THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CC TO JUDGE mr

JAMES HORTON, et al., Plaintiffs, vs. BOB WILLIAMS, et al., Defendants.	No. C94-5428 RJB MEMORANDUM SUPPORTING PLAINTIFFS' FIRST APPLICATION FOR ATTORNEYS' FEES AND COSTS

I. INTRODUCTION

On September 11, 1995, this Court entered the parties' Stipulation and Judgment Resolving Certain Claims And Continuing Trial On The Remaining Ones. On November 5, 1996, the parties' Supplemental Stipulation and Judgment Resolving Remaining Claims was entered. Under these agreements, which together resolve all of plaintiffs' claims in this case, plaintiffs are prevailing parties, and as such, are entitled to attorneys' fees and costs under 42 U.S.C. § 1988 and 20 U.S.C. § 1415 (e)(4)(B)-(C). Plaintiffs, therefore, submit this first

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request for fees of $342,465.40 and out-of-pocket expenses of $19,289.37.[1] This is our first request for fees that represents only the hours of work performed to date. Plaintiffs will from time to time seek additional fees for ongoing monitoring activities as allowed by the parties' original and supplemental Stipulation and Judgment. This Memorandum supports plaintiffs' Motion. The declarations filed herewith provide the facts supporting the hours spent, expenses incurred, and prevailing rates.

II. ARGUMENT

A. The Purposes Of The Attorneys' Fees Act

In Riverside v. Rivera, 477 U.S. 561, 91 L.Ed. 466, 106 S.Ct. 2686 (1986), the Supreme Court examined the purposes of 42 U.S.C. § 1988, the Federal Civil Rights Attorneys' Fees Statute.

> Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. See Carey v. Piphus, 435 U.S. 247, 266, 55 L.Ed.2d 252, 98 S.Ct. 1042 (1978). And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in Sec. 1988, over and above the value of a civil rights remedy to a particular plaintiff . . ." Hensley [v. Eckerhart], 461 U.S. at 444 n.4, 76 L.Ed.2d 40, 103 S.Ct. 1933 (Brennan, J., concurring in part and dissenting in part) . . .
>
> Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit "'does so not for himself alone but also as a 'private attorney general' vindicating a policy that Congress considered of the highest importance.'" House Report at 2 (quoting Newman v. Piggy Park Enterprises, Inc., 390 U.S. 400, 402, 19 L.Ed.2d 1263, 88 S.Ct. 964 (1968)) . . .
>
> Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief. Rather, Congress made clear that it "intended that the amount of fees

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[1]/ This motion is brought against all defendants. The State defendants and the Chehalis School District are jointly and severally liable for plaintiffs' fees and costs in this case. See Conte, Attorney Fee Awards (2d Ed. 1993); Corder v. Gates, 947 F.2d 374 (9th Cir. 1991).

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> awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature." Senate Report, at 6, U.S. Code Cong. and Admin. News 1976, p. 5913 (emphasis added).

477 U.S. at 574-75 (plurality opinion).

As the Court of Appeals for the Seventh Circuit has noted,

> An award of fees enables the plaintiff to keep the whole recovery and brings home to the defendants the full social costs of their unconstitutional conduct, costs that include litigation as well as the original damages.

Kirchoff v. Flynn, 786 F.2d 320, 327 (7th Cir. 1986).

B. Plaintiffs Are The Prevailing Party

To be a prevailing party eligible for attorneys' fees under § 1988, plaintiff must succeed on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Texas State Teachers Association v. Garland Independent School District, 498 U.S. 782, 791-92, 103 L.Ed.2d 866, 109 S.Ct. 1486, 1493 (1989). A plaintiff need not obtain formal judicial relief to be a prevailing party under § 1988. Maher v. Gagne, 448 U.S. 122, 126 n.8, 128 n.10, 129, 131 (1980). Plaintiff may be deemed to be a prevailing party if the lawsuit "produces voluntary action by the defendant that affords plaintiff all or some of the relief he sought through a judgment -- e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances." Hewitt v. Helms, 482 U.S. 755, 776-61 (1987).

Plaintiffs here, through settlement, achieved substantially all the benefits sought in bringing the suit, i.e., (1) the reconstruction of Green Hill School to address the institution's physical plant deficiencies; (2) the severe limitation on the use of chemical and physical restraint; (3) the revision of disciplinary practices and procedures; (4) the provision of special

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education assessments and services previously denied youth at Green Hill School; (5) the guarantee of basic and special education services to youth in lock-up; (6) guaranteed improvements in the health, including mental health, and rehabilitative services offered to youth, and (7) language translation services to non-English speaking juveniles incarcerated at Green Hill School. Declaration of Patricia J. Arthur. There can be no question that plaintiffs are the prevailing party in this case.

C. Calculation Of The Fee Award

The Court has broad discretion in the calculation of the amount of federal civil rights attorneys' fees to be awarded in a particular case. Hall v. Bolger, 786 F.2d 1148, 1150 (9th Cir. 1985).

1. Factors In The Lodestar Fee Calculation.

The Supreme Court in Riverside reaffirmed its holding in Hensley v. Eckerhart, 461 U.S. 424 (1983), that "'[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.' Id. at 433." 477 U.S. at 468. That is the method plaintiffs here use to calculate the "lodestar" figure for their application.

Plaintiffs are entitled to compensation for time reasonably expended on litigation. In addition, "time spent in establishing entitlement to an amount of fees awarded under § 1988 is compensable." Clark v. City of Los Angeles, 803 F.2d 987, 992 (9th Cir. 1986).

The reasonableness of the lodestar amount should be reviewed in light of the following factors: (1) time and labor required; (2) novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6)

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whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975), cert. denied, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). A review of the lodestar in this case in light of those factors supports the reasonableness of plaintiffs' fee request.

2. The *Kerr* Factors

(1) Time and Labor. This case required extensive time and labor because it was a fact-intensive class action which involved many different legal claims and incarcerated youth who were located almost 100 miles from the offices of plaintiffs' counsel.

The class involved over a thousand members. Lawyers and staff extensively reviewed institutional records and responded to many individual complaints about the myriad kinds of constitutional violations which are the subject of this litigation. Declaration of Patricia J. Arthur. In anticipation of trial, and given the numerous legal claims and facts, plaintiffs' counsel developed a data bank to manage all factual information relevant to plaintiffs' respective claims. Declaration of Patricia J. Arthur. The task of managing facts in a case such as this, involving multiple and complex constitutional and statutory claims, is labor intensive. Moreover, much time and work was required to: (a) defend against defendants' Motion to Dismiss; (b) obtain a preliminary injunction against defendants' pepper spray practices; (c) prepare and take depositions (there were a total of 15 depositions taken in this case); (d) prepare evidence for possible trial; and (e) conduct extensive negotiations that ultimately resulted in a full settlement of the case.

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(2) Difficulty of Questions Involved. The issues in this litigation, some of which were novel, were difficult and complex. Many claims involved constitutional issues or intricate federal statutory provisions. For example, with regard to plaintiffs' education claims brought under the Individuals with Disabilities Education Act, plaintiffs had to research such questions as whether, in a class action challenge such as this, named class members with special education claims were required to individually exhaust their administrative remedies before seeking the kind of systemic, class-wide relief sought in this action.

Plaintiffs' constitutional claims raised similar complex questions. For example, there are no reported (or unreported, so far as we know) cases in the country that set forth the standard to apply to determine the constitutionality of defendants' pepper spray practices, practices that were ultimately enjoined here.

(3) Skill Required. The central issues in this litigation were of a constitutional nature which required significant skills with respect to constitutional law and institutional litigation. The many issues involved in this case required special knowledge of a variety of areas of the law and expertise in juvenile institutional litigation. A skilled team of four lawyers and their support staff were required to manage the litigation. Due to the breadth of the case, and need for special expertise in juvenile institutional litigation, local counsel associated with a nationally known lawyer from the National Center for Youth Law who has for years specialized in juvenile litigation.

(4 & 7) Preclusion of Other Employment and Time Limitations. An extraordinary amount of time was required to manage and organize the volume of facts in this class action, as well as to prepare legal arguments in support of plaintiffs' many claims.

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The time it took counsel to review and prepare facts in support of plaintiffs' pepper spray claim alone significantly affected counsels' ability to take on other work.[2]

(5) Customary Fees. The customary fee for plaintiffs' counsel in this type of litigation is consistent with that being requested by plaintiffs in this case. See Declaration of John Phillips submitted in support of this Motion.[3] As in most, if not all civil rights litigation, plaintiffs' counsel and organizational sponsors took the case on a contingency basis incurring the risk of non-payment, as well as loss of costs expended.

(6 & 8) Contingency of Fees and Results Obtained. Economic damages were not sought in this litigation. Rather, the case involved requests for injunctive and declaratory relief. As detailed in the Declaration of Patricia J. Arthur, the results obtained in this case were extraordinary. Green Hill School is being rebuilt and remodeled; previously non-existent special education services are now available to youth at GHS, improved health and rehabilitation programs have been implemented, mental health services have been and will continue to be improved for youth, the use of pepper spray and other inappropriate physical restraints on youth have been curtailed, Spanish translation services are now available, and defendants have significantly changed their disciplinary and segregation practices as a result of this case. Moreover, the effects of this litigation may extend beyond Green Hill School. For example, the Juvenile Rehabilitation Administration (JRA) is conducting a statewide review and revision of the mental health services available for youth at all JRA facilities.

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[2]/ Over one hundred videotapes and thousands of pages of documents concerning defendants' pepper spray practices were reviewed, organized, and prepared for trial. These tasks alone took counsel hundreds of hours, and plaintiffs' pepper spray claim was only one of many equally fact-intensive claims in the case.

[3]/ The Declaration of James Lobsenz, submitted in support of attorneys fees in another case, is submitted herewith solely as support for the market rates of plaintiffs' counsel in this case. See, especially, pages 5 and 11.

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(9) Counsel Reputation. The three lead counsel in this case, Patricia J. Arthur, David Lambert, and Katrin E. Frank are all experienced civil rights litigators. All counsel have extensive experience and a strong reputation for their civil rights advocacy on behalf of people in institutions. The attached declarations of counsel detail their respective experience, reputation and expertise.

(10 & 11) Desirability of the Case. It is difficult in the local legal community to obtain counsel for cases, such as this one, involving the representation of incarcerated youth; the case is difficult and risky. Furthermore, it was, by necessity, a contingent case which required not only that attorneys bear the risk of non-payment of fees, but also that the organizational sponsors had to underwrite the cost of litigation, as there was no likelihood that the plaintiffs could pay any costs incurred whether they won or lost. For example, plaintiffs incurred expert witness expenses in this case which will not be reimbursed.[4] Any other expenses not compensated by the Court will remain unreimbursed expenses, since plaintiffs have no resources with which to compensate counsel.

D. The Base Fee Rate And Hours Expended

The number of hours plaintiffs' counsel have expended is set forth in the Declarations of Patricia J. Arthur, Katrin E. Frank, Robert A. Stalker, Jr., and David Lambert. Given the complexity of the claims, the number of class members, the many claims, and huge volume of facts, plaintiffs anticipate no serious question about the reasonableness of the total number of hours expended. The Declarations of John Phillips and James Lobsenz submitted herewith further support the reasonableness of the fee rates we use and the hours expended on this litigation.

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[4]/ Expert witness fees for the consultants used to pursue plaintiffs' claims against the State defendants are excluded since they are not compensable under 42 U.S.C. § 1988.

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In addition to hours for direct representation, attorney time is compensable for activities such as services before a lawsuit is formally commenced, including drafting initial pleadings, and work associated with the development of the theory of the case. Webb v. Board of Education, 471 U.S. 234, 243 (1985); Culman v. Block, 589 F. Supp. 1411, 1418 n.8 (D.N.D. 1984). Plaintiffs here also seek fees for productive discussions among attorneys for case management purposes, National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1337 (D.C. Cir. 1982); for necessary conferences with paralegals and potential witnesses, Morgan v. Nevada Board of State Prison Commissioners, 615 F. Supp. 882, 884 (D. Nev. 1985) (paralegals); Spell v. McDaniel, 616 F. Supp. 1069, 1099 (E.D.N.C. 1985) (potential witnesses); and for time spent on supervision by a senior attorney, Reed v. New York, 584 F. Supp. 461, 462 (S.D.N.Y. 1984).[5]

As part of their fees, plaintiffs seek recovery for hours worked by paralegals, law clerks and the data base manager. These hours are appropriately included in the fees counsel seek. Missouri v. Jenkins, 491 U.S. 274, 285 (1989). The term "reasonable attorney fee" in 42 U.S.C. § 1988 refers to attorney work product, including work performed by paralegals and the like. Id. Where the prevailing practice is to bill fee-paying clients for paralegal and other work, it is appropriate to calculate the fee, including paralegal and clerk work, on the basis of "rates and practices prevailing in the relevant market." Id. at 286-87. See also Davis v. County of Los Angeles, 8 E.P.D. 9444 (D.C. Cal. 1974).[6] See also

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[5]/ Plaintiffs have exercised billing judgment by not charging for all activity. See Declarations of Plaintiffs' Counsel attached.

[6]/ Davis was decided before the enactment of Section 1988, but was cited specifically as an example of a case in which "[t]he appropriate standards . . . are correctly applied" in the Senate Report on the Civil Rights Attorneys' Fee Act. See Larson, Federal Court Awards of

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Virginia University v. Kaycee, 499 U.S. 83, 99-100 (1991).

Plaintiffs have calculated their fee request at the standard hourly market rate of each attorney and support staff involved.[7] These rates are at or below the prevailing market rates in the area for lawyers and staff involved in litigation of this type and complexity.[8] Courts have approved similar, or greater, fees in other cases in this Circuit. See e.g., Dease v. City of Anaheim, 838 F. Supp. 131 (C.D. Cal. 1993).

E. The Bill For Expenses

Out-of-pocket expenses, as well as attorneys' fees, are compensable under the Civil Rights Act. See Palmigiano v. Garrahy, 707 F.2d 636, 637 (1st Cir. 1983), and cases cited therein. The general rule is that expenses in litigation normally billed to a fee-paying client should be taxed under § 1988. See Thornberry v. Delta Airlines, Inc., 676 F.2d 1240, 1244 (9th Cir. 1982), vacated on other grounds, 461 U.S. 952 (1983); Gorelangton v. City of Reno, 638 F. Supp. 1426, 1434 (D. Nev. 1986).

Courts have recognized that such expenses may include the same kinds of expenses requested by the plaintiffs here. The cases in this area are legion; the following is a sampling of cases involving the kinds of expense items plaintiffs have included:

(1) Photocopying expenses: Northcross v. Board of Education, 611 F.2d 624, 642 (6th Cir. 1979).

(2) Long distance charges: Gorelangton v. City of Reno, supra, 638 F. Supp. at

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Attorney's Fees 320 (1981).

7/ A local market rate is used to calculate the fees for out-of-town counsel.

8/ The determination of a reasonable hourly rate depends on prevailing market rates, not the individual billing rates of the lawyers involved. Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984).

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1436.

(3) Federal Express and postage charges: Gorelangton v. City of Reno, supra, 638 F. Supp. at 1436.

(4) Attorneys' travel expenses: Northcross v. Board of Education, supra, 611 F.2d at 629; Gorelangton v. City of Reno, supra, 638 F. Supp. at 1436.

(5) Facsimile and messenger expenses: International Woodworkers v. Champion International, 790 F.2d 1174, 1185 (5th Cir. 1986); Palmigiano v. Garrahy, 707 F.2d 636, 637 (1st Cir. 1983).

The expenses incurred in this case are detailed in the supporting declarations of counsel submitted herewith. An award of any of these expenses is therefore appropriate under 42 U.S.C. § 1988.

III. CONCLUSION

For these reasons, plaintiffs' request for attorneys' fees and expenses under the Civil Rights Act is reasonable and should be granted. This case is ongoing and there will be monitoring for at least another four years. Accordingly, plaintiffs request that the Court's order reflect that plaintiffs may apply for future expenses and fees periodically as they are incurred.

Respectfully submitted this 22nd day of November, 1996.

COLUMBIA LEGAL SERVICES
Attorneys for Plaintiffs

PATRICIA J. ARTHUR, WSBA #13769
Of Attorneys for Plaintiffs

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SUMMARY

Horton v. Williams:
Plaintiffs' First Application for Costs and Fees

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Patricia J. Arthur		$197,597.50
Robert A. Stalker		35, 817.90
Ursula Barbosa		5720.00
Kelli Schmidt		5210.00
Tom Janega		700.00
Maureen Janega		280.00
COSTS		16,383.07
	SUBTOTAL	261,708.47
NATIONAL CENTER FOR YOUTH LAW		
David Lambert		79,668.00
COSTS		2,856.08
	SUBTOTAL	82,524.08
MACDONALD, HOAGUE AND BAYLESS		
Katrin E. Frank		17,280.00
Tim Ford		192.00
COSTS		50.22
	SUBTOTAL	17,522.22
GRAND TOTAL		$361,754.77