IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

John Doe, *et al.*,	:	**Case No.: 2:91-cv-00464**
	:	
Plaintiffs,	:	**Judge: Michael H. Watson**
	:	
vs.,	:	**Magistrate Judge: Chelsey M. Vascura**
	:	
State of Ohio, *et al*.	:	
	:	
Defendants.	:	

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

Pursuant to Fed. R. Civ. Proc. 23(h) and 54(d), Plaintiffs move for an order granting $3 million in attorneys' fees and costs as the prevailing parties in this action. A memorandum in support is attached and incorporated by reference herein. Pursuant to the parties' agreement on attorneys' fees and costs, Defendants assent to the filing of this Motion.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This case began over two decades ago, when Plaintiffs sought to intervene on behalf of students with disabilities in a pending lawsuit on the adequacy of educational funding in Ohio. The central focus of the case is whether Defendants are meeting their obligations to provide a "free appropriate public education" (FAPE) under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*, and Section 504 of the Rehabilitation Act of 1973 ("Section 504").

IDEA requires that all students with disabilities "have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Section 504 requires "A recipient [of federal financial assistance] that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified [ ] person [with a disability] who is in the recipient's jurisdiction, regardless of the nature or severity of the person's [disability]." 34 C.F.R. § 104.33.

In 1996, the Court certified a class of: "All children, ages three through 21, currently enrolled or seeking enrollment, now or in the future, in Ohio's public school system, who have a disability . . . , and who require, as a result of their disability, special education and related services or accommodations that are designed to meet individual educational needs of students with disabilities as adequately as the needs of nondisabled children are met, and the parents or guardians of such children." Doc. 59 (entered on Feb. 20, 1996).

This case is one of the largest and most complex education cases in the nation, involving the State's system of supervision and support for special education, over 600 school districts, and

approximately 260,000 children with a variety of disabilities. It is far larger than other special education cases litigated or settled in recent years. *See, e.g., DL v. District of Columbia*, 267 F. Supp. 3d 55, 65 (D.D.C. 2017) ("[T]he class size numbered 2,886."); Civil Minutes: Preliminary Ruling on Motion for Class Certification, *Garcia v. Los Angeles Cnty. Sheriff's Dep't* (C.D. Cal. 2010) (2:09-cv-08943)[1] (approving certification for class estimated at "between 400 and 700")[2]; Order: Consent Judgement, *PB v. White* (E.D. La. 2015) (2:10-cv-04049) (approving settlement for class of students with disabilities for single school district); Order Certifying Class, *Chester Upland School Dist. v. Pennsylvania* (E.D. Pa. 2012) (2:12-cv-00132) (approving settlement for class including parents of students with disabilities in one single school district excluding charter school students).

The current phase of litigation began in October 2009, after the parties entered into a limited Consent Decree.[3] After nine years of litigation, Plaintiffs and Defendants settled the case with a comprehensive, outcome-focused settlement that will benefit Ohio's students with disabilities.[4]

The parties also agreed that, instead of litigating Plaintiffs' fees and costs before the Court, they would present the matter to the Mediator, and seek the Mediator's determination of the fees and costs Plaintiffs should recover. Plaintiffs sought an award of attorneys' fees in the amount of $5,782,214.46, including compensation for 11,614.85 hours of attorney time and

[1] Cases not available on WestLaw can be provided.
[2] Civil Minutes: Court Order on Motion for Class Certification, Garcia v. Los Angeles Cnty. Sheriff's Dep't (C.D. Cal 2010) (2:09-cv-08943) (final order for class certification); Order Granting Plaintiffs' Motion for Final Approval of Class Action Settlement and Motion for Attorneys Fees, *Garcia v. Los Angeles Cnty. Sheriff's Dep't* (C.D. Cal. 2015) (2:09-cv-08943) (order approving settlement).
[3] Plaintiffs could seek fees for time spent prior to this date, but are not.
[4] Plaintiffs refer to the Joint Motion for Preliminary Approval (Doc. 584) for a description of the Settlement Agreement's terms.

4,305.6 hours for paralegals including skilled educational advocates.[5] Plaintiffs also sought $612,021.18 as compensation for costs[6] for a total of $6,394,235.64. Plaintiffs submitted to Defendants and the Mediator a fee petition describing how Plaintiffs arrived at these figures as well as detailed time records supporting Plaintiffs' request. Mediation produced an agreement that Plaintiffs would receive an award of $3,000,000.00 for fees and costs.

The negotiated fee and cost award is reasonable when compared to recoveries in similar cases. For example, in *Blackman v. District of Columbia*, Plaintiffs' counsel in this case, Steptoe & Johnson ("Steptoe") and the Bazelon Center for Mental Health Law ("Bazelon") were awarded $1,454,030 in fees for 2.5 years of work in a special education class action. *Blackman v. District of Columbia*, 677 F. Supp. 2d 169, 177 (D.D.C. 2010), *aff'd*, 633 F.3d 1088 (D.C. Cir. 2011. Recently, Hawai'i Disability Rights Center (Hawai'i's Protection and Advocacy System) received a $1.5 million fee award in a special education lawsuit on behalf of a class of 500 students who challenged a Hawai'i statute preventing students with disabilities from receiving educational services after age 20.[7]

It is also reasonable when compared to awards in special education cases brought on behalf of an individual student. Disability Rights Ohio recently received negotiated fee awards in special education cases on behalf of single students in the amounts of $305,000 and $400,000. In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), a special education case involving a single student, plaintiff's attorneys obtained $1.3 million in fees. *See*

[5] *See Missouri v. Jenkins by Agyei*, 491 U.S. 274, 285 (1989) ("Clearly, a 'reasonable attorney's fee' cannot have been meant to compensate only work performed personally by members of the bar. … it must also take account of other expenses . . . The parties have suggested no reason why the work of paralegals should not be similarly compensated, nor can we think of any.").
[6] Plaintiffs are seeking costs for the period October 1, 2012 to the present.
[7] *See*, Bianca Smallwood, *Hawaii Will Pay $10.25 Million To Settle Special Education Lawsuit*, HON. CIVIL BEAT (Jun. 14, 2018) https://www.civilbeat.org/2018/06/hawaii-will-pay-10-25-million-to-settle-special-education-lawsuit/ (last visited Dec. 2, 2019); *see also* Order Approving Settlement for Class Members, *E.R.K. v. Dep't of Educ.* (D. Haw. 2017) (1:10-cv-00436).

also Blackman v. District of Columbia, 56 F. Supp. 3d 19, 21–22 (D.D.C. 2014) (Steptoe, Bazelon, and other counsel awarded $321,355 in fees for work on behalf of one *Blackman* class member)

The requested fees are also reasonable in comparison to awards in other public interest lawsuits. *See, e.g.*, *Bourke v. Beshear*, No. 3:13-CV-00750-CRS, 2016 WL 164626 (W.D. Ky. Jan. 13, 2016) (awarding $1,115,632.96 in fees and costs to attorneys challenging Kentucky's same-sex marriage ban); Order at ¶ 8, *Keepseagle v. Vilsack* (D.D.C. 2011) (1:99-cv-03119) (approving fees of $6,080,000 in discrimination action between Native Americans and U.S. Department of Agriculture); *Dupuy v. McEwen*, 648 F. Supp. 2d 1007, 1031-32 (N.D. Ill. 2009) (class counsel awarded $5,700,000 in fees in a §1983 due process class action against Illinois Department of Children and Family Services, which settled after preliminary injunction was affirmed by the Seventh Circuit); *Cole v. Collier*, 2018 WL 2766028, at *3 (S.D. Texas 2018) *Appeal filed*, No. 18-20402 (5th Cir.) (class counsel awarded $4,500,000 in fees for §1983/ADA claims about extreme heat in prison, which settled after four years and two preliminary injunctions); *Lopez v. San Francisco Unified School Dist.*, 385 F. Supp. 2d 981, 1004 (N.D. Cal. 2005) (class counsel awarded $5,000,000 for ADA class action, which settled after summary judgment); *Gascho v. Glob. Fitness Holdings, LLC*, No. 2:11-CV-436, 2014 WL 1350509, at *6 (S.D. Ohio Apr. 4, 2014) (class counsel awarded $2,390,000 in a contracts class action that settled after third amended complaint).

II. ARGUMENT

A. Plaintiffs are entitled to an award of attorneys' fees and costs under well-established U.S. Supreme Court and Sixth Circuit law.

For civil rights cases, like the instant case, Congress has abrogated the "normal" rule that each party bears their own attorneys' fees. Instead, Congress has declared that plaintiffs who

secure substantial relief by way of a judgment or settlement are entitled to an award of attorneys' fees and costs. Congress enacted this entitlement to incentivize civil rights cases and compensate counsel who act as "private attorneys general." *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances.") (quoting H.R.Rep. No. 94–1558, p. 1 (1976)); *see also* S. REP. 94-1011, 2, 1976 U.S.C.C.A.N. 5908, 5910 ("fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which [civil rights] laws contain."). In this case, Disability Rights Ohio, Bazelon, and Steptoe (through its *pro bono* program) have acted as "private attorneys general," seeking enforcement of basic federal rights.[8]

Congress established the general principle of fee shifting in civil rights cases in 42 U.S.C. § 1988. It also enacted that principle into specific civil rights statutes like IDEA and Section 504. Both IDEA and Section 504 include fee-shifting provisions entitling parties who secure relief through a judgment or settlement to an award of attorneys' fees.[9] To recover fees, a party must be a prevailing party. Under well-settled law, a party prevails when (1) it receives "at least some relief on the merits of [its] claim," and (2) there is a "judicially sanctioned change in the

[8] Disability Rights Ohio is a non-profit organization and the federally mandated Protection and Advocacy system for the State of Ohio. Disability Rights Ohio's mission is to advocate for the human, civil and legal rights of people with disabilities in Ohio. The Bazelon Center for Mental Health Law is a non-profit public interest firm founded in 1972 and known until 1993 as the Mental Health Law Project. The Center works to protect and advance the rights of children and adults with mental disabilities. Both Disability Rights Ohio and Bazelon rely in significant part on attorneys' fees to finance their public interest litigation programs.

[9] IDEA, 20 U.S.C. § 1415(i)(3)(B)(i)(I) ("In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs-- . . . (I) to a prevailing party who is the parent of a child with a disability."); Section 504, 29 U.S.C. § 794a ("In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").
Attorneys' fees are typically awarded as part of the allowable costs under 28 U.S.C. § 1920. *Arlington Center School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297-8 (2006) ("This language ['may award reasonable attorneys' fees as part of the costs'] simply adds reasonable attorney's fees incurred by prevailing parents to the list of costs that prevailing parents are otherwise entitled to recover [set out in 28 U.S.C. § 1920]".).

legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health and Human Res.* 532 U.S. 598, 603, 605 (2001) (internal citations omitted); *Tompkins ex rel. A.T. v. Troy Sch. Dist.*, 199 Fed. App'x 463, 466 (6th Cir. 2006) (internal citations omitted) (IDEA case); *B.H. v. West Clermont Bd. of Educ.*, 788 F. Supp. 2d 682, 702 (S.D. Ohio 2011) (internal citations omitted) (IDEA case).

The Supreme Court has made plain that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting S.Rep. No. 94–1011, p. 4 (1976), U.S.Code Cong. & Admin.News 1976, p. 5912) (internal quotations omitted); *Wikol ex rel. Wikol v. Birmingham Pub. Sch. Bd. of Educ.*, 360 F.3d 604, 611 (6th Cir. 2004); ("Sixth Circuit case law requires that a district court award attorney fees to a prevailing party where no special circumstances militate against such an award.") (internal quotation omitted).

Here, there is no dispute that Plaintiffs are prevailing parties. Plaintiffs have secured a comprehensive settlement of their claims, and significant relief for the class, in the form of a legally binding agreement with Defendants. Under the settlement, Plaintiffs receive "relief on the merits of [their] claim" and there is a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health and Human Res.* 532 U.S. 598, 603, 605 (2001).

B. In Reviewing the Negotiated Fee Award, the Court Should Give Weight to the Parties' Agreement, Negotiated at Arm's Length by Teams of Experienced Civil Rights Litigators.

The purpose of a court's review of a negotiated fee award in the context of a class action settlement is to ensure that it is fair and proper. Here, where the negotiated fee award is the result of arm's length negotiations by experienced attorneys who represented their clients' interests vigorously throughout the process, a court should approve the award.

1. The Purpose and Scope of a District Court's Review of Attorney's Fees under Fed. R. Civ. P. 23(h).

Fed. R. Civ. P. 23(h) went into effect in 2003 to provide a consistent format for all awards of attorney's fees in class action lawsuits and to affirm the responsibility of federal courts to see "that the amount and mode of payment of fees are fair and proper." Fed. R. Civ. P. 23(h) Advisory Committee's Note, 2003 Amendment. The Rule gives the Court responsibility to review fee awards in class action lawsuits, and recognizes that the nature of the Court's review depends on the circumstances of the case and should be guided by applicable case law. *Id.*

In reviewing a fee award in a settlement context, the Court's primary concern is the award's reasonableness. *Geier v. Sundquist*, 372 F.3d 784, 792 (6th Cir. 2004) (citing *Blum v. Stenson*, 465 U.S. 886, 893 (1984)); *see also* Fed R. Civ. P. 23(e)(2) (class action settlements should be approved when they meet fair, reasonable, and adequate standard). In cases like this one, "where litigants are vindicating a social grievance," district courts should use the lodestar method rather than the common fund doctrine to determine reasonable attorney's fees. *Geier*, 372 F. 3d at 790. The lodestar method should be used even if a dollar value could be assigned to the relief obtained. *Id.*

Applying the lodestar method, the $3 million award to Plaintiffs is both reasonable and fair, as discussed below, the award is reasonable given the complexity of the case, the efforts taken to litigate the case efficiently, counsel's reasonable market-based rates, the significant benefit obtained for the class, and awards in similar cases. Here, the negotiated award is less than half of Plaintiffs' reasonable lodestar, further supporting the reasonableness of Plaintiffs' request for an award of $3 million for fees and costs.

2. In a Civil Rights Injunctive Case, the Court Should Approve a Negotiated Fee Award Where Collusion Is Absent and Arms-Length Negotiations Have Resulted in Comprehensive Relief to the Class.

The Civil Rules expressly permit this Court to "award reasonable attorney's fees and nontaxable costs that are authorized by the parties' agreement." Fed. R. Civ. P. 23(h). When evaluating a negotiated fee award in civil rights cases like this one, the Court should give weight to the Agreement between Plaintiffs' counsel and the Defendants where there are no collusion concerns and months of arms-length negotiations resulted in comprehensive and substantial relief to the class. *See, e.g.*, *Smith v. Ohio Dept. of Rehabilitation and Correction*, 2012 WL 1440254, at *18–19 (S.D. Ohio Apr. 26, 2012) (approving settlement agreement reached after three years of litigation and two years of settlement discussions); *cf. Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 277 (6th Cir. 2016) (affirming district court's determination that "two-and-a-half years of litigation, extensive discovery, ongoing settlement negotiations, and formal mediation session all weighed against the possibility of fraud or collusion"). As the U.S. Supreme Court held in *Hensley v. Eckerhart*,

> [a] request for attorney's fees should not result in a second major litigation. **Ideally, of course, litigants will settle the amount of a fee**. Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.

461 U.S. 424, 437 (1983) (emphasis added).

The parties' vigorous litigation of this action over a nine year period—including extensive discovery and motion practice —is evidence of the lack of collusion. The parties engaged the services of an independent mediator, who helped facilitate negotiations, ultimately leading to an agreement on relief. The terms of the agreement were reached over months of arms-length negotiations. Only after the substantive provisions of the agreement were negotiated did the parties discuss reimbursing the Plaintiffs for attorney's fees and costs.

Ultimately, Defendants agreed to pay Plaintiffs' counsel $3 million—less than 50% of the attorney's fees and costs originally requested by Plaintiffs and to which Plaintiffs believed they were entitled. These agreed-upon fees and costs were then incorporated into the larger, comprehensive Settlement Agreement, which provides substantial relief for the certified class members.

Given the absence of collusion and the parties' history of repeated, arms-length negotiations, the Court should approve the agreed-upon fee award.

C. The Law Requires the Fee Award be Based on Counsel's "Lodestar."

The Supreme Court has declared that a prevailing plaintiff's fee award should be based on the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). This amount is known as the "lodestar." There is a strong presumption that the lodestar is the amount plaintiffs should receive as compensation for attorney time. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) ("A strong presumption that the lodestar figure--the product of reasonable hours times a reasonable rate--represents a 'reasonable' fee is wholly consistent with the rationale behind the usual fee-shifting statute."); *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 350 (6th Cir. 2000) ("Generally, a 'strong presumption' favors the prevailing lawyer's entitlement to his lodestar fee.") (internal citations omitted).

"Modifications to the lodestar are proper only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts.'" *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d at 350 (quoting *Delaware Valley Citizens' Council,* 478 U.S. at 565) (internal citation omitted); *Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ.,*

655 F. App'x 423, 443 (6th Cir. 2016) ("[B]inding authority required the district court to more clearly explain which factors motivated its decision to depart from the lodestar calculation . . . ").

D. The negotiated award is reasonable for the time spent by Plaintiffs' counsel in securing the Settlement Agreement.

1. Plaintiffs reasonably spent a large number of hours on this litigation.

Given the complexity and breadth of this case, and the vigorous defense mounted by the State, Plaintiffs' counsel reasonably spent, over nine years, 15,920.6 hours preparing and settling this case.

The instant case is large and complex. The Court docket for the nine years for which Plaintiffs are seeking a fee recovery spans 5,899 entries and includes 406 pages. The case involves State government, school districts across the State, and 260,000 children.

Litigating the case posed substantial challenges. To properly litigate the case, counsel assembled a team of lawyers with complementary expertise. Tasks were assigned based on expertise and available time. All the attorneys involved in the case had substantial other commitments. All major tasks were assigned to a team, typically comprised of a lawyer or two from each of the three counsel organizations: Disability Rights Ohio, Bazelon, and Steptoe. Periodically, there were teleconferences to chart strategy, resolve tactical issues, and ensure consistency in the work.

One attorney from each legal organization served as "lead counsel": Disability Rights Ohio's Director of Advocacy Kerstin Sjoberg, Bazelon's Legal Director Ira Burnim, and Steptoe partner Douglas Green. They provided overall strategic direction and guidance and spent considerable time on significant filings and the expert evaluations and reports. Less experienced attorneys (those with a lower billable rate) did the bulk of the work, including producing drafts

of motions and briefs, taking depositions, managing and responding to discovery, and supporting the experts through the completion of their evaluations and reports.

Plaintiffs staffed this case comparably to other large and complex special education cases. *See, e.g.*, *Blackman v. District of Columbia*, 56 F. Supp. 3d 19, 24 (D.D.C. 2014) (granting attorney fees in IDEA case for 12 lawyers and 1 paralegal); Order, *DL v. District of Columbia*, 267 F. Supp. 3d 55 (D.D.C. 2017) (1:05-cv-01437) (granting attorney fees in IDEA case for 21 attorneys, 3 law clerks, 16 paralegals, and several law students); Order at 32-33, *Garcia v. Los Angeles Cnty. Sheriff's Dep't* (C.D. Cal. 2015) (2:09-cv-08943) (granting attorney fees in IDEA case for 12 attorneys, 2 law students, and 1 paralegal).

Plaintiffs engaged in extensive factual investigation and discovery during the nine-year period, including: reviewing thousands of pages of produced documents, identifying and interviewing potential witnesses including class exemplars, responding to discovery requests, and taking and defending depositions including of experts and the representative Plaintiffs. Plaintiffs worked intensively with three national experts (Dr. Thomas Hehir, Dr. Mary Jo Dare, and Dr. Thomas Parrish) on extensive evaluations and lengthy reports.

Plaintiffs prepared and filed numerous pleadings and briefs, as well as participated in numerous conferences and arguments before the Court. Plaintiffs' filings included, *inter alia*, two Amended Complaints (in 2010 and 2014), responses to two motions to dismiss (in 2010 and 2013), and responses to Defendants' Motion to Decertify Class (filed in 2016).

Plaintiffs twice prepared for and engaged in mediation, a mediation in 2013 as well as the current mediation process.

Working with and supporting Plaintiffs' experts was especially time-intensive, and that work itself spanned several years. It also required numerous negotiations and Court conferences

to secure access to information. For example, in 2013, Plaintiffs requested access to individual student data reported to the State's Education Management Information System ("EMIS") for Dr. Hehir's data review. Defendants filed a motion for a protective order. Over a period of months, Plaintiffs prepared several briefs on the issue, including a sur-reply and a response to Defendants' objections to the Magistrate's decision allowing Plaintiffs to access the data. Plaintiffs spent considerable time working out the details of the data to be exchanged, including negotiating the language of a confidentiality order and a process for required notice to be sent to affected students and parents (including the ability to file objections with the Court), and the transfer of data to Dr. Hehir in a useable format.

For Dr. Dare's expert review, Plaintiffs sent subpoenas in October 2014 to three school districts for purposes of conducting a qualitative review, including classroom observations, review of student records, and staff interviews. The individual school districts objected to Plaintiffs' subpoenas and retained counsel to address Plaintiffs' requests. Over a period of many months, Plaintiffs had multiple in-person meetings with counsel for the districts and status conferences with the Court regarding the experts' access to the information requested. Again, Plaintiffs negotiated confidentiality orders and notices to parents and students regarding the use of the information. After the experts' classroom observations, review of records, and interviews, Plaintiffs engaged in follow up discovery.

2. The reductions Plaintiffs made to their original fee request demonstrates the reasonableness of the negotiated award.

To arrive at the amount originally requested, Plaintiffs exercised billing judgment in identifying the attorney time for which they seek compensation. In the exercise of such judgment, Plaintiffs have *excluded* all of the following time:

- All time prior to October 22, 2009, the date of the parties' previous Consent Decree;
- Time deemed to be excessive, duplicative, or otherwise unnecessary;
- Timekeepers who billed fewer than 75 hours;
- Time related to securing and implementing the Parties' previous Consent Decree; and
- Time on individual advocacy for the representative Plaintiffs.

In addition, after excluding the above time, Plaintiffs further reduced the time for which they were seeking compensation by reducing travel time by 50% and reducing their total time by 5%, to account for the possibility that, in exercising billing judgment, Plaintiffs missed some time that might be considered excessive or duplicative.

3. There is strong support for the hourly rates requested by Plaintiffs.

To determine the rates at which counsel should be compensated, courts look to prevailing market rates in the relevant community for lawyers with comparable skill and experience.[10] *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 350 (6th Cir. 2000) (quoting *Blum*, 465 U.S. at 895) ("A trial court, in calculating the 'reasonable hourly rate' component of the lodestar computation, should initially assess the 'prevailing market rate in the relevant community.'")

To avoid litigation over the appropriate "market rate" for non-profit counsel, some federal courts, including those in the District of Columbia and in the Southern District of Ohio,

[10] The same rule applies for attorneys who work for a non-profit like Disability Rights Ohio and Bazelon that does not typically charge for its services, or if their participation in the case is on a pro bono basis, as is the case with Steptoe's lawyers. See *Blum*, 465 U.S. at 894 ("[ ] Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization."); *Eggers v. Bullitt Cty. Sch. Dist.*, 854 F.2d 892, 899 (6th Cir. 1988) (attorneys for publicly funded agencies are entitled to fees at fair market value); *Lentz v. City of Cleveland*, No. 1:04 CV669, 2011 WL 5360141 at *7 (N.D. Ohio Nov. 7, 2011) (awarding non-profit attorney a rate of $475 per hour).

have identified a set of presumptive rates to be used in fee-shifting cases. They are annually updated based on inflation. In D.C., these rates are known as the "Laffey rates." [11] *Miller v. Holzmann*, 575 F. Supp. 2d 2, 18 n.29 (D.D.C. 2008) (Laffey rates are the "benchmark for reasonable rates" in D.C.); *see, e.g., Joaquin v. Friendship Pub. Charter Sch.*, 188 F. Supp. 3d 1 (D.D.C. 2016); *Fisher v. Friendship Pub. Charter Sch.*, 880 F. Supp. 2d 149, 154-55 (D.D.C. 2012); *Hayes v. District of Columbia Pub. Sch.*, 815 F. Supp. 2d 134, 142-43 (D.D.C. 2011).

In the Southern District of Ohio, courts have used the rates identified by the Rubin Committee in 1983, adjusted upward each year by 4% for inflation ("Rubin rates"). *See, e.g., Gibson v. Forest Hills Sch. Dist., Bd. of Educ.*, No. 1:11-CV-329, 2014 WL 3530708, at *6 (S.D. Ohio, July 15, 2014) ("Judges in the Southern District of Ohio have applied the Rubin Committee rate with a 4% annual cost-of-living allowance to measure the reasonableness of fees requested." (citing *Hunter v. Hamilton Cty. Bd. of Elections*, No. 1:10-CV-820, 2013 WL 5467751, at *17 (S.D. Ohio Sept. 30, 2013)); *Schumacher v. AK Steel Corp. Ret. Acc. Pension Plan*, 995 F. Supp. 2d 835, 844 (S.D. Ohio 2014).

The Rubin rates are consistent with rates used by other district courts in the Sixth Circuit. *See In re Sulzer Orthopedics, Inc.*, 398 F.3d 778, 780 (6th Cir. 2005) (approving rates of $200-$500/hour); *NE. Coal. for Homeless v. Brunner*, No. 2:06-CV-896, 2010 WL 4939946, at *7 (S.D. Ohio Nov. 30, 2010) (court approved as reasonable, rates ranging from $280-$400/hour); *Estep v. Blackwell*, No. 1:06-CV-106, 2006 WL 3469569, at *2 (S.D. Ohio Nov. 29, 2006) (court approved rates ranging from $190-$400/hour); *Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, No. 1:08-CV-605, 2010 WL 1751995, at *4 (N.D. Ohio Apr. 30, 2010) (court approved rates ranging from $250-$450/hour for attorneys and $110-$150/hour for paralegals); *Jordan v.*

[11] The Laffey rates are published at Dep't of Justice , *USAO Attorney's Fees Matrix—2015-2018*, https://www.justice.gov/usao-dc/file/796471/download (last visited Dec. 2, 2019).

Michigan Conference of Teamsters Welfare Fund, No. 96-73113, 2000 WL 33321350, at *6 (E.D. Mich. Sept. 28, 2000) (court approved rates of $275 and $300/hour).

The award of over $6 million originally sought by Plaintiffs was based on the number of hours believed by plaintiffs' counsel to have been reasonably spent on the case, valued at Laffey and Rubin rates. Plaintiffs sought compensation for Disability Rights Ohio lawyers at Rubin rates and for their DC-based counsel at Laffey rates. It was reasonable to value Plaintiffs' counsel's time according to the Laffey and Rubin rates, as the case law underscores.[12]

E. Plaintiffs are entitled to costs of $612,021.18.

In addition to fees for the time spent by Plaintiffs' counsel and staff, Plaintiffs are entitled to a recovery of costs. Plaintiffs are entitled to an award of those costs normally recoverable in a civil action in federal court. 28 U.S.C. § 1920 identifies those costs, which include filing fees and deposition transcripts.[13]

In addition, Plaintiffs are entitled to recover a broader range of costs. This is true because this case includes, and Plaintiffs prepared for trial, a substantial claim under Section 504 of the Rehabilitation Act.[14] When Congress enacted Section 504, it specified that, in actions to enforce Section 504, the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 . . . shall be available." 29 U.S.C. § 794a(2). Those "remedies, procedures, and rights" include the right to recover all of "what it costs them to vindicate their rights in court." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2. Case law indicates that this includes the expenses for which an attorney in private practice would normally bill a client. *Northcross v. Board of*

[12] The Laffey and Rubin rates used by plaintiffs to develop their fee request along with counsels' years of experience are set out in declarations, which are Exhibits A-C attached to this motion.

[13] Costs recoverable under 28 U.S.C.§ 1920 include: "(1) Fees of the clerk and marshal; (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) Fees and disbursements for . . . witnesses; (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case . . . ."

[14] The Court denied two motions by Defendants to dismiss Plaintiffs' 504 claim. Docs. 203 and 269.

Education, 611 F.2d 624, 639 (6th Cir. 1980) ("reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client") abrogation recognized on other grounds *L & W Supply Corp. v. Acuity*, 475 F.3d 737; *Project Vote v. Blackwell*, No. 1:06-CV-1628, 2009 WL 917737, at *19 (N.D. Ohio Mar. 31, 2009) ("It is well established that expenses such as travel (including airfare, mileage, meal, and lodging), telephone bills, shipping and postage, photocopying, filing fees, and similar items are expenses necessarily incurred in the natural course of litigation and are recoverable"); *Grimm v. Lane*, 895 F. Supp. 907, 917 (S.D. Ohio 1995) (postage, meals, and lodging recoverable).[15]

While this case was litigated primarily under IDEA, the Supreme Court has indicated that, when a plaintiff asserts a claim entitling the plaintiff to a broad cost recovery (here Plaintiffs' Section 504 claim), the plaintiff is entitled to such a recovery as long as plaintiff's claim is substantial. *Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980). Plaintiffs' Section 504 claim is substantial, and the Court twice denied motions to dismiss the claim (Docs. 203 and 269).

Furthermore, in cases asserting both Section 504 and IDEA claims in the context of special education, courts have held that a prevailing party is entitled to recover expert costs. *DL v. District of Columbia*, 267 F.Supp.3d 55, 80 (D.D.C. 2017) (recovery of expert fees awarded since "it is not true that [Section 504] added nothing of substance to this case"); *M.M. v. Sch. Dist. of Philadelphia*, 142 F. Supp. 3d 396, 413 (E.D. Pa. 2015) (expert fees recovered in case asserting both IDEA and Section 504 claims), *K.N. v. Passaic City Bd. of Educ.*, No. CIV.A. 11-399 JLL, 2011 WL 5157280, at *15 (D.N.J. Oct. 28, 2011).

[15] The cited case law interprets 42 U.S.C. § 1988 (part of the Civil Rights Attorneys Fees Award Act) that provides for the recovery of a broad range of costs in actions to enforce Title VI and other specified civil rights statutes. The cited Senate Report addresses the statute.

III. CONCLUSION

For the reasons stated above, the negotiated amount of $3,000,000.00 for attorneys' fees and costs is reasonable and should be approved.

Respectfully submitted,

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Of Counsel

CERTIFICATE OF SERVICE

A copy of the foregoing **PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS WITH MEMORANDUM IN SUPPORT** has been served via the Court's electronic filing system this 5th day of December 2019, which will send notice of such filing to all counsel of record.

s/ Kerstin Sjoberg
Kerstin Sjoberg (0076405)