



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 7th day of October 2013, a copy of the foregoing Plaintiffs' Opposition to Defendant District of Columbia's Motion to Dismiss was served on the following via CaseFileXpress:

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\_\_\_\_\_/s/\_\_\_\_\_  
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**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CIVIL DIVISION**

MICHELLE MCCRAE et al.,	)	
	)	
Plaintiffs,	)	<b>C.A. No. 2013 CA 0004758B</b>
	)	<b>Judge John M. Mott</b>
v.	)	
	)	<b>Next Event: November 8, 2013</b>
DISTRICT OF COLUMBIA,	)	<b>Initial Conference</b>
	)	
Defendant.	)	
	)	
	)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS’  
OPPOSITION TO DEFENDANT DISTRICT OF COLUMBIA’S MOTION TO DISMISS**

Plaintiffs Michelle McCrae and Tiffani Taylor, by and through undersigned counsel, submit this Memorandum of Points and Authorities to support their Opposition to Defendant’s Motion to Dismiss and respectfully request that this Honorable Court deny Defendant’s Motion to Dismiss.

**INTRODUCTION**

This breach of contract action was brought by two parents seeking to enforce the terms of settlement agreements that require Defendant District of Columbia Public Schools (“DCPS”) to pay the parents a reasonable attorney’s 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’s fees “contingent upon submission of . . . a certified Invoice conforming to the DCPS attorney fee guidelines, issued October 1, 2006[.]” Although the parents submitted such invoices seeking fees in conformance

with the guidelines, DCPS refused to pay the fees because the parents were represented by appointed counsel at no cost to the parents, and because the appointment order provided that the District of Columbia Courts would compensate counsel under the Criminal Justice Act (“CJA”) in the event that counsel was not compensated by DCPS. DCPS asserted that it owed no more than the amount of fees that the District of Columbia Courts would have paid counsel under the CJA, even though DCPS executed a settlement agreement obligating DCPS to pay fees in conformance with the DCPS attorney’s fee guidelines.

In response to the parents’ complaint for breach of the settlement agreements, DCPS filed a motion to dismiss under Super. Ct. Civ. R. 12(b)(6). In support of its motion, DCPS argues that it need not comply with the terms of the contracts it made because 1) parents who are represented at no cost to themselves lack standing to seek attorney’s fees, and 2) even if the parents are entitled to attorney’s fees, they are entitled to payment at a rate no higher than the rate a third party would have been obligated to pay the parents’ counsel had DCPS not agreed to pay fees in conformance with the DCPS fee guidelines. As explained in detail below, DCPS’s arguments are unavailing and its motion should be denied.

### **BACKGROUND**

Plaintiffs Michelle McCrae and Tiffani Taylor are parents of children with disabilities eligible to receive special education and related services from DCPS under the IDEA. 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 appointed by the Family Court to represent plaintiffs in seeking educational services for their minor children. DCPS Mem., Exh. 1. In his capacity as counsel for plaintiffs, Mr. Bergeron filed administrative complaints against DCPS under the IDEA. Those complaints were settled on terms favorable to the parents. *See id.*, Exh. 2.

The two settlement agreements contained identical provisions for attorney's fees, under which each "[p]arent agree[d] 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," to be paid on the filing of "a certified Invoice conforming to the DCPS attorney fee guidelines, issued October 1, 2006." *Id.*, p.3, ¶12.

The 2006 DCPS attorney fee guidelines provided an hourly rate of \$200 to \$275 for attorneys, like Mr. Bergeron, with eight or more years' experience. Both plaintiffs filed appropriate invoices with DCPS, Ms. McCrae in October 2011, and Ms. Taylor in December 2011, seeking an hourly rate of \$250 for Mr. Bergeron's services. DCPS responded to each invoice, in January and February 2012 respectively, but paid only \$90 an hour. On July 12, 2013, plaintiffs filed this breach-of-contract action against DCPS to recover the difference between the contractually required attorney's fees of \$200 to \$275 an hour and the \$90 an hour that DCPS paid.

## **ARGUMENT**

### **I. Plaintiffs Have Standing To Bring Their Claims for Breach of Contract.**

Although DCPS purports to move for dismissal under Rule 12(b)(6) for failure to state a claim, DCPS first argues, without citation to any authority, that plaintiffs lack standing to sue for breach of the contracts requiring DCPS to pay plaintiffs their reasonable attorney's fees because,

according to DCPS, a party represented free of charge cannot recover attorney's fees at all. DCPS Mem. at 3. As an initial matter, even if DCPS were correct that the contracts at issue only require DCPS to reimburse the parents the amount the parents actually paid in attorney's fees, it would not deprive plaintiffs of standing to sue for breach of contract; it would simply provide DCPS with a potential defense on the merits. Thus, DCPS errs by characterizing its argument as an attack on plaintiffs' standing to bring this breach of contract action.

More importantly, DCPS is wrong when it argues that reasonable attorney's fees are measured by the amount of fees a party has actually paid. To the contrary, it is well-established that where a party is entitled to reasonable attorney's fees the amount is calculated according to prevailing market rates and not on the basis of actual cost. *See, e.g., 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).

## **II. Plaintiffs State a Claim for Breach of Contract Based on DCPS's Failure To Pay Attorney's Fees in Accordance with the Terms of the Settlement Agreements.**

To prevail on a claim of breach of contract, a party must establish (1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach. *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009) (citation omitted). Plaintiffs have alleged each of these elements, and DCPS does not argue otherwise. Thus, plaintiffs have stated a claim for breach of contract.

Rather than address the elements of a breach of contract claim, DCPS asserts that if the parents had not settled their IDEA claims but had instead prevailed on the merits, the parents would not have been entitled to recover reasonable attorney's fees under the IDEA's fee-shifting provision because they "were never obligated to pay Mr. Bergeron in the first place given that he was appointed under the Criminal Justice Act." DCPS Mem. at 4. According to DCPS, the fee-

shifting provision of the IDEA, 20 U.S.C. § 1415(i)(3)(B), applies only if the parent is “under an obligation to pay the attorney fees.” DCPS Mem. at 4. DCPS could not be more wrong. The IDEA’s fee-shifting provision is interpreted in the same way as other civil rights fee-shifting statutes. *J.C. v. Reg’l Sch. Dist. 10, Bd. of Educ.*, 278 F.3d 119, 124 (2d Cir. 2002). Thus, in determining the reasonable hourly rate payable to a prevailing IDEA plaintiff, a court applies the prevailing market rate, *I.B. v. New York City Dep’t of Educ.*, 336 F.3d 79, 80 (2d Cir. 2003) (citing *Blum*, 465 U.S. at 895 n. 11), regardless of whether the prevailing plaintiff is paying her counsel, being represented pro bono, or having her counsel’s fees paid by a third party.

In any event, DCPS’s misunderstanding of the IDEA’s fee-shifting provision is largely irrelevant, because the parents in this case are not claiming that they are entitled to an award of attorney’s fees as prevailing parties in an IDEA case. Rather, the parents seek payment of reasonable attorney’s fees in accordance with the DCPS fee guidelines because that is what DCPS agreed to pay to settle the IDEA cases.

DCPS also argues that the complaint should be dismissed because DCPS paid plaintiffs’ counsel at the statutory rate authorized by the CJA. DCPS Mem. at 5. The fact that DCPS paid the CJA rate does not resolve the primary issue in this case—whether DCPS has fulfilled its contractual obligation to pay a reasonable attorney’s fee in conformance with the DCPS attorney fee guidelines incorporated by reference in the settlement agreements. Plaintiffs have stated a claim for breach of contract because they allege that payment of the CJA rate did not fulfill DCPS’s obligations under the settlement agreements. That the parties disagree regarding the rate contemplated by the contracts does not provide a reason to dismiss the complaint; rather, it highlights the issue that the Court will need to decide when it addresses the merits of plaintiffs’ claims.

In any event, DCPS's assertion that it satisfied its obligations under the settlement agreements by paying plaintiffs' counsel the CJA rate is untenable for several reasons. First, the settlement agreements do not mention the CJA rate; they incorporate by reference the rates set forth in "the DCPS attorney fee guidelines, issued October 1, 2006." DCPS Mem., Exh. 2, p.3, ¶12. Second, the appointment orders state 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.*, Exh. 1, p.2 (emphasis added). The fact that the courts would be obligated to pay counsel the CJA rate only if attorney's fees could not be recovered from DCPS does not suggest that DCPS owes only the CJA rate if plaintiffs prevail in an IDEA case or settle such a case on terms that require the payment of fees in conformance with the DCPS attorney fee guidelines. Rather, appointed counsel are guaranteed the CJA rate from the courts but are directed to seek fees from DCPS as a prevailing party under the IDEA or in settlement as circumstances permit. Thus, the CJA rate does not operate as a cap, as DCPS suggests, but as a guarantee that the appointed lawyer will receive some compensation from the courts if DCPS pays nothing. Indeed, DCPS apparently recognizes that the CJA rate applies only in the event that DCPS has no fee liability at all, and thus characterizes its decision to pay the CJA rate as a voluntary undertaking by DCPS as "a courtesy to the Court," DCPS Mem. at 1, rather than an obligation arising from the settlement agreements.

## **CONCLUSION**

WHEREFORE, because the Plaintiffs have standing to bring their claims for breach of contract and state a claim for breach of contract based on DCPS's failure to pay attorney's fees

in accordance with the terms of the settlement agreement, Plaintiffs respectfully request that this Court deny Defendant's Motion to Dismiss.

Respectfully submitted,

Date: October 7, 2013

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**ORDER**

Upon consideration of the Plaintiffs' Opposition to Defendant District of Columbia's Motion to Dismiss and the record herein, it is this \_\_\_\_ day of \_\_\_\_\_ 2013:

**ORDERED** that Defendant District of Columbia's Motion to Dismiss is DENIED.

SO ORDERED.

\_\_\_\_\_  
Judge John M. Mott  
Superior Court of the District of Columbia

Copies to: Charles Moran, Esq.  
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