

Slip Copy, 2009 WL 4672167 (D.N.J.)
(Cite as: 2009 WL 4672167 (D.N.J.))

Only the Westlaw citation is currently available.

United States District Court,
D. New Jersey.
C.T. and J.R., on behalf of their minor child D.H.,
Plaintiffs,
v.
TRENTON BOARD OF EDUCATION, et al., De-
fendants.
Civil Action No. 07-4144 (JAP).

Dec. 7, 2009.

West KeySummary

Schools 345  **155.5(5)**

345 Schools

345II Public Schools

345II(L) Pupils

345k155.5 Handicapped Children, Pro-
ceedings to Enforce Rights

345k155.5(5) k. Judgment and Relief;
Damages, Injunction, and Costs. **Most Cited Cases**

A \$75,000 settlement for a board of education's violation of the Individuals with Disabilities Act (IDEA) was allocated between attorney fees and a trust for the minor student. Without any information in the record regarding the care the student would need in the future, the court placed \$50,000 in a trust for the student, and awarded \$25,000 in attorney fees. Individuals with Disabilities Education Act, § 601 et seq., as amended, **20 U.S.C.A. § 1400 et seq.** (IDEA).

George M. Holland, Lentz & Gengaro, West Orange, NJ, for Plaintiffs.

John E. Collins, Parker McCay, PA, Lawrenceville, NJ, for Defendants.

ORDER

PISANO, District Judge.

*1 This matter comes before the Court upon both the Plaintiffs and Defendants objection to Magistrate Judge Douglas E. Arpert's September 24, 2009 Report and Recommendation. The Court has jurisdiction over this matter pursuant to **28 U.S.C. § 1331**.

I. Background

On March 30, 2004, in response to a request from Plaintiffs and the school staff's concern regarding Plaintiffs' adopted son D.H.'s behavior, the Trenton Board of Education's Child Study Team conducted evaluations to determine whether D.H. was eligible for special education and related services. (Pls.' Complaint, ¶ 18-19). On May 24, 2004, the Board denied D.H. any services despite ample information that D.H. was eligible for special education. (*Id.* ¶ 22). Over the next year, D.H. was evaluated by multiple specialists at the Board's direction who all noted that D.H. required supplemental education services; however, services continued to be denied by the Board. (*Id.* ¶ 25-37). On May 24, 2006, the Board finally determined that D.H. was eligible for special education services under the Individuals with Disabilities Act ("IDEA"). (*Id.* ¶ 45). An Individual Education Program was prepared and implemented for the 2006-2007 school year. (*Id.* ¶ 47-49).

On August 29, 2007, Plaintiffs filed a Complaint against the Trenton Board of Education and Barbara Tucker relating to the denial of D.H.'s special education and related services. (*See generally* Pls.' Compl.). Plaintiffs sought reimbursement for attorneys' fees and costs stemming from proceedings before the New Jersey Office of Administrative Law which had compelled Defendants to restore and continue funding D.H.'s out-of-district school placement and transportation costs. (*Id.* ¶ 53-61). Additionally, Plaintiffs sought monetary damages and reimbursement for fees and costs for the Board's violation of the IDEA, New Jersey's Law

Slip Copy, 2009 WL 4672167 (D.N.J.)
(Cite as: 2009 WL 4672167 (D.N.J.))

Against Discrimination, Rehabilitation Act of 1973, Americans with Disabilities Act of 1990, Equal Protection and Due Process clauses of the Fourteenth Amendment, Civil Rights Act and a cause of action for negligent supervision. (*Id.* ¶ 62-91).

On October 6, 2008, Magistrate John J. Hughes conducted a settlement conference with counsel. A proposed settlement of \$75,000 was reached subject to the approval of their respective clients. After both parties' approval was communicated to the court, a dispute arose as to how the \$75,000 was to be allocated. Defendants believed that \$60,000 was to be given in trust for the benefit of D.H. and \$15,000 was to be allocated to Plaintiffs' attorneys' fees. Plaintiffs, however, intended for \$15,000 of the settlement proceeds to be specifically allocated towards fees and costs incurred during the proceedings before the New Jersey Office of Administrative Law; additionally, Plaintiffs believed that their lawyer's fee in connection with this litigation would come out of the remaining \$60,000. Therefore, according to the Plaintiffs, Plaintiffs' counsel would receive \$30,000 and D.H. would be entitled to the remaining \$45,000. Unable to resolve this misunderstanding, on February 11, 2009, Plaintiffs filed a Motion to Enforce the Settlement and on March 6, 2009 Defendants filed a Cross Motion to Enforce the Settlement. (*See* Dkt. # 20 & 21). After oral argument, Magistrate Judge Arpert^{FN1} issued a Report to this Court recommending that Plaintiffs' Motion to Enforce the Settlement be granted in so far as it sought to enforce the essential terms of the agreement, specifically payment by Defendants of \$75,000 in exchange for Plaintiffs' release of liability for all claims asserted. (*See* Dkt. # 28). Subsequently, both Defendants and Plaintiffs filed timely objections to the Report and Recommendation. (*See* Dkt. # 32 & 33). On June 15, 2009, this Court issued an Order affirming Magistrate Judge Arpert's findings that a settlement agreement was formed between Plaintiffs and Defendants in the amount of \$75,000. (*See* Dkt. # 43). Additionally, the Order remanded the matter to Magistrate Judge Arpert for a hearing on the "allocation of the

\$75,000 settlement between damages and attorney's fees, taking into account the paramount interests of the minor, D.H." (*See* Dkt. # 43).

FN1. Judge Hughes retired during the pendency of the dispute.

***2** On July 2, 2009, Plaintiffs' attorney submitted an application with supporting documents in support of his application for appropriate attorneys' fees for the New Jersey administrative action and for the current action. (*See* Dkt. # 44). On July 6, 2009, Defendants filed a response to the above application. (*See* Dkt. # 45). On July 8, 2009, Magistrate Judge Arpert conducted a hearing to determine the allocation of the settlement proceedings with the goal of "taking into account the paramount interests of the minor D . H." After hearing testimony from the Plaintiff, Magistrate Judge Arpert concluded in his September 24, 2009 Report and Recommendation that D.H. will require some form of continuing therapeutic. (R & R 9/24, at 4). Since neither party presented specifics regarding cost or services required, Magistrate Judge Arpert found that "the most equitable distribution of the settlement amount is for \$50,000 to be placed in the **Special Needs Trust** for D.H. and the remaining \$25,000 to be allocated to the Plaintiffs' attorney for fees and costs incurred in both the instant action as well as the proceeding before the New Jersey Office of Administrative Law." (*Id.* at 4-5). Additionally, the court found that \$25,000 would adequately compensate Plaintiffs' counsel for representation in both proceedings. (*Id.* at 5).

On October 5, 2009, Defendants' counsel raised objections to Magistrate Judge Arpert's Report and Recommendation. (*See* Dkt. # 52). While Defendants expressed their intent not to re-litigate the issue of the nature of the settlement agreement reached by the parties, Defendants urged this court to grant D.H. \$60,000 because any lesser amount will "deny him the therapeutic services he will require in the future." (*See* Dkt. # 52). On October 15, 2009, Plaintiffs filed their own objection in light of Defendant's objection arguing that \$30,000

Slip Copy, 2009 WL 4672167 (D.N.J.)
 (Cite as: 2009 WL 4672167 (D.N.J.))

is an appropriate legal fee and if D.H. requires additional funding for support services, the total settlement amount should be adjusted, not the legal fees. (*See* Dkt. # 55).

II. Analysis

Review of a Magistrate Judge's Report and Recommendation is governed by [Local Civil Rule 72.1](#). The Rule provides that the Court “shall make a *de novo* determination of those portions of the report and recommendation to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge.” L. Civ. R. 72.1(c) (2). In so reviewing, the Court need not conduct a new hearing, but “may consider the record developed before the Magistrate Judge, making his or her own determination on the basis of that record.” *Id.*

Applying this legal standard to the facts of this case, the Court adopts Judge Arpert's September 24, 2009 Report and Recommendation and declines to accept both Plaintiffs' and Defendants' proposals for allocating the settlement proceeds. Here, the Court is tasked with deciding the allocation of attorneys' fees and funds for therapeutic services by “taking into account the paramount interest of the minor.” Having reviewed the entire record in this case *de novo*, the Court finds that neither Plaintiffs nor Defendants offered any evidence to support and validate the type of services and their cost which may be needed for D.H. in the future. (*See* Transcript of Friendly Hearing 8/7/09). In fact, Judge Arpert noted that there was no evidence “presented concerning the costs of those benefits or any specific care D.H. might require in the future.” (R & R 9/24, at 4-5). A majority of the transcript from the hearing simply repeats the history of D.H.'s treatment and the current services he is receiving. (*See* Transcript of Friendly Hearing 8/7/09). Plaintiffs however did establish, as Judge Arpert noted, that therapeutic services outside of school would be necessary in the future although the Plaintiff admitted that she did not “know how much the counseling

would cost.” (*See* Transcript of Friendly Hearing 8/7/09, at 13). As Judge Arpert and this Court are left with little evidence on the cost of D.H.'s needs, the Court supports Judge Arpert's equitable decision of placing \$50,000 in trust for D.H. and awarding \$25,000 for all the attorneys' fees.

***3 IT IS** on this 7th day of December, 2009,

ORDERED that the Report and Recommendation filed on September 24, 2009, recommending that the settlement between Plaintiffs and Defendants be allocated \$50,000 in trust for D.H. and \$25,000 for attorneys' fees is hereby **ADOPTED** as the findings of fact and conclusions of this Court.

SO ORDERED.

REPORT & RECOMMENDATION

[ARPERT](#), United States Magistrate Judge.

This matter having been referred by the Honorable Joel A. Pisano, U.S.D.J. “for a hearing for review and approval of the settlement and the allocation of the \$75,000 settlement amount between damages and attorneys' fees, taking into account the paramount interests of the minor, D.H.” *See* [dkt. entry no. 43] and a Report and Recommendation, pursuant to [28 U.S.C. § 636\(b\)\(1\)](#). The Court has reviewed fully and considered the submissions of Plaintiffs C.T. and J.R. on behalf of their minor child D.H. (collectively, “Plaintiffs”) and Defendants the Trenton Board of Education (the “Board”) and Barbara Tucker (collectively, “Defendants”), and conducted a hearing in this matter on July 8, 2009 at which the mother of D.H. testified. For the reasons set forth below, the Court recommends that the \$75,000 settlement amount be allocated as follows: \$50,000 to a **Special Needs Trust** to be created and maintained for the benefit of D.H. and \$25,000 to Plaintiffs' attorneys' fees and costs.

I. Background

Slip Copy, 2009 WL 4672167 (D.N.J.)
(Cite as: 2009 WL 4672167 (D.N.J.))

On August 29, 2007, Plaintiffs filed a Complaint which set forth various claims against the Defendants. *See generally* (Pls.' Complaint). Plaintiffs' first cause of action sought payment of attorney's fees and costs for work performed in proceedings before the New Jersey Office of Administrative Law, as a result of which Plaintiffs successfully compelled the Board to restore and continue funding D.H.'s out-of-district, private school placement and transportation costs. *Id.* at 11-14. In addition, Plaintiffs' Complaint set forth eight separate, statutory and common law causes of action based on the harm allegedly caused to D.H. as a result of the Board's failure to provide special education and related services and support for a period of two years. *Id.* at 14. Plaintiffs also asserted a claim for payment of attorney's fees and costs as well as expert witness fees incurred in pursuing the instant action. *Id.* at 14-19.

On October 6, 2008, a settlement conference took place before the Honorable John J. Hughes, U.S.M.J. during which counsel for Plaintiffs and Defendants negotiated a proposed settlement which was subject to the approval of their respective clients. Subsequently, counsel communicated their respective clients' approval of the proposed settlement to the Court. While there is no question that the agreed settlement amount was \$75,000, a dispute arose with respect to the allocation of the settlement amount. Specifically, Plaintiffs intended to allocate \$15,000 of the settlement proceeds toward the attorneys fees and costs incurred in connection with the case before the New Jersey Office of Administrative Law plus certain expert fees. In addition, Plaintiffs understood that 25% of the remaining \$60,000 (i.e.\$15,000) would be paid to their attorney, per their contingency fee agreement, as legal fees and costs in connection with the instant litigation. Defendants, on the other hand, contend that the settlement amount was intended to be allocated such that Plaintiffs would receive \$60,000 for the benefit of D.H. and their attorney would receive a total of \$15,000.

*4 Because the parties were unable to resolve this dispute on their own accord, on February 11, 2009 Plaintiffs filed a Motion to Enforce Settlement and on March 6, 2009 Defendants filed a Counter Motion to Enforce Settlement. On April 17, 2009, the Court conducted oral argument on the Motions. On April 21, 2009, the Court issued its recommendation "that Plaintiffs' Motion to Enforce Settlement be granted in so far as it seeks to enforce the essential terms of the settlement, specifically that Defendants be directed to tender a total of \$75,000 to Plaintiffs in exchange for their release of any and all claims asserted in the Complaint." *See* [dkt. entry no. 28]. Defendants and Plaintiffs each filed objections to the Report and Recommendation on May 4, 2009 and May 11, 2009, respectively. On June 11, 2009, the Honorable Joel A. Pisano issued an Order 1) affirming Magistrate Judge Arpert's finding that the parties entered into a settlement requiring the payment of \$75,000 by the Defendants to the Plaintiffs in exchange for the Plaintiffs' promise to forgo all of their claims against the Defendants; and 2) remanding the matter to Magistrate Judge Arpert for a hearing regarding the appropriate allocation of the settlement amount between damages and attorneys' fees. *See* [dkt. entry no. 43].

On July 2, 2009, the Plaintiffs' attorney submitted documents in support of his application for attorneys' fees and costs for both the underlying state administrative action and the instant action. On July 6, 2009, Defendants filed a response to the July 2, 2009 submission by Plaintiffs' attorney, who replied on July 7, 2009. On July 8, 2009, the Court conducted a hearing to determine the allocation of the settlement monies "taking into account the paramount interests of the minor, D.H.."

II. DISCUSSION

On June 11, 2009, the Honorable Joel A. Pisano issued an Order affirming the settlement of this matter for a total of \$75,000. The issue that remains before the Court is how the settlement amount is to be allocated. Plaintiffs' attorney explains that Plaintiffs

seek

To have the Board of Education pay \$60,000 as a settlement for the cause of action [for] damages for the pain and suffering that D.H. endured, with the understanding that a ' **special needs trust** ' for D.H.'s benefit would be created from *the balance* of the \$60,000 *after* payment of legal fees and costs per a contingency fee agreement my law has with my clients; and [t]o have the Board of Education pay \$15,000 to this law firm to cover not only the attorney's fees and costs incurred in handling the case in the New Jersey Office of Administrative Law ... but also to reimburse my law firm law firm for the costs it incurred in hiring a private Psychologist, Dr. Gordon to evaluate D.H.

See (Pls.' July 2, 2009 Letter at 1). Ultimately, Plaintiffs' counsel is requesting the Court to approve allocation of the settlement amount as follows: a total of \$30,000 for attorneys' fees and costs and the remaining \$45,000 to fund a **Special Needs Trust** for D.H. *Id.* at 4. Plaintiffs appear to have understood and agreed to the allocation proposed by their attorney when they accepted the settlement amount. *See* (Pls.' Decl. at 1-2). Defendants' counsel contends that the Court should allocate \$15,000 to attorneys' fees and costs and \$60,000 to the **Special Needs Trust** for D.H. According to counsel, this is the allocation upon which Defendants' agreement to pay the settlement amount was premised. Having found that an enforceable settlement exists, notwithstanding the parties' disagreement as to its proper allocation, this Court is charged with the task of determining how much of the settlement amount should be directed to a **Special Needs Trust** to meet D.H.'s future needs.

*5 After carefully reviewing the submissions before the Court and conducting a hearing on July 8, 2009, it appears likely that as a result of his disabilities, D.H. will require some form of ongoing therapeutic. At present, D.H. is receiving counseling and special education benefits through his current school placement. No evidence was presented con-

cerning the cost of those benefits or of any specific care D.H. might require in the future. That being said, the Court feels that the most equitable distribution of the settlement amount is for \$50,000 to be placed in the **Special Needs Trust** for D.H. and the remaining \$25,000 to be allocated to the Plaintiffs' attorney for fees and costs incurred in both the instant action as well as the proceedings before the New Jersey Office of Administrative Law. The Court recognizes that the services rendered by Plaintiffs' counsel are documented in the Plaintiffs' Declaration of Counsel in support of their request for approval of the distribution of the settlement monies and the accompanying billing statements for work performed in both the New Jersey Office of Administrative Law proceedings as well as the instant action that are attached as exhibits to said Declaration. *See* [dkt. entry no. 44]. Having carefully reviewed those statements, the Court believes that \$25,000 adequately and fairly compensates Plaintiffs' attorney for his time and the costs incurred in his representation of Plaintiffs in both venues while giving paramount consideration to the needs of the minor. Therefore, the Court recommends that \$25,000 be paid directly to counsel for Plaintiffs for attorney's fees and disbursements related to this litigation and that \$50,000 be placed in a **Special Needs Trust** for D.H. in exchange for the release of any and all claims asserted against Defendants.

III. CONCLUSION

In consideration of the foregoing, it is respectfully recommended that Plaintiffs' Proposed Order for Judgment Approving Distribution of Settlement Monies [dkt. entry no. 48] be executed by the Court in accordance with the above outlined distribution of \$25,000 for attorneys' fees and costs and \$50,000 for the benefit of D.H.

[Local Civil Rule 72.1\(c\)\(2\)](#) and [Federal Rule of Civil Procedure 72\(b\)](#) permits objections to this Report and Recommendation within ten (10) days after being served with a copy thereof. A party may

Slip Copy, 2009 WL 4672167 (D.N.J.)
(Cite as: 2009 WL 4672167 (D.N.J.))

respond to another party's objections within ten (10) days after being served with a copy thereof. The Clerk of Court is directed to serve a copy of this Report and Recommendation on Plaintiff and Counsel for Defendant by *regular and certified mail*.

D.N.J.,2009.
C.T. ex rel. D.H. v. Trenton Bd. of Educ.
Slip Copy, 2009 WL 4672167 (D.N.J.)

END OF DOCUMENT