

**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

MICHELLE McCRAE, <i>et al.</i> ,)	
)	
Plaintiffs,)	C.A. No. 2013 CA 0004758B
)	Judge John M. Mott
v.)	
)	
DISTRICT OF COLUMBIA,)	
)	
Defendant.)	
)	
)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

This breach of contract action was brought by Plaintiffs Michelle McCrae (“Ms. McCrae”) and Tiffani Taylor (“Ms. Taylor”) to enforce the terms of settlement agreements that require Defendant District of Columbia Public Schools (“DCPS”) to pay Plaintiffs a reasonable attorney fee as part of the resolution of complaints filed pursuant to the Individuals with Disabilities Education Act (“IDEA”). The settlement agreements provide, in relevant part, that DCPS will pay reasonable and documented attorney fees “contingent upon submission of . . . a certified Invoice conforming to the DCPS attorney fee guidelines, issued October 1, 2006.” Exhibits D & E.¹ Plaintiffs submitted invoices seeking fees at the rate of \$250 per hour in conformance with the 2006 guidelines. DCPS paid only \$90 per hour, claiming that \$90 was the hourly rate Plaintiffs were entitled to for attorney fees because Plaintiffs were represented by counsel appointed under the Criminal Justice Act (“CJA”). Pursuant to the appointment orders, the District of Columbia Courts would have paid Plaintiffs’ counsel \$90 per hour if fees could not be recovered from DCPS. Exhibits B & C. Because DCPS contracted to pay attorney fees at

¹ The Exhibits are attached to Plaintiffs’ Statement of Undisputed Material Facts.

the rates set forth in the DCPS attorney fee guidelines, but paid the lower CJA rate, DCPS has breached the settlement agreements. Accordingly, the Court should enter summary judgment for Plaintiffs and order DCPS to pay the difference between the contractually required attorney fees of \$200 to \$275 an hour and the \$90 an hour that DCPS paid.

FACTS

Plaintiffs are parents of children with disabilities eligible to receive special education and related services from DCPS under the IDEA. Exhibit A. The IDEA, 20 U.S.C. § 1400, *et seq.*, seeks to ensure that each child with a disability receives a comprehensive evaluation of his or her unique needs, and a free appropriate public education (“FAPE”), by imposing certain conditions on states and local school districts in return for federal money.

Pierre Bergeron is a specially trained educational attorney. He has been a member of the District of Columbia Bar since 1981, and he has practiced special education law since 1995. Exhibit A. Mr. Bergeron was appointed by the Court to represent Plaintiffs in seeking educational services for their minor children. Exhibits B & C. The appointment orders provide that “the District of Columbia Courts will compensate the Educational Attorney pursuant to the Criminal Justice Act . . . if he is not compensated by the District of Columbia Public Schools.” *Id.* In his capacity as counsel for Plaintiffs, Mr. Bergeron filed administrative complaints against DCPS under the IDEA. Those complaints were settled. Exhibits D & E.

The two settlement agreements contain identical provisions for attorney fees:

Parent agrees to accept reasonable and documented attorney fees, as full and final payment of any attorney fees and related costs incurred, or to be incurred, in this matter. Payment of the specified amount is contingent upon submission of the following: a) a certified Invoice conforming to the DCPS attorney fee guidelines, issued October 1, 2006, and itemizing all costs incurred to date relating to the pending hearing request; and b) signature by the parent below or written authorization by the parent for the attorney to enter into this Settlement Agreement on the parent’s behalf.

Id., ¶12.

The 2006 DCPS attorney fee guidelines provide an hourly rate of \$200 to \$275 for attorneys, like Mr. Bergeron, with eight or more years' experience. Exhibit F. Each Plaintiff submitted a certified invoice to DCPS seeking an hourly rate of \$250 for Mr. Bergeron's services. Exhibits G & H. Ms. McCrae sought attorney fees for 47 hours and Ms. Taylor sought attorney fees for 40.9 hours. DCPS approved payment for 45 hours and 38.8 hours, respectively, but paid each invoice at the rate of \$90 an hour rather than at the rates called for by the guidelines incorporated by reference in the settlement agreements.² Exhibits I & J. Plaintiffs brought this breach-of-contract action against DCPS to recover the difference between the contractually mandated attorney fees of \$200 to \$275 an hour and the \$90 an hour that DCPS paid. Had DCPS paid a rate of \$250 an hour, Plaintiffs would have recovered an additional \$13,408 in attorney fees.³

SUMMARY JUDGMENT STANDARD

Summary judgment is proper if there is no issue of material fact and the record shows that the moving party is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c). Settlement agreements are construed under general principles of contract law. *Dyer v. Bilaal*, 983 A.2d 349, 354–55 (D.C. 2009) (citations omitted). The District of Columbia adheres to an “objective” law of contracts. Thus, where a contract is unambiguous, the court interprets the terms of the agreement as matter of law, and contracts are not rendered ambiguous just because the parties disagree regarding the contract's proper construction. *Id.*

² Plaintiffs do not challenge the reduction in hours by DCPS.

³ Ms. McCrae would have received an additional \$7,200 in attorney fees and Ms. Taylor would have received an additional \$6,208 in attorney fees.

ARGUMENT

I. The Settlement Agreements Incorporate by Reference The Rates Set Forth in The DCPS Attorney Fee Guidelines.

The parties do not dispute that they contracted to settle the underlying IDEA cases and that Plaintiffs are entitled to attorney fees for 83.8 hours of work by an attorney with more than eight years' experience. The issue in dispute is the hourly rate DCPS is required to pay pursuant to the contracts. Under the plain language of the settlement agreements, DCPS is required to pay "reasonable and documented attorney fees . . . conforming to the DCPS attorney fee guidelines," which provide for a rate of \$200 to \$275 an hour. *See* Exhibit F. In *Adams v. District of Columbia*, this Court found that a settlement agreement that referenced the DCPS attorney fee guidelines incorporated not only the procedural requirements of the guidelines but also the substantive requirements, such as rates. *Adams v. District of Columbia*, No. 2012-SC2-002801, Mem. at 9 (D.C. Super. Ct. July 11, 2012) (attached as Exhibit K to plaintiffs' statement of material facts). Indeed, the language of the settlement agreements in *Adams* is the same language used in the settlement agreements in this case. *Compare id.* at 8 with Exhibits D & E.

II. The Fact That Plaintiffs Were Represented by Appointed Counsel is Irrelevant.

Based on its motion to dismiss, DCPS is likely to argue that its failure to pay the guideline rates incorporated by reference in the settlement agreements should be excused because the appointment orders provide that Plaintiffs' counsel can recover \$90 per hour from the Court under the CJA *if* Plaintiffs are unable to recover attorney fees from DCPS. DCPS's argument fails because Plaintiffs *can* recover attorney fees from DCPS. Indeed, DCPS entered into settlement agreements obligating DCPS to pay Plaintiffs attorneys' fees in accordance with the DCPS attorney fee guidelines; the settlement agreements do not mention the CJA rate. Exhibits D & E. Having contracted to pay Plaintiffs the rate provided in the DCPS guidelines,

DCPS cannot now claim that it has no obligation to fulfill the terms of its contract with Plaintiffs because, had it not obligated itself to pay attorney fees, Plaintiffs' counsel would have been entitled to fees at the CJA rate from the Court.

DCPS may also argue that Plaintiffs cannot recover attorney fees because Plaintiffs were represented by counsel at no cost to themselves, or because their counsel agreed to accept the CJA rate if Plaintiffs could not recover fees from DCPS. Such an argument would be wrong for two reasons. First, as explained above, this breach of contract action seeks to enforce terms agreed to by DCPS. Whether DCPS would have been liable for fees under the fee-shifting provision of the IDEA had it not settled, and in what amounts, is beside the point. Second, it is well-settled that where a Plaintiff is entitled to recover reasonable attorney fees, the fee is calculated based on the prevailing market rate and not on the basis of actual cost. *See, e.g., Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989); *Blum v. Stenson*, 465 U.S. 886, 894-96 (1984); *Link v. District of Columbia*, 650 A.2d 929, 934 (D.C. 1994); *Henderson v. District of Columbia*, 493 A.2d 982, 999 (D.C. 1985). Whether the party entitled to fees is represented by appointed counsel who agrees to accept a reduced rate paid by the Court if fees cannot be recovered from the defendant is irrelevant. Thus, the CJA rate cannot cap DCPS's liability under the settlement agreements.

CONCLUSION

DCPS breached its contracts with Plaintiffs by failing to pay attorney fees in conformance with the DCPS attorney fee guidelines incorporated by reference in the settlement agreements. Accordingly, the Court should enter judgment for Plaintiffs and order DCPS to pay Plaintiffs an additional \$13,408 in attorney fees, plus interest and costs.

Respectfully submitted,

Date: December 6, 2013

 /s/
Michael T. Kirkpatrick, Esq.
Bar No. 486293
Public Citizen Litigation Group
1600 20th Street NW
Washington, D.C. 20009
(202)588-1000
mkirkpatrick@citizen.org
Counsel for Plaintiffs

 /s/
Charles A. Moran, Esq.
Bar No. 970871
Tanjima Islam, Esq.
Bar No. 1014998
Moran & Associates
1220 L Street NW, Suite 760
Washington, D.C. 20005
(202)742-2022
Charles.moran@camoranlaw.com
Counsel for Plaintiffs