to an IEP, but I also remind the court that, as I recall a conference that we had with the court, the court was saying if we didn't come to terms on the IEP, that the court would consider appointing psychiatric experts, security experts and relayed to both sides what that would cost us. And quite frankly, I think the State's entitled to look what it's going to cost us to go to trial and decide if it's going to cost us less to do what they are asking. And that's not whether or not he would or would not have that entitlement, it may just be on a cost benefit analysis. App. at 299-300.

When asked by the District Judge at the same hearing whether it had been the State's position that Adams was not entitled to any compensatory education, the attorney for the State responded:

I don't know what the answer would be on that. I think this is why we were willing to negotiate. App. at 300-301.

Thus, the State's agreement to the settlement IEP was not a gratuitous act on its part but was motivated by an intent to avoid the risks and expenses of a trial on the issue of whether Adams' FAPE had been denied.

As the above chronology demonstrates, the district court's hypothesis that the State only adopted its no compensatory education position in response to the "extreme" positions taken by Adams and the hearing officer has no basis in fact. Not only did the State take this position before the hearing officer ruled, but it maintained it during the nine months between the vacation of the hearing officer's orders and the reaching of a final settlement agreement. To be sure, it ultimately withdrew this position as part of the settlement, but the fact that Adams was able to secure his objective through negotiation and not by a final adjudication in his favor, does not lessen his entitlement to attorney's fees.

The district court's view of this litigation was understandably colored by the fact that the only issue on the merits that it was called upon to decide was the full extent of the remedy ordered by the administrative hearing officer. It appears to have erroneously deduced that because that was the

only issue that the parties were unable to settle, that it was, therefore, the sole or at least principal issue. But from Adams' perspective, that issue was decidedly of secondary importance once his final stay in SHU concluded on June 6, 1994. App. at 163. After June of 1994, the key issues for him were whether he was entitled to compensatory education for the time he was in SHU, and if he was so entitled, was it just for the time he had been in SHU or had the intervals there so disrupted his educational progress that he was entitled to an additional two years of education. And if he was entitled to a new IEP, would it take him beyond the high school level and entitle him to private counseling. On each one of these issues his position was adopted in the final settlement.

The district court predicated its conclusion that Adams' entitlement to compensatory education was not in dispute upon an erroneous interpretation of the administrative pre-hearing order. Add.6. What the State was represented as conceding in the excerpted part of the order was no more than that Adams was entitled to special education under the first IEP which was still in effect.⁴ The State did not concede at that point or later that he was entitled to additional compensatory education.

The law does not require a prevailing party to succeed on

⁴ The hearing officer's order incorrectly characterizes Adams' position as claiming an entitlement to attend classes in other parts of the prison while classified in SHU. His actual position was that he was entitled to either the delivery of his IEP in SHU or attending classes in other parts of the prison. See App. 174-177, 240.

every issue, particularly where the issue on which no successful resolution was reached has no immediate practical application to the party seeking fees. It is sufficient that the prevailing party succeed on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1984). See Phelan v. Bell, 8 F.3d 369, 373 (6th Cir. 1993).

In an analogous situation, a group of Roman Catholic inmates brought suit to secure access to Roman Catholic services and to possess certain sacramental articles. Most of the issues were resolved by agreement. On the one remaining issue -- whether inmates had a right to unsupervised and unfettered possession of sacramental articles -- the court granted summary judgment for the county. Although the defendant thus prevailed on the only contested motion decided by the court, the district court determined, and the Ninth Circuit affirmed, that plaintiffs were entitled to an award of fees as the prevailing parties. Friend v. Kolodziejczak, 72 F.3d. 1386, 1391 (9th Cir. 1995).

In this circuit a party can be considered a prevailing party under the "catalyst" theory if there was a causal connection between the litigation and the relief and if that relief was not obtained gratuitously, even in the absence of a final order. Williams v. Hanover Housing Authority, 113 F.3d 1294, 1299 (1st Cir. 1997). Thus the proper question is not whether Adams won but whether he received an appreciable benefit as a result of the litigation.

III. THE DISTRICT COURT ERRED IN ITS ASSESSMENT OF THE BENEFIT TO ADAMS

In a case such as this one which culminated in a settlement, the most important basis for determining entitlement to attorney's fees is whether the parties seeking fees "obtain at least some relief on the merits of his claim" which relief "directly benefit[s] him at the time of the judgment or settlement." Farrar v. Hobby, 506 U.S.103, 111 (1992). This relief can be secured either through an enforceable judgment, a consent decree or, as here, through a settlement. Thus, the dispositive question on this appeal is whether the IEP plan reached in settlement of the underlying proceeding 1) amounted to at least some relief on the merits of the defendant's claim and, 2) directly benefited him at the time of settlement.

In its decision, the district court acknowledged that Adams received an additional two years of compensatory education but stated that "Adams' victory on that front can be fairly described as comparatively de minimus." Add. at 13. The appropriate inquiry, however, is not whether the settlement was a "victory" for Adams but the extent of the benefit. It is not clear what the district court meant by the term "comparatively de minimus", whether it was comparing the benefit in this case to that of other cases or the benefit in this case to what Adams had originally sought.⁵ If the court intended the latter, then its

⁵ It is also possible that the district court was comparing the benefits secured to what Adams could have been secured had Adams not brought this proceeding. Inasmuch as the district court is suggesting that Adams could have achieved a comparable

conclusion is incorrect. It is difficult to compare what Adams ultimately received by way of a final settlement with what he could have gotten earlier because most of the components of the final settlement were shaped by subsequent developments. However, inasmuch as a comparison is possible, it is clear that Adams secured far more by the outcome of the litigation than he had sought at the beginning. In his original request for a due process hearing, App. at 167, Adams solely raised the denial of his opportunity to participate in an educational program while at SHU. He did not ask that his IEP be extended beyond the high school level.

It appears from its opinion denying fees that the district court erroneously assumed that any inmate at the Prison was entitled to an education and accordingly that Adams was not receiving anything through the settlement IEP beyond what he was entitled to in consequence of his inmate status. However, the IDEA does not provide open-ended educational rights for inmates. Since Adams was 25 at the time the settlement was reached, he had no legal entitlement to a free education designed to meet his individual needs under IDEA, 20 U.S.C. § § 1400 et. seq., absent a finding that the State had previously violated his rights while he was in SHU. A FAPE pursuant to the IEP is fundamentally

benefit without resort to an administrative appeal, this conclusion is clearly incorrect. The most the State was willing to offer was a "transition plan" -- not an IEP -- contingent upon Adams' agreement not to demand any service not already available at the Prison. And even that was not offered until well after the initiation of administrative proceedings. App. at 263-264.

different -- both qualitatively and quantitatively -- from the grade school or high school programs that the Prison may choose to make available to inmates within the constraints of its resources. And the terms of the settlement IEP go well beyond the services otherwise available at the State Prison including counseling by a licensed clinical or certified school psychologist not employed by or on the staff of the Departments of Corrections or Education. App. 141.

A second error made by the district court was failing to consider the specific nature of the settlement IEP. From the court's opinion, it appears that the judge assumed that the settlement IEP was an effort to give Adams what he had missed from the first IEP by reason of his assignments to SHU. In fact, notwithstanding his time in SHU, Adams had already secured the principal goal of his first IEP in terms of completing his high school requirements. The settlement IEP provided him with two years of post-high school education involving an accredited post-secondary education program culminating in a post-secondary degree and individual counseling by a private psychologist at the State's expense. App. at 140. The record makes clear that this IEP was only agreed upon after lengthy and laborious negotiations between Adams and the State with the latter raising a number of objections that had to be overcome. App. 99-117. Ultimately, the State acquiesced on a number of issues rather than facing the uncertainties of trial. Had the district court considered the specific provisions of the settlement IEP, it

could not have ruled that the benefits to Adams were "comparatively de minimus". To the contrary, there was nothing that Adams could reasonably have sought that was not contained in this document.

IV. THE DISTRICT COURT ERRED IN DETERMINING THAT ADAMS COULD HAVE SECURED THE SAME BENEFIT WITHOUT LITIGATION

It appears from the district court's opinion that its principal reason for the denial of the fee application was its determination that Adams achieved nothing in the settlement that he could not have obtained in 1993 if he had not asked for an administrative hearing and had not interposed an "unreasonable condition of settlement". Add. at 15. These findings are clearly erroneous and without any support in the record.

The district court's attempted comparison between what Adams actually achieved and what he could have achieved in 1993 makes clear that the court had not considered the specific terms of the settlement IEP or compared that document, App. 140-148, with what the State had offered less than two months earlier. App. 99-104, 112-117, 127-135. Even if Adams had been able to secure two years of compensatory education in 1993, that would have only carried him through to 1995 and would not have included the post-high school component contained in the settlement IEP. But there is no reason to speculate about what Adams could have achieved through negotiations prior to requesting a due process hearing because the actual history of his attempted negotiations with the State both before and after he filed a request for a due process hearing makes clear that no reasonable settlement in this matter

was possible until this case reached the district court and the State was faced with the prospect of a trial.

As described in the affidavit of Attorney Peter Smith, Adams made substantial efforts to secure a negotiated resolution prior to requesting a due process hearing. App. at 158-160. On September 13, 1993, Attorney Smith sent a letter to the Director of Education at the prison requesting a meeting of Adams' educational team to discuss the problems relative to his being transferred to SHU. On October 21, 1993, Attorney Smith went to the prison and met with employees of the prison's education center to discuss the problems posed by Adams being placed at SHU. Attorney Smith then set up another meeting on December 6th with employees at the prison's Education Center at which time he was informed that the already modest level of education provided to Adams at SHU would be further diminished. He then sought the Warden's permission to have Adams receive educational programming at the Adult Education Center in the prison's main unit. Only after the warden rejected that request and no additional educational resources were made available at SHU, did he file a request for a due process hearing on December 22, 1993.

The State expressed no interest in a resolution until April of 1994 at which point it requested a meeting with the Manchester School District to discuss the development of a new IEP for Adams. Remarkably, the State did not even notify Adams' attorneys of its interest in discussing a new IEP and they did not find out about the State's request until May 23, 1994 on the

third day of the administrative hearing. App. at 229-230. On June 28, 1994, at the commencement of the seventh day of the administrative hearing, the State requested that an IEP meeting be convened. Although this meeting did not occur, Adams never declined to be present or to participate. App. at 230-231. On October 21, 1994, the State sent another letter to the MSD about setting up an IEP meeting. Once again Adams' attorneys were not copied with this letter and did not receive a copy until November 7th. An educational team meeting was held by the MSD on December 12, 1994 and an agreement reached to complete certain evaluations and develop details of a new IEP at a subsequent meeting which was scheduled for January 9, 1995. App. at 231. However, on January 5, 1995, the State requested that the meeting be postponed because an important member of its team was unavailable for health reasons. App. at 255. Then on February 3, 1995, the State cancelled the meeting for "circumstances beyond our control". App. at 259. That was followed on February 6, 1995 with another letter from the State saying that it wanted to postpone the meeting for one week or more because "we are concerned that our position may be harmed if we rush into another IEP." App. at 261. Finally, on February 10, 1995, counsel for the State sent a letter stating in pertinent part:

From a legal standpoint, we believe that our obligations to provide compensatory education under the settlement agreement have been fulfilled for the following the reasons:

1. The main objectives of the IEP dated January 1993 have been met.

2. Compensatory education services have been provided to Marc Adams pursuant to the January, 1993 IEP for over two years.

3. Marc Adam's [sic] entitlement to special education services under the IDEA and/or state law does not extend any further as he is over the age of 21 and he has graduated from high school. App. at 263.

The letter went on to say that the State was willing to set up its own team to develop a "transition plan", but the Manchester School District no longer had any obligations under the IDEA. The letter made clear that the establishment of a "transition" plan was contingent upon Adams' agreeing that it would not extend beyond programs and courses currently available at the prison. A comparison between the terms of this letter and the settlement IEP makes clear that the benefits secured by Adams could not and would not have been accomplished without this litigation.

The other pertinent observation made by the district court was that the situation could have been resolved "amicably in 1993" if Adams had not "interpose[d] what was an undeniably an unreasonable condition of settlement (i.e., full implementation of an unmodified IEP while he was in SHU)." Add. at 15. The first answer to this observation is that there is not a shred of evidence to support the alleged interposing of any settlement conditions. The district court appears to be assuming that the position taken by Adams on remedy in argument before the administrative hearing officer was identical with his settlement position. But Adams never took the position that he would not settle unless he received full implementation of an unmodified

IEP while he was in SHU. As outlined above, the settlement discussions never reached that point, because the State was never willing to engage in them at least until 1994, by which time Adams was no longer in SHU. Any statement, therefore, about what Adams' position would have been had settlement discussions been possible in 1993, is pure speculation which has no foundation in the record.

V. THE DISTRICT COURT ERRED IN CLAIMING THAT ADAMS TOOK AN UNREASONABLE POSITION

As addressed in the prior subheading, the district court's opinion attributed to Adams a settlement position he never took. It also condemns his position in the litigation as being unreasonable based upon a mischaracterization of that position. First, the court in its fees opinion described the issue on the cross motions for summary judgment as being "whether the prison administration's legitimate security and penological concerns had to yield to the provisions of Adams IEP." Add. 10. Adams took the position that the prison's legitimate interests could be reconciled with his IEP so that neither had to yield to the other. No factual determination was made on this point by the court because the case settled prior to trial. Although the court vacated the administrative remedy decision based on its conclusion that it gave insufficient deference to the prison's security interest, it did not conduct its own fact finding, and could not rely on the transcript of the administrative record which it accurately considered to be defective. App. 79, n.5.

Adams took the position that notwithstanding his transfer to SHU, he was still entitled to delivery of services under his IEP. However, he did not insist on being able to remain in the same programs at the Prison's Adult Education Center which he had participated in while he was in the general population. Rather, his position was that if that were not feasible then it was the responsibility of the prison to provide programs within SHU to meet his IEP. App. 175, ¶ 8. The district court's decision on summary judgment neither decided what level of services Adams was entitled to at SHU nor did it criticize the position that he took on the motion.

The fact that the district court did not adopt Adams' position on remedy does not mean that he was unreasonable. After this litigation, effective June 4, 1997, Congress amended the IDEA to state that a prisoner's IEP may be modified if the prison demonstrates a "bona fide security or compelling penological interest that cannot otherwise be accommodated." 20 U.S.C. §1414(d)(6)(B). As the district court itself observed in its ruling on the State's Motion for Summary Judgment, the balancing of the inmate's rights under the IDEA with the Prison's security interest was a "difficult question". App. 78. Further complicating the case was that the prior IEP, which was not being carried out, had been prepared after Adams was incarcerated and was incorporated into a settlement agreement that was arguably a contract between the parties.

It appears that the district court is taking the position

that because it vacated the administrative orders initiated by Adams' due process request, it would be "unreasonable" for Adams to recover his fees when so little of the litigation ostensibly contributed to his benefit. This argument, however, should not lead to the conclusion that Adams is not entitled to fees. If it were accurate, it would be a factor to take into account in determining how much of his fees Adams was entitled to, an issue not involved in this appeal. As this court has stated: "the degree of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all." Williams v. Hanover Housing Authority, 113 F.3d 1294, 1302, n.14 (1st Cir. 1997), quoting from, Texas State Teachers Association v. Garland Indep. School Dist., 489 U.S. 782, 790 (1989) Furthermore, the fact that a particular claim fails does not mean that the time spent on it should not be compensable:

Even if the specific claim fails, the time spent on this claim may be compensable, in full or in part, if it contributed to the success of other claims. . . . [Time] spent on a losing stage of litigation contributes to success because it constitutes a step towards victory. Cabrales v. County of Los Angeles, 935 F.2d 150, 152 (9th Cir. 1991).

As the Court stated in Hensley v. Eckerhart, 461 U.S. 424, 440 (1983):

Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorneys' fee reduced simply because the district court did not adopt each contention raised.

In this matter, the State placed the question of compensatory education at issue in its appeal. The defendant had to contest

the State's motion in order to preserve his claim. Although the district court found in the State's favor insofar as it vacated the orders of the hearing officer, the fact that it did not reverse his findings on the violation of Adams' right to a FAPE at SHU and Adams' right to compensatory education was critical to the relief the defendant ultimately secured.

Finally, even if Adams' position had been unreasonable, the governing law is that an otherwise eligible fee petition should not be denied unless there was "outrageous" or "inexcusable" conduct by the plaintiff or his counsel, Williams v. Hanover Housing Authority. 113 F.3d 1294, 1300 (1st Cir. 1997). That is not alleged here.

VI. CONCLUSION

Appellant respectfully requests that the district court order denying fees be vacated and the case be remanded to the district court for a determination of the amount of fees to be awarded.

Respectfully Submitted,

MARC ADAMS
By His Attorneys,

BACKUS, MEYER, SOLOMON,
ROOD & BRANCH

Date: _____

4/30/98

By: _____

Jon Meyer, Esquire
116 Lowell St., P. O. Box 516
Manchester, NH 03105
(603) 668-7272

and

Peter Smith, Esquire
DISABILITIES RIGHTS CENTER
18 Low Ave., P. O. Box 3660
Concord, NH 03302
(603) 228-0432

CERTIFICATION OF SERVICE

I hereby certify that two copies of the foregoing Brief was
this day mailed to Nancy Smith, Esquire.

Date: 4/5/98 By: 
Jon Meyer, Esquire

ADDENDUM

J.S. DISTRICT COURT
DISTRICT OF N.H.
FILED

JAN 22 1998

JAN 21 2 59 PM '98

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

State of New Hampshire
Department of Education and
Department of Corrections,
Plaintiffs

v.

Civil No. 94-573-M

Marc Adams and
Manchester School District,
Defendants

O R D E R

In November of 1994, the New Hampshire Department of Education and the New Hampshire Department of Corrections (collectively, the "State"), filed this civil action, appealing a final administrative order issued pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq. Defendants, the City of Manchester School District (the "School District") and Marc Adams, responded, seeking an order affirming both the preliminary and final administrative orders issued by the hearing officer.

In March of 1996, the court granted, in part, the State's motion for summary judgment and vacated the hearing officer's orders dated July 14 and October 6, 1994. The court then denied

the School District's motion for summary judgment and Adams' motion to dismiss. Subsequently, the parties resolved their remaining differences and executed a settlement agreement. Claiming to have been the "prevailing party," Adams now moves for an award of attorneys' fees of approximately \$100,000 and costs of roughly \$6,000.

Legal Standard

That portion of the IDEA under which Adams seeks attorneys' fees provides:

In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

20 U.S.C. § 1415(e)(4)(B) (emphasis supplied). Such fees may be recovered for legal services provided at both the administrative and appellate levels. See Burpee v. Manchester School Dist., 661 F. Supp. 731, 732 (D.N.H. 1987).

Although the Court of Appeals for the First Circuit has yet to address the issue, several other circuits have held that the phrase "prevailing party" has the same meaning under the IDEA as it does under 42 U.S.C. § 1988. See, e.g., Combs v. School Bd.

of Rockingham County, 15 F.3d 357, 360 (4th Cir. 1994) ("The term 'prevailing party' connotes the same general meaning under § 1415(e)(4)(B) and 42 U.S.C. § 1988, and cases interpreting both sections apply the same principles to determine a plaintiff's entitlement to attorney's fees."); see also, Beard v. Teska, 31 F.3d 942, 950 (10th Cir. 1994); Borengasser v. Arkansas State Bd. of Educ., 996 F.2d 196, 199 (8th Cir. 1993); Krichinski v. Knox County Schools, 963 F.2d 847, 849 (6th Cir. 1992); Wheeler v. Towanda Area School Dist., 950 F.2d 128, 132 (3rd Cir. 1991); Barlow-Gresham Union High School Dist., v. Mitchell, 940 F.2d 1280, 1284 (9th Cir. 1991); Angela L. v. Pasadena Indep. School Dist., 918 F.2d 1188, 1193 (5th Cir. 1990).

In Farrar v. Hobby, 506 U.S. 103 (1992), the Supreme Court described a "prevailing party," in the context of section 1988, as follows:

[A] plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Id. at 111-12. (emphasis supplied). Accordingly, the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner

which Congress sought to promote in the fees statute." Texas Teachers' Assoc. v. Garland School Dist., 489 U.S. 782, 792-93 (1989). Success on any significant issue in the litigation which achieves some of the benefit sought in bringing the action is sufficient to qualify the recipient of the benefit as a "prevailing party." Id. at 791-92 (citing Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)).

If the court finds that an award of attorneys' fees is justified under the statute, it must then determine whether the sum requested is reasonable. "Whether an award of attorney's fees is reasonable depends, in part, upon the degree of success obtained by the plaintiff." Urban v. Jefferson Cty. School Dist., 89 F.3d 720, 729 (10th Cir. 1996) (citing Hensley v. Eckerhart, 461 U.S. 424, 436 (1983)). In fact, there are certainly circumstances under which a party who technically prevails, "should receive no attorney's fees at all." Farrar, 506 U.S. at 115.

Background

The factual background to this litigation is set forth in detail in the court's orders dated March 21, 1996, and April 17, 1997. The facts pertinent to the instant dispute are as follows.

In 1991 Adams pled guilty to a charge of manslaughter in connection with the death of a three year old girl. He was sentenced to a term of 15 to 30 years in the New Hampshire State Prison, where he is currently incarcerated. In February of 1992, Adams requested a due process hearing under the IDEA, asserting that he was entitled to, but was not receiving, a free and appropriate public education in the prison. Prior to the due process hearing, however, the parties executed a settlement agreement, which the hearing officer then entered as his final order (the "Stipulated Order"). That order provided that the School District (with input from the State) would develop an Individualized Education Plan ("IEP") for Adams for each year of a two-year compensatory education program and that the State would implement the IEP at the prison. Accordingly, all parties agreed that Adams was entitled to, and would in fact receive, a free and appropriate public education while in the State's custody.

Due to his own misbehavior and failure to comply with prison regulations, however, Adams was periodically confined to the prison's Secure Housing Unit ("SHU" or "C-5"), which precluded the State from fully implementing the IEP as written. Adams and the School District then requested another due process hearing,

at which they argued that the State had breached the terms of the Stipulated Order by failing to implement the IEP as written, notwithstanding the substantial changes in circumstances surrounding Adams' incarceration. The State objected, claiming that Adams' IEP had to be modified to take into account his periodic misbehavior and the necessity of housing him in SHU. The hearings officer framed the issues presented to him as follows:

Mar[c] A. seeks additional compensatory education and seeks an order from the Hearing Officer requiring the State Department of Corrections and the State Department of Education to implement the IEP as written. On behalf of the Department of Education, Attorney Nancy Smith argued that . . . invalid prison regulations justify a need to change the IEP so as to provide for essentially a different educational component when Mark A. is in the C-5 classification. The Department of Corrections had been providing five hours per week of tutoring and that has now been reduced to 3½ hours per week due to completion of certain courses by Mark A. Essentially the Department of Corrections argues that alternative IEPs need to be developed depending on Mark's classification and therefore his placement within the prison.

The real issue presented in this case is whether a Hearing Officer can order the Department of Corrections to allow Mark A. to attend classes in other parts of the prison campus while he is classified C-5. Mark A. argues that he should be allowed to do so in order to receive a Free Appropriate Public Education. The Department of Corrections argues that prison regulations and safety of other prisoners require that alternative IEPs be developed so as to take into account Mark's actual placement within the prison system.

Pre-Hearing Order at 2-3 (February 8, 1994) (emphasis supplied). Thus, the issue was not whether Adams was entitled to compensatory education. Rather, the question was how that compensatory education would be delivered to him. The hearing officer agreed with Adams' position and, among other things, ordered the State to implement Adams' IEP, without regard to his prison security classification and notwithstanding the fact that he might periodically be confined to SHU.

The State appealed the hearing officer's decision to this court, which noted:

The issue presented in this case is not whether Adams is entitled to a free and appropriate education while incarcerated at the New Hampshire State Prison; it is clear (and the State does not dispute) that he is. Rather, the issue is whether Adams is entitled to the specific educational program described in the IEP developed in early 1993, which, as construed by the hearing officer, calls for 5.25 hours of daily instruction, whether Adams' misbehavior causes him to be reclassified to C-5 status and confined in SHU from time to time or not.

N.H. Dept. of Educ. v. Adams, No. 94-573-M, slip op. at 16 (D.N.H. March 21, 1996) (emphasis in original). Again, it is clear from the record that what was not in dispute was whether Adams was entitled to a free appropriate public education while

in the custody of the State. All parties agreed that he was. The court then concluded that Adams was not entitled to full implementation of the IEP to the extent that it conflicted with the State's legitimate penological and/or security concerns. Accordingly, the court vacated the hearing officer's administrative orders to the contrary.

At that point, the issue presented to this court had been resolved in favor of the State and against Adams. To the extent that Adams' IEP could not be fully implemented, the parties were left to formulate a new one, which took into proper account not only Adams' educational needs, but also the State's legitimate penological and security concerns. With that, the court afforded the parties an opportunity to resolve the dispute without further court intervention. The court also indicated that, should the parties be unwilling or unable to settle that matter amicably, it was equally willing to appoint an expert and/or master to recommend an appropriate IEP for Adams, taking into account the need to strike a reasonable balance between the prison's legitimate penological interests and Adams' entitlement to a free and appropriate public education.

The parties opted for the former alternative, reached an agreement, and formulated a new IEP for Adams. Consistent with the court's order, the revised IEP, unlike its predecessor, acknowledges the State's authority to discipline Adams for reasons related to legitimate security and penological concerns, notwithstanding some possibly inconsistent provision(s) in his IEP.

Discussion

Despite the fact that this court vacated the hearing officer's administrative orders (which Adams sought to affirm), and the parties have negotiated a revised IEP which expressly acknowledges that the State's legitimate security interests are not subordinate to Adams' right to a free and appropriate public education (contrary to Adams' earlier position), Adams claims that he "prevailed" in this litigation and should be awarded approximately \$100,000.00 in attorneys' fees. The court disagrees.

I. The Conflict Between Adams' IEP and Legitimate Prison Regulations and Security Concerns.

As noted above, the issue presented on appeal to this court was whether the State breached the terms of the Stipulated Order

by failing to provide Adams with 5.25 hours of educational training each day he was confined in SHU. Stated more broadly, the question was whether the prison administration's legitimate security and penological concerns had to yield to the provisions of Adams' IEP. The court held that they did not. In short, the court rejected the position advocated by Adams and adopted that advanced by the State. In no sense was Adams a "prevailing party" with regard to the basic legal issue presented to this court.

That Adams subsequently negotiated a new IEP with the State and secured a plan under which he would receive two years of compensatory education (which, following the entry of the Stipulated Order, the State had agreed to provide) does not transform him into a prevailing party. The dispute resolution mechanism envisioned by the IDEA calls for precisely that type of cooperative effort aimed at providing a free appropriate public education to a child in a manner that is acceptable to all concerned parties. Simply because Adams is satisfied with the product of that subsequent negotiation does not entitle him to attorneys' fees generated during the course of litigation in which he was, without any doubt, not the prevailing party.

Here, once the court intervened and removed the sole obstacle to a negotiated IEP — Adams' steadfast refusal to agree that his IEP must, under certain circumstances, yield when in conflict with legitimate prison security regulations — an agreed resolution soon followed. In light of those circumstances, it would be entirely inappropriate to award Adams' the substantial fees which were generated in the course of litigating the issue: (1) which he interposed as the impediment to any negotiated resolution; and (2) with regard to which the State, and not he, ultimately prevailed. As the Court of Appeals for the Fourth Circuit has observed:

While [the child] is free to resort to administrative and judicial action, he cannot expect to recover fees and costs when his efforts contributed nothing to the final resolution of a problem that could have been achieved without resort to administrative or legal process.

Under these circumstances, it would be inappropriate for [the child] to recover attorneys' fees. Allowing such an award would encourage potential litigants and their attorneys to pursue legal claims prior to attempting a simpler resolution and would discourage the school from taking any action whatsoever, particularly any favorable change in a child's IEP, once an administrative proceeding or lawsuit was underway for fear that any action on its part would give rise to a claim by the plaintiff that he prevailed and that attorneys' fees are in order. We are not prepared to disorder the careful construct of the IDEA in this manner.

Combs, 15 F.3d at 364. See also Chad L. v. Manchester, No. 94-498-M, slip op. at 14-15 (D.N.H. July 20, 1995) ("sound discretion obviously militates against awarding fees where timely, nonadversarial, productive, and cost-effective means of exploring and deciding issues related to the best educational alternatives for a child are available, but have been shunned").

Like the situations presented in Combs and Chad L., this case is one in which it would be entirely inappropriate for Adams' to recover the substantial attorney's fees generated in the course of litigating his meritless efforts to have the State deliver his IEP without modification, notwithstanding its periodic conflict with legitimate security regulations and penological concerns. It is inconceivable that Congress intended federal courts to award attorney's fees to an individual who has created the sole obstacle to settlement, litigated and ultimately lost with regard to that issue (and, in the process, generated sizeable attorney's fees), and then, with that obstacle having been judicially removed, reached agreement on an appropriate educational plan in the usual course of discussion anticipated by the IDEA.

II. Two Years of Compensatory Education.

Adams readily concedes that he was not the prevailing party with regard to his claim concerning the delivery educational services while he was classified as a C-5 inmate or otherwise housed in SHU. Nevertheless, he claims that because this court did not "reverse" the hearing officer's conclusion that he was entitled to an additional two years of compensatory education (a point which was not addressed by the court, but which the State conceded in its settlement of this case), he is a "prevailing party," entitled to an award of attorneys' fees. Adams' victory on that front can be fairly described as comparatively de minimis. To be sure, however, it did yield a tangible (if modest) result: because Adams' two years of compensatory education were periodically interrupted by his confinement in SHU, the State agreed to "reset the clock" and provide him with an additional two years of compensatory education.

It determining the overall reasonableness of Adams' request for attorney's fees, it is important to understand the context in which the State made its "concession" concerning the additional two years of compensatory education. It appears that the State only seriously contended that it had already delivered all of the educational services to which Adams was entitled after it became

clear that Adams refused to yield on his demand for full implementation of his IEP even while he was in SHU, and after the hearing officer had ordered the State to deliver those services called for in the IEP, as written, regardless of Adams' confinement to the high security section. See, e.g., Letter from Attorney Nancy Smith to Attorney Peter Smith, dated February 10, 1995. Prior to that, the State simply argued that Adams' IEP should be modified, so that it could be implemented in a reasonable way if he were again confined to SHU. See, e.g., Pre-Hearing Order at 3 (February 8, 1994); State of New Hampshire's Proposed Findings of Fact and Conclusions of Law at 6 (dated 9/19/94). And, even after adopting the view (as an alternate theory of its case) that it had already delivered to Adams all the education that was required under the Settlement Order, the State continued to focus primarily upon its claim that, while it was willing to continue to deliver educational services to Adams, his IEP had to be modified to account for his periodic confinement in SHU. Presented with what was a patently unreasonable demand from Adams, the State seems to have asserted the parrying view that his claims were moot because he was no longer entitled to any compensatory education. Viewed in context, the State's position was neither surprising nor unreasonable.

Adams was not a "prevailing party" because the settlement reached between the parties neither "materially altered" the nature of their legal relationship nor did it compel the State to modify its behavior in a way that directly benefitted Adams. See Farrar, 506 U.S. at 11; Texas Teachers' Assoc., 489 U.S. at 792-93. Adams obtained nothing in the parties' recent settlement agreement that he would not have obtained had he made a reasonable effort to resolve this situation amicably in 1993, rather than: (1) invoke the administrative remedies available under the IDEA; and (2) interpose what was undeniably an unreasonable condition of settlement (i.e., full implementation of an unmodified IEP while he was in SHU).

In the exercise of its discretion (and considering that but for Adams' steadfast refusal to yield on the main issue, on which the State did completely prevail, the parties could have and likely would have negotiated an acceptable resolution to this matter long ago and as contemplated by the IDEA, with no need of administrative or other adjudicatory processes) the court holds that no award of attorneys' fees is appropriate in this case, and declines to award any amount.

Conclusion

The legal issue presented in this matter was resolved in favor of the State and against Adams. Accordingly, the costs and fees in excess of \$100,000 which were generated in the course of researching and advancing Adams' position on that issue are not recoverable under the IDEA. Simply because Adams subsequently negotiated a revised IEP with which he is now satisfied does not entitle him to recover the substantial sums which were expended in what was a meritless effort to force the State to subordinate its penological interests to his IEP as written, notwithstanding obvious conflicts with the prison's legitimate security and operational goals.¹ Those subsequent negotiations could have (and, indeed, probably should have) occurred without resort to administrative or judicial proceedings.

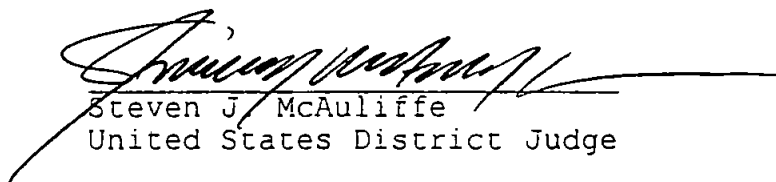
¹ Effective June 4, 1997, Congress amended the provisions of the IDEA to make clear that, as this court previously held, the delivery of educational services under the IDEA must yield when it conflicts with a prison's legitimate security and penological concerns:

If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections 1412(a)(5)(A) of this title and 1414(d)(1)(A) of this title if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

20 U.S.C. § 1414(d)(6)(B).

Adams' motion for attorneys' fees and costs (document no. 53) is denied. The Clerk of the Court is instructed to close the case.

SO ORDERED.


Steven J. McAuliffe
United States District Judge

January 21, 1998

cc: Nancy J. Smith, Esq.
Peter S. Smith, Esq.
H. Jonathan Meyer, Esq.
Dean B. Eggert, Esq.