UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No. 98-1244

State of New Hampshire, et al.
Plaintiffs - Appellees

v.

Marc Adams, et al.
Defendants - Appellants

On Appeal from the United States District Court
for the District of New Hampshire

BRIEF FOR APPELLEES

STATE OF NEW HAMPSHIRE,
DEPARTMENT OF CORRECTIONS &
DEPARTMENT OF EDUCATION

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May 29, 1998

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October 23, 1998

Phoebe Morse, Clerk
United States Court of Appeals
For The First Circuit
United States Courthouse
1 Courthouse Way, Ste 2500
Boston, MA 02210

Re: State V. Adams, et al.
Docket # 98-1244

Dear Ms. Morse:

I am writing at this time to correct an inadvertent error in the State's Brief in the above referenced matter. On page 9 the reference to App. pp. 119-126 should be changed to App. pp. 140-148.

Very truly yours,

Nancy J. Smith
Assistant Attorney General
Civil Bureau

NJS/syl

97231.doc

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May 29, 1998

Phoebe Morse, Clerk
U.S. Court of Appeals
for the First Circuit
1606 John W. McCormack Post Office
& Courthouse
90 Devonshire Street
Boston, MA 02109-4590

Re: State of New Hampshire, et al. v. Marc Adams, et al.;
Docket No. 98-1244

Dear Ms. Morse:

Enclosed you will find an original and nine (9) copies of Appellees' Brief and pursuant to Rule 31.1 you will also find a 3 1/2" disk for filing in the above-referenced matter. Also enclosed is an original and three (3) copies of Appellees' Motion for Leave to File Supplemental Appendix Along With Brief and an original and four (4) copies of Appellees' Supplemental Appendix.

Very truly yours,

Nancy J. Smith
Assistant Attorney General
Civil Bureau

NJS/lllt
Enclosure
cc: Jon Meyer, Esquire
cc: Peter Smith, Esquire
cc: Dean Eggert, Esquire
83974_1.DOC

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April 30, 1998

BY HAND

Phoebe Morse, Clerk
United States Court of
Appeals for the First Circuit
1606 John W. McCormack Post Office
& Courthouse
Boston, Massachusetts 02109

RE: State of New Hampshire, et al v. Marc Adams, Appellant
Appeal No. 98-1244

Dear Ms. Morse:

I enclose herewith original and eight copies of joint Brief of Appellant filed on behalf of Marc Adams. I also enclose one original copy of Brief on 3½ inch diskette and original and four copies of Appendix.

Counsel for State of New Hampshire is being sent two copies of Brief and one Appendix, along with a copy of this letter.

Yours truly,

Jon Meyer
JM/skp

Enc.

cc: Nancy Smith, Esquire

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STATEMENT OF ISSUE

Whether the district court committed clear error or an abuse of discretion in determining that Adams was not a prevailing party and was not entitled to attorney fees.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Appellees do not dispute the Appellants' statement of subject matter and appellate jurisdiction except to further state that the district court had jurisdiction over the request for fees under 20 U.S.C. § 1415(e)(4)(B).

STATEMENT OF THE CASE

This is an appeal from the denial of Adams' motion for attorney fees and costs following entry of judgment by the district court. The parties had negotiated a voluntary IEP following the district court's granting of the State's motion for summary judgment vacating underlying administrative hearing orders.

The action before the district court was an appeal by the State from administrative due process hearing orders entered on July 14 and October 6, 1994 in an administrative due process hearing brought by Marc Adams (hereinafter "Adams") and the City of Manchester School District (hereinafter "Manchester"). The administrative due process hearing was necessitated by and centered on the refusal of Manchester and Adams to agree that the individualized education plan (hereinafter "IEP") that had been written by Manchester as a result of a settlement of an earlier due process claim[1] be altered in any way to conform to the safety and security rules and regulations of the prison, particularly in regards to the Secure Housing Unit (hereinafter "SHU") following a reclassification of Adams.

Prior to institution of the due process, (Supp. App. p. 3) throughout the due process hearing and during the appeal to district court Adams has consistently and

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[1] The consent order did not state that the two year period began on February 4, 1993. Therefore Appellants representations in their brief that the two year period of compensatory education necessarily ran from 1993 to 1995 is incorrect. The consent order stated that the two year period would begin on implementation of the IEP. App. p. 273.

vigorously maintained the position that changes in classification, housing and resultant limitations on movement within the prison for safety and security reasons cannot in any way alter the provisions of a pre-existing individualized education plan which was devised solely for an inmate in the general population. App. pp. 2, 5-6, 9, 295-96.

Adams is incarcerated as a result of a 1991 plea to a charge of manslaughter in connection with the death of a three year old girl. He is 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 and not receiving a free appropriate public education (hereinafter "FAPE") in the prison. The parties entered into a consent order which was approved by the hearing officer dated December 16, 1992 (App. pp. 14-17) which required the development of an IEP. At the time IEP was developed in February of 1993 Adams was classified as a C-4 inmate which allowed him to attend classes in the education center. As noted by the court, the State agreed that Adams was entitled to, and would in fact receive, a free and appropriate public education while in the State's custody. App. pp. 288-289.[2]

Due to misbehavior and failure to comply with prison regulations, Adams received multiple disciplinary violations which resulted in periodic confinement in SHU and ultimate reclassification to C-5 status and housing in SHU for a period of

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[2] The State and Manchester paid attorney fees to Adams counsel in regards to that first due process request which was resolved by the December 16, 1992 consent order. Supp. App. pp. 21-22.

time which precluded the State from fully implementing the February, 1993 IEP which required attendance at classes in the general education center. There was substantial testimony at the due process hearing that security and safety regulations require that inmates housed in SHU not mingle with the general population and that group classes within SHU are not practical or feasible for security and safety reasons. App. p. 75.

While housed in SHU the State did not simply discontinue educational services to Adams. Rather, they continued him in all classes which were possible via correspondence, continued counseling services in SHU and requested that Manchester schedule an IEP meeting to revise the IEP due to the change in security classification. Supp. App. pp. 5-9. Although Manchester failed to schedule an IEP meeting or attend the meeting prison staff set up, the prison met with Adams and his counsel to discuss possible modifications. Supp. App. p. 2. Adams demand at that time was that he be allowed to attend classes in the education center. Supp. App. p. 3. Following the warden's refusal to waive applicable security and safety regulations, Adams instituted the due process proceeding which resulted in nine days of administrative hearing preceded by a pretrial hearing conference on February 7, 1994 and concluding with an order on October 6, 1994. As indicated in Adams Brief, p. 3, Adams requested that either the educational services as provided in his IEP be delivered to him in SHU or that he be permitted to attend classes with the general population. In other words, Adams steadfastly maintained as his primary objective throughout the underlying administrative hearing that the change in classification could not result in modification

of the services provided under his IEP. The State maintained that either alternative would have been contrary to prison safety and security regulations and would have compromised the safety and security concerns of the prison.

The hearing officer framed the issues presented to him was

> "Marc A. seeks additional compensatory education and seeks an order from the hearing officer requiring the State Department of Corrections and State Department of Education to implement the IEP as written. On behalf of the Department of Education, Attorney Nancy Smith argued . . . that alternative IEP's need to be developed depending on Marc'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 Marc A. to attend classes in other parts of the prison campus while he was classified C-5. Marc A. argues that he should be allowed to do so in order to receive a free appropriate public education. The Department of Corrections argues the prison regulations and safety of other prisoners require that alternative IEPs be developed so as to take into account Marc's actual placement within the prison system. Prehearing order at 2-3 (February 8, 1984)." App. p. 287.

As noted by the district court, the issue is not whether Adams is entitled to compensatory education. Rather, the question is how that compensatory education would be delivered to him. App. p. 288.

The order dated March 21, 1996 found that the hearing officer totally ignored security issues in ordering that, because the IEP had not been implemented as written[3]

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[3] In fact the issue of whether the IEP had been implemented as written in SHU was never a disputed factual issue.

that a FAPE was denied. App. p. 74. The hearing officer's second order in October of 1996 required that Adams be allowed, despite prison security regulations, to attend classes in the education center outside of SHU or alternatively that classes be held within SHU despite the testimony that such was not possible due to security reasons with mixing violent inmates and the non-feasibility of technical options. App. p. 75.

During the pendency of the administrative hearing, the State did not keep Adams in SHU when he was eligible for reduced classification. During Adams stay in SHU, services were continued although not at the same level described in the 1993 IEP. As soon as Adams obtained reduced custody, he was reintegrated into the education center program and the counseling called for under the 1993 IEP continued to be offered. All inmates, regardless of age or handicap are entitled to participate in the educational programs within the prison to the extent that they are eligible to do so depending on the classification status. App. p. 261.

Despite Adams position in this appeal that he no longer cared about whether or not the IEP could be changed depending on security classification and that his only interest was additional compensatory education, this position was never articulated during the administrative due process hearing. At no point in time during the administrative due process hearing did Adams or his counsel inform the hearing officer that the issues had changed. At no time did Adams or his counsel advise the hearing officer that the only issue remaining to be resolved was whether Adams was entitled to some additional period of compensatory education.

The State appealed the hearing officer's orders dated July 14th and October 6, 1994 to the district court. As noted in the United States District Court pretrial order dated March 2, 1995 the question of law in this appeal was the apparent conflict between the requirements of IDEA and prison disciplinary and security interests. Supp. App. p. 10.

In September of 1995 Manchester and Adams filed a joint motion for summary judgment. The State objected to this motion for summary judgment and filed a cross motion for summary judgment. Both Manchester and Adams filed objections to the State's cross motion for summary judgment. By order dated March 21, 1996 the district court denied Manchester and Adams' motions for summary judgment and granted the State's motion for summary judgment vacating the hearing officer's orders, stating that legitimate prison interests must be accorded significant deference and the IEP must be modified to the extent possible. App. pp. 67-93. Furthermore, the court stated "at this juncture, no award of attorneys fees is appropriate, see 20 U.S.C. § 1415(e)(4)(B), and each party shall bear its own costs and fees associated with pursuing this matter." App. p. 93.

In compliance with the court's directive that the parties make a good faith effort to negotiate a new IEP and settlement of any remaining issues (App. p. 92), the parties met repeatedly. The revised IEP, unlike its predecessor, acknowledges the State's authority to discipline Adams for reasons related to legitimate security and penalogical concerns, notwithstanding any provisions in his IEP. It further specifically

mandates that the IEP is to be revised and modified as is necessary depending upon changes in classification. App. pp. 119-126.

Thereafter Manchester filed a motion for award of attorneys fees claiming to have been a "prevailing party." While recognizing that school districts are not entitled to fees under the IDEA, Manchester sought fees under several other theories which would also require them to have been a prevailing party. In determining that Manchester was not eligible for prevailing party status the court reviewed the position taken by both Adams and Manchester in the due process hearing and found that it was not reasonable. App. pp. 149-155.

SUMMARY OF ARGUMENT

Appellant concedes that the district court applied the proper standard in determining whether or not Adams was a "prevailing party." Therefore the standard of review is a clearly erroneous or abuse of discretion standard.

The district court's conclusions regarding the issues involved in the administrative hearing were not clearly erroneous nor is there any abuse of discretion in the district court's conclusion that the positions taken by Manchester and Adams throughout the underlying litigation were patently unreasonable and meritless. The court's decision granting summary judgment to the State did not alter the legal relationship between the State and Adams to Adams benefit nor did it order any specific relief for him which he had sought. The subsequent agreement by the State to an IEP providing different goals than an earlier, no longer appropriate IEP, cannot be the basis for a finding that Adams was a prevailing party. Adams was not a catalyst to any general change by the State in its previous practices or policies and therefore cannot be a prevailing party under the catalyst theory.

ARGUMENT

I. Standard Of Review

The only issue subject to *de novo* review by the appellate court is whether the district court applied the correct legal standard in determining the question of "prevailing party" which is a question of law. Warner v. Independent School District No. 625, 134 F.3d 1333, 1337 (8th Cir. 1998). The Appellant has conceded that the district court applied the appropriate legal standard to determine "prevailing party." Appellant's Brief pp. 6 and 7. As noted by the district court, 20 U.S.C. § 1415(e)(4)(B) provides that the court in its discretion may award reasonable attorneys fees to a prevailing party.

The courts of numerous other jurisdictions have indicated that in the context of the IDEA, circuit court review of district court's decisions to award attorneys fees is reviewed for abuse of discretion. Payne v. Board of Education, Cleveland City Schools, 88 F.3d 392, 397 (6th Cir. 1996). The appellate court reviews the district court's determination whether to grant attorneys fees under the IDEA in a highly deferential manner and will reverse the district court's decision only for an abuse of discretion. An abuse of discretion is found only where reasonable persons could not take the view espoused by the district court. Monticello School District No. 25 v. George L., 102 F.3d 895, 907 (7th Cir. 1996). A district court's discretion as to the proper rate to award counsel should not be upset absent clear misapplication of legal principles, arbitrary fact-finding, or unprinciple disregard for the record evidence. Kattan v. District of Columbia, 995 F.2d 274, 278 (D.C. Cir. 1993). The refusal to

award attorneys fees under the IDEA is reviewed for abuse of discretion. Irvin v. Jefferson County School District R-1, 89 F.3d 720, 728 (10th Cir. 1996).

The First Circuit cases also suggest that this circuit's standard of review in this case is for abuse of discretion. In Caroline T. v. Hudson School District, 915 F.2d 752 (1st Cir. 1990) the court, in considering a request for injunctive relief on a special education case, stated that since injunctive relief, like the award for attorneys fees, is a discretionary remedy, the First Circuit reviews only to insure that the district court did not abuse its discretion in granting, or failing to grant, such relief. In Garrity v. Sununu, 752 F.2d 727, 735 (1984) where the district court judge gave consideration to the appropriate relevant legal standard, its judgment was entitled to stand absent an abuse of discretion. An abuse of discretion occurs when a relevant factor deserving of significant weight is overlooked, or where an improper factor is accorded significant weight, or when the court considers the appropriate factors, but commits a palpable error of judgment in calibrating the decisional scales. Murphy v. Timberlane Regional School District, 22 F.3d 1186, 1189-90 (1st Cir. 1994).

II. The District Court Did Not Abuse Its Discretion Or Commit Clear Error In Holding That Adams Was Not A Prevailing Party.

The issue of provision of a FAPE or the length of the period of compensatory education under the 1992 consent order have not been the issue in the underlying due process hearing or the appeal to district court. Appellant's statement that the two principle questions in controversy in this case are whether Adams right to a FAPE was violated while he was in SHU and if so what he was entitled to by way of remedy

ignores the fact that Adams right to a FAPE in SHU could only be violated if the State was obligated to implement the IEP without modification. Contrary to Adams statement, the district court never incorporated in its ruling, explicitly or by implication, any finding that Adams did not receive a FAPE while in SHU and was therefore entitled to additional compensatory education. In fact the court explicitly stated during the May 27, 1997 hearing on fees that Adams was wrong on his claim that he had been denied a FAPE while in SHU or at least that this issue was not decided. Supp. App. p. 31.

The fact that the State was willing to negotiate a new IEP at all and that the new IEP has different goals does not reflect Adams prevailing on any disputed issue. The fact that there are different goals in the new IEP is attributable solely to the passage of time. Because of the stay put provisions of the IDEA and because Adams is an inmate, he was entitled to and in fact continued to participate in education at the prison despite this litigation. Therefore he completed the requirements for a high school diploma while this litigation was pending. Adams is therefore seeking to penalize the State for doing the right thing and continuing to educate him while his claims were pending. The only way that an IEP with the same goals expressed in the 1993 IEP would have been reasonable in 1996 was if the State had stopped providing any services to Adams as soon as he filed the request for due process thereby "freezing" Adams at the point in his education were he was at the time the due process hearing was filed. Supp. App. pp. 20-25.

In Carrie v. Grasmick, 26 I.D.E.L.R. 21 (1997) Supp. App. pp. 12-15 the Fourth Circuit Court affirmed, without formal opinion, the district court's denial of an inmate's request for attorneys fees in a special education case, finding that the inmate had not been a prevailing party. Stating that the State must have "denied" the inmate something he requested before he can be a "prevailing party," the court pointed out that the State never disputed his right to special education services. Unlike a case where a school system found a student ineligible for services under the IDEA and later changed its position after a demand for a due process, the fact that the inmate had instituted a due process hearing after which the State provided him with services was not enough to make him a prevailing party for purposes of an award of attorneys fees.

The First Circuit Court has not addressed the issue of attorneys fees in the context of the IDEA. Therefore the district court correctly reviewed and relied on cases from other circuits in determining the standard to apply to whether or not Adams could be considered to be a prevailing party.

> "While [the child] is free to resort to administrative and judicial action, it cannot expect to recover fees and costs when his efforts contributed to 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 simple resolution and would discourage the school from taking any action whatsoever, particularly any favorable change in the child's IEP, once the 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 v. School Board of Rockingham County, 15 F.3d 357, 364 (4th Cir. 1994)." App. p. 292.

A Plaintiff must cross a statutory threshold of prevailing party status before a district court may consider awarding attorneys fees. The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties. Payne v. Board of Education, Cleveland City Schools, 88 F.3d 392, 397 (6th Cir. 1996); Jodlowski v. Valleyview Community Munich School District, 109 F.3d 1250, 1253 (7th Cir. 1997); Warner v. Independent School District No. 625, 134 F.3d 1333, 1336 (8th Cir. 1998); Urban v. Jefferson County School District R-1, 89 F.3d 720, 729 (10th Cir. 1996).

III. The District Court Did Not Abuse Its Discretion In Determining That Any Benefit To Adams Was Not Causally Related To The Position Adams Had Taken In This Litigation.

It is not enough that the State, as a result of a cost benefit analysis after having won the critical legal battle concerning whether an IEP must be implemented regardless of safety and security concerns, decided to agree to an IEP providing Adams with benefits that he may or may not have been entitled to. If this matter could have been resolved in 1993[4] while Adams was still working on his high school diploma, the relief in any new IEP would have been the same as in the 1993 IEP with the additional

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[4] Appellees are not stating that Adams or any other party was at fault in the length of time it took to resolve this matter.

provisions included in the 1996 IEP that the IEP was subject to modification if his classification status was changed.

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. Farrar v. Hobby, 506 U.S. 103, 112, 113 S.Ct. 566, 573, 121 L.Ed.2d 494 (1992); see also Urban, 89 F.3d at 729. As explained by the court in Warner, the benefit analysis, as well as the determination of whether a legal relationship was materially altered, is not the standard by which the court measures whether to award fees in the first place. Material alteration of the legal relationship or benefit is not a basis for awarding fees to a Plaintiff who does not prevail on the merits of any claim.

> "[T]he district court awarded attorneys fees because the hearing review officer's order 'materially altered the legal relationship of the parties.' That phrase indeed appears in the Supreme Court's prevailing parties decisions. But it is the standard by which the court measures how much relief on the merits is sufficient to justify at least a partial fee award; it is not a basis for awarding fees to a Plaintiff who did not prevail on the merits of any claim under the fee shifting statute in question. As the court explained in Farrar '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' (citation omitted)."

Warner v. Independent School District, 134 F.3d at 1336.

Even in cases where a "victory" was obtained by the parents that has altered the parties relationship in a beneficial manner thereby making them eligible to receive

attorneys fees, the circuit court has upheld the district court's refusal to award fees where the success was minimal. Farrar, 506 U.S. at 115, 113 S.Ct at 575. Here Adams success can be described in the same terms as the court used in Jodlowski; "mostly they lost." Under such circumstances the district court did not abuse its discretion in denying fees. Jodlowski, 109 F.3d at 1255.

A claim of prevailing party status can also not be braced simply on the results of the invocation of the stay put provision. As previously stated, the only reason the IEP negotiated 1996 contained a different benefit for Adams was the passage of time during which the State continued to provide services. "It is insufficient to show that but for the request for a hearing and the hearing itself, the school district would not have provided the child with special education services." Board of Education of Downers Grove Grade School District No. 58 v. Stephen L., 89 F.3d 464, 469 (7th Cir. 1996).

Regardless of whether the central issue of the due process proceeding appealed by the State now has no practical application to Adams because he has been in the general population for two years, the fact is that Adams continued to prosecute this issue vigorously throughout the due process hearing and the district court appeal even after he returned to the general population. It was this refusal to recognize that the IEP was subject to the legitimate penalogical concerns of the prison that necessitated the State's appeal of the hearing officer's orders. Adams belated attempt to cast this as a "technical" victory for the State defies the overwhelming majority of the testimony at the nine days of administrative hearings, the summary judgment motions and briefs

and the hearings before the district court. As the State pointed out to the district court at the hearing on Adams fee motion, the State is entitled to look at what it is going to cost to go to trial on the issue of whether or not Adams was still entitled to any additional compensatory education after it won the main issue. (Supp. App. pp. 32-33). A cost benefit analysis has nothing whatsoever to do with the merits of any claim advanced by Adams. As the district court pointed out, school districts or the State should not be put in a position where they will be penalized by finding that the other side is a prevailing party for making favorable change in a child's IEP after an administrative proceeding or lawsuit is underway. Combs, Id. 15 F.3d at 364.

IV. The District Court Did Not Abuse Its Discretion In Finding That Adams Position Was Patently Unreasonable And Meritless.

The March 21, 1996 district court order denying Manchester and Adams motion for summary judgment and vacating the hearing officer's orders while granting the State's cross motion for summary judgment stated

> "At the outset it should be recognized that the tail of Adams' IEP cannot wag the dog of his prison sentence, nor can it serve to exempt him from legitimate administrative and disciplinary systems in place within the prison. Stated somewhat differently, Adams is not entitled to an IEP which effectively insulates him from prison discipline and control, particularly if a different IEP could be developed which might serve both his educational needs and the prison's valid security and disciplinary interests, or at least one that did not undermine legitimate penalogical interests." App. p. 84.

The court went on to note that the administrative hearing officer made no effort at all to recognize or accommodate the State's legitimate penalogical interests. He

attempted to strike no balance between the competing penalogical interests and educational interests. Finally, the court stated that "at this juncture no award of attorneys fees is appropriate, see 20 U.S.C. § 1415(e)(4)(B) and each party shall bear its own costs and fees associated with pursuing this matter." App. p. 93. The court's language in this order left no room for doubt that Adams and Manchester's position in insisting that the IEP not be modified under any circumstances was not reasonable.

Despite this language, the City of Manchester, following negotiation of the new IEP in December of 1996, filed a summary judgment motion requesting attorneys fees claiming to have been a prevailing party. While Manchester's request was not under the IDEA, it would have still needed to be a prevailing party to get fees under the theories alleged. The court found that in no way, shape or form could either Adams or Manchester be considered a prevailing party in this litigation. App. p. 154.

Following these two orders in which the district court made it clear that it considered the position taken by Adams in the underlying due process hearing unreasonable and the State the prevailing party, Adams filed his request for attorneys fees. Adams sought attorney fees and costs of approximately $106,000 for the entire nine day due process hearing and appeal in district court as well as the negotiation of the 1996 IEP. The district court, after conducting its own detailed review of the record, App. pp. 67-75 determined that what was not in dispute was whether Adams was entitled to a FAPE while in the custody of the State. The court made its own reasonable determination that the issue presented on appeal and resolved in favor of

the State and against Adams was whether or not the IEP negotiated as a result of the first consent order had to be fully implemented regardless of the State's legitimate penalogical and security concerns.

Simply because Adams is satisfied with the product of subsequent negotiations does not entitle him for attorneys fees generated during the administrative hearing and litigation in which he was "without any doubt not the prevailing party." App. p. 291. The court did not err in determining that once it removed the obstacle of Adams steadfast refusal to agree that the IEP be modified, an agreed resolution soon followed. In review of Adams' position, the district court described Adams' position with the words "entirely inappropriate, inconceivable, *de minimus*, patently unreasonable, unreasonable condition, steadfast refusal, sole obstacle, undeniably unreasonable condition and meritless effort" making it clear that the court considered and rejected the characterization of events advanced by Adams in this appeal. Not only was Adams claim to be a prevailing party considered and rejected but the district court felt it was meritless.

Adams steadfastly maintained throughout the due process hearing and the district court hearing that no disciplinary action or change in classification could justify or require modification of his IEP. Adams' statements in this appeal ignore the district court's finding that the hearing officer's concluded that his IEP could not be accommodated within the confines of SHU in accordance with legitimate penalogical concerns. App. p. 75. Whether or not the transcription of the due process hearing

might be less than optimal,[5] it was never found to be defective and was appropriately relied on by the district court. As the district court pointed out, the subsequent reauthorization of the IDEA, 20 U.S.C. § 1414(b)(6)(B) makes explicit what the State's position had been all along, which is that a prisoner's IEP is subordinate to legitimate security and compelling penalogical interests.

A plaintiff cannot qualify as a prevailing party if the only basis for his claim of success on the merits is a judgment that has been reversed on appeal. Pottgen v. Missouri State High School Activities, 103 F.3d 720, 723-24 (8th Cir. 1997). Possible victories in what turns out to be a losing war do not create a right to attorney fees. An abuse of discretion is found only when reasonable persons could not take the view espoused by the district court. Monticello School District No. 25, Id. at 102 F.3d 907. As pointed out by the court in Monticello, although the Appellants did achieve a better program for their child with more personal attention, in view of what they were seeking, this achievement was *de minimus*. Id. at 908. Where the relief achieved is not mandated by the IDEA such relief cannot be the basis for a fee award. Warner v. Independent School District No. 625, 134 F.3d at 1336.

Likewise, Adams cannot argue that he is entitled to the prevailing party status on the catalyst theory. Adams cannot point to any significant changes that the State

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[5] Appellant has submitted, as part of the Appendix, part of a transcript with Adams' counsel's handwritten changes. These changes were never accepted and this is not the official record. The stenographer reviewed the tapes again and stood by the transcription without the changes by Adams' attorney. Supp. App. p. 34.

has made in its past practices or shown that this litigation was the catalyst for Defendants to make those changes. Payne v. Board of Education, Id. 88 F.3d at 397.[6]

CONCLUSION

In conclusion, Adams cannot point to any specific claim in which he prevailed. The district court used the proper legal standard to determine prevailing party status and cannot be said to have abused its discretion.

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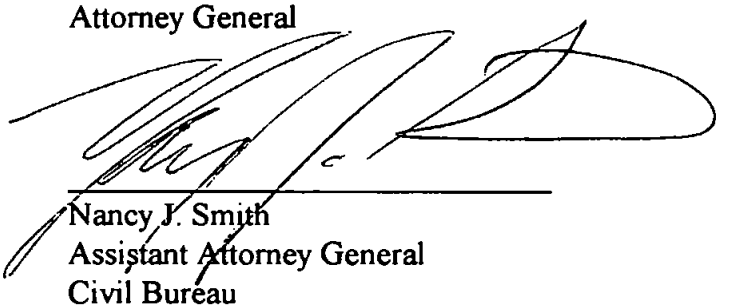
[6] It is not clear whether the catalyst test as the basis for establishing prevailing party status continues after Farrar. There is a split in the circuits regarding this matter. See Paine v. Board of Education, 88 F.3d at 397 footnote 2.

Respectfully submitted,

STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION
DEPARTMENT OF CORRECTIONS

By their attorneys,

Philip T. McLaughlin
Attorney General



Nancy J. Smith
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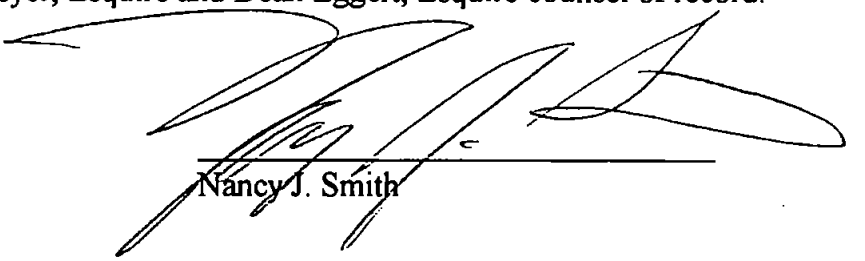
May 29, 1998

I hereby certify that a copy of the foregoing was mailed this day, postage prepaid, to Peter Smith, Esquire, Jon Meyer, Esquire and Dean Eggert, Esquire counsel of record.



Nancy J. Smith

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