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United States District Court,
District of Columbia.

LaSHAWN A., by her next friend Evelyn Moore, et al., Plaintiffs,
v.
Marion BARRY, as Mayor of the District of Columbia, et al., Defendants.

Civ. No. 89–1754 (TFH). | Feb. 18, 1998.

Attorneys and Law Firms

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Opinion

MEMORANDUM OPINION

THOMAS F. HOGAN, United States District Judge.

***1** Pending before the Court is plaintiffs' motion for interim attorneys fees.[1] Plaintiffs have requested that the Court award them $2,419,373.17 in fees and costs. Defendants oppose the award of any fees; they further assert that plaintiffs' request is unreasonable. The Court will grant plaintiffs' motion and will award them fees, but it will reduce the award from the amount requested.

I Procedural History

The Court's April 18, 1991 opinion found defendants liable on slightly different grounds for two portions of the plaintiff class. As to plaintiff children in defendants' custody, the Court found that defendants violated their federal and local statutory rights and also their constitutional rights. As to plaintiff children not in the defendants' custody, the Court found only that defendants violated their federal and local statutory rights. A few months after the finding of liability, the Court granted the parties' joint motion for entry into judgment of a remedial order.

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983, which creates a cause of action to redress "the deprivation of any rights, privileges, or immunities secured by the Constitution and law." A violation of federal statute amounts to an actionable harm under § 1983 when Congress has not specifically foreclosed such suits, and when the statute in question unambiguously creates definite obligations that are not " 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.' " *Golden State Transit Corp. v. City of Los Angeles,* 493 U.S. 103, 106 (1989) (citation omitted). Plaintiffs argued ***inter*** alia that defendants had violated the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620–628, 670–679a ("Adoption Assistance Act"). Relying on precedent from several circuits and Supreme Court guidance regarding § 1983, this Court held that the Adoption Assistance Act imposed obligations specific enough to create rights enforceable under § 1983.

After the Court released its opinion, the Supreme Court examined the Adoption Assistance Act in light of § 1983. *Suter v. Artist M .,* 503 U.S. 347 (1992). It focused upon 42 U.S.C. § 671(a)(15), which requires that each recipient of certain federal funds must ensure that its "state plan" provides that "reasonable efforts" will be made to prevent the removal of children to foster homes and that "reasonable efforts" will also be made to enable children who are removed to return home. The Supreme Court held that this provision of the Adoption Assistance Act was unenforceable through § 1983 because the statute only required funding recipients to adopt a plan, and not to ensure that the specific element of the plan requiring "reasonable efforts" was actually performed. Congress later overturned much of this decision.[2]

After the *Sutter* opinion was released, this case reached the Court of Appeals. Defendants urged the court to rely upon *Suter* and reverse the federal statutory liability finding, but the Court of Appeals took another approach. It held that

> ***2** [b]ecause the district court's judgment is independently supportable by District of Columbia law, we affirm the court's decision in favor of the children in this case. It appears that each provision of the remedial order reflects the requirements of District of Columbia statutes and regulations, as well as of federal statutes. Nevertheless, because the order was drafted to conform with federal as well as with District law, there are scattered references in the order to federal law that are inappropriate in light of our confirmation of the decision entirely on the basis of local law.
>
> We therefore remand to the district court, with instructions to fashion an equally comprehensive order based entirely on District of Columbia law, if possible. If there are any portions of the consent decree that depend entirely on a federal statute, the district court should consider [the *Suter* decision] ... before it includes them in the revised consent decree.

LaShawn A. ex rel. Moore v. Kelly, 990 F.2d 1319, 1326 (D.C.Cir.1993). On remand, the Court issued a second remedial order which incorporated the changes directed by the Court of Appeals.

The Circuit then considered defendants' appeal of the second remedial order. The original panel issued an opinion that remanded the order back to this Court for reconsideration of the exercise of pendant jurisdiction. *LaShawn A. v. Barry,* 69 F. 3d 556 (D.C.Cir.1995). However, an opinion of the Circuit, sitting *en banc,* vacated that opinion and effectively affirmed the Court's remedial order. *LaShawn A. v. Barry,* 87 F.3d 1389 (D.C.Cir.1996). Therefore, all appellate challenge of the Court's remedial order in this case is complete; there is no question that plaintiffs have prevailed in this litigation.

II Entitlement to Award

The Court has discretion to award attorney's fees to a party that prevails under § 1983. 42 U.S.C. § 1988(b). Interim fee awards are appropriate once a plaintiff becomes a prevailing party, even if the entire course of litigation has not terminated. *Texas Association v. Garland,* 489 U.S. 782, 790–91 (1989). Therefore, if the Court finds that plaintiffs have prevailed pursuant to § 1983, it may award fees, even though substantial issues may remain in the underlying case.

There is no dispute that plaintiffs are the prevailing party; there are no appealable issues remaining in this litigation. It is also irrelevant that plaintiffs prevailed through a consent judgment, and not after a full trial and judgment on the merits. The Supreme Court has stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." *Maher v. Gagne,* 448 U.S. 122, 129 (1980).

Not all of the claims brought by the plaintiffs are fee-shifting claims. Because local statutes are not enforced through 42 U.S.C. § 1983, the fee-shifting provisions of § 1988 do not apply directly to those claims. Therefore, the Court cannot award fees solely because plaintiffs have prevailed on local grounds not covered under § 1983. However, the Supreme Court noted that "Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under [§ 1988]." *Maher,* 448 U.S. at 132 n. 15. Thus, it is not dispositive that the Court eventually premised its second remedial order on local law alone, in order to comply with the Court of Appeals' desire to avoid reaching the federal issues.

***3** Courts have applied this theory to award fees when only local law claims are reached and federal constitutional or statutory claims remain unresolved, so long as the federal claims are substantial and the federal and local claims arise out of a common nucleus of operative fact. *See, e.g., Hewitt v. Joyner,* 940 F.2d 1561, 1572–73 (9th Cir.1991), *cert. denied,* 502 U.S. 1073 (1992) (state constitutional claim resolved); *Plott v. Griffiths,* 938 F .2d 164, 167–68 (10th Cir.1991) (state statutory claim resolved); *Wisconsin Hospital Ass'n v. Reivitz,* 820 F.2d 863, 865 (7th Cir.1987) (claim of violation of consent decree resolved); *Seaway Drive–In v. Clay,* 791 F.2d 447, 449–51 (6th Cir.), *cert. denied,* 479 U.S. 884 (1986) (state statutory claim resolved); *Exeter–West Greenwich Regional School District v. Pontarelli,* 788 F.2d 47, 50 (1st Cir. 1986) (state statutory claim resolved by certification to state supreme court); *New York v. 11 Cornwell Co.,* 718 F.2d 22, 23, 25 n. 3 (2d Cir.1983) (en banc) (state statutory claim resolved); *Williams v. Thomas,* 692 F.2d 1032, 1036 (5th Cir. 1982), *cert. denied,* 462 U.S. 1133 (1983) (state tort claim resolved); *Kimbrough v. Arkansas Activity Ass'n,* 574 F.2d 423, 426–27 (8th Cir.1978) ("nonfederal," "nonconstitutional" claim resolved at preliminary injunction stage). Therefore, the Court may award plaintiffs with fees if they have substantial federal claims, and if those claims are sufficiently related to the state grounds on which they prevailed.

Defendants ask the Court to revisit its original finding of liability, and to determine that the plaintiffs should not prevail on their federal claims, thereby rendering § 1988 inapplicable. The Court declines to do so. Not only would a fresh merits determination expand this litigation beyond its already convoluted state, but the Court is satisfied that, even if plaintiffs' federal statutory claims do not survive *Suter,*[3] plaintiffs have substantial constitutional claims on which they would prevail. *LaShawn v. Dixon.* 762 F.Supp. at 990–994 (Rejecting arguments that constitutional claims lacked merit). Even if there is a defect in the finding of statutory liability, neither *Suter* nor its congressional override disturbs this court's holding on the constitutional claims of the custodial portion of the plaintiff class. Therefore, the Court finds that plaintiffs have substantial constitutional claims, on which they would have prevailed, had the Court reached those issues in its opinion.

Defendants argue, first, that plaintiffs' success on the local law claims somehow preempts recovery on federal constitutional claims, thereby foreclosing the application of § 1988. Defendants rely on the Supreme Court case of *Smith v. Robinson.* 468 U.S. 992 (1984), which denied fees to a party that recovered under a non-fee generating, federal statute.[4] The *Smith* Court held that parties seeking fees under § 1988 had to establish both that they had substantial federal claims, and that Congress intended § 1983 to extend to those claims. *Smith.* 468 U.S. at 1007.

***4** Plaintiffs in the present case easily meet the *Smith* standard. The Smith plaintiffs were barred from recovery of fees because they had achieved their full relief through a federal statute—the Education of the Handicapped Act—in which Congress had specifically decided not to permit fee shifting. In that case, the Court found that Congress intended to foreclose § 1983 claims, in favor of claims under the EHA. For this reason, the Court refused to permit the plaintiffs to execute an end run around the Congressional intent embodied in the statute. In the present case, by contrast, plaintiffs have not recovered under any comprehensive federal statute, such as the EHA. Instead, plaintiffs have viable, at least partially parallel claims under the Constitution and under local law. There is no indication that Congress intended to make an exception, or to foreclose recovery on a constitutional basis, as it clearly did with the EHA. Thus, plaintiffs' recovery of fees is not barred under the *Smith* doctrine.

Defendants further argue that plaintiffs' § 1983 claims are not related to the local grounds on which they obtained relief. This argument must also fail. It is clear from the Court's remedial order and opinion that the constitutional claims arise from the same set of facts as the local claims, since both involve defendants' operation of their child welfare system.[5] Thus, plaintiffs' constitutional claims are not only substantial, but are intertwined with the local law claims on which relief was predicated. Thus, recovery of fees is proper under § 1988, as interpreted by *Maher v.. Gagne* and the Courts of Appeals.

Finally, defendants argue that the constitutional grounds extend only to the plaintiffs who were in custodial care, and that plaintiffs should not recover fees for litigating the claims of non-custodial plaintiffs. The Court is not persuaded by this argument to reduce the award. Because the facts involving the care of the custodial children and the non-custodial children are so intertwined, a proportionate reduction is neither appropriate, nor possible. *See Hensley v. Eckerhart,* 461 U.S. 424, 435, 440 (1983) (requiring proportionate reduction when claims are "distinct in all respects" but allowing full fees when claims are "related").

The Court finds that plaintiffs are a prevailing party, and that they have federal claims that are substantial and related to the local claims upon which the Court fashioned its second remedial order. Therefore, the Court holds that plaintiffs are entitled to an award of fees and costs under 42 U.S.C. § 1988.

III Extent of Award

Plaintiffs' most recent fee request—their "Revised Request for Interim Attorneys' Fees and Expenses (through October 30, 1997)"[6]—asks the Court to award $2,419,373.17 in fees and expenses. In addition to objecting to the award of fees in general, defendants object to the amount of plaintiffs' request. Specifically, defendants argue that plaintiffs request payment for, .. hours not reasonably expended, request for payment at an unreasonable hourly rate, and request payment for unreasonable expenses.

***5** The Court will address these issues, and will impose certain caps and reductions on the award. The Court will also ask plaintiffs to recalculate their counsel's hourly rates; the Court will wait for those figures before entering a final fee award.

A. Attorneys' Fees
The initial estimate of a reasonable attorney's fee is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate, or "lodestar." *Blum v. Stenson,* 465 U .S. 886, 888 (1984); *Hensley,* 461 U.S. at 433; *Covington v. District of Columbia,* 57 F.3d 1101, 1109 (D.C.Cir.1995). This figure can then be modified by a multiplier, if necessary. *Covington,* 57 F.3d at 1107. Generally, the applicants bear the burden of establishing the appropriate hours and the reasonableness of the rate. *Id.*

Therefore, in order to evaluate whether plaintiffs have submitted a reasonable request, the Court will first examine plaintiffs' hours to determine whether they were reasonably expended. Then, the Court will determine what hourly rate is reasonable.

1. Appropriate Number of Hours
In order to justify a fee request, a plaintiff must document hours worked through contemporaneous time records, or risk a reduction in the award. Hensley, 461 U.S. at 433; *In Re North,* 12 F.3d 252, 257 (D.C.Cir.1994). In the present case, plaintiffs have presented fairly detailed time records. Therefore, the Court finds that plaintiffs have properly documented their request.

However, defendant objects to three aspects of plaintiffs request—time expended in travel between New York and Washington, D.C, redundant time in which more than one attorney attended the same hearing, deposition, or meeting, and time spent preparing to file the complaint. The Court agrees in part with defendants, and will order a reduction in the overall award. Defendants also ask the Court to define what hours are recoverable for litigating this fee issue, which the Court will do.

a. Travel Time
Plaintiffs' counsel is based in New York; therefore, counsel has spent substantial time in transit, to attend meetings, depositions, and hearings in Washington, D.C, where the case and the Court are located. Defendants concede that plaintiffs can recover time for travel within the Washington area—because even local counsel would engage in such travel—but they argue that plaintiffs should not recover for travel between the cities.

Plaintiffs argue that all travel time was productively spent discussing and preparing the case. Courts are divided on how much compensation attorneys are due for travel time. *See e.g., Gay, Lesbian, and BiSexual Alliance v. Sessions,* 930 F.Supp. 1492 (M.D.Ala.1996) (granting full recovery for travel time by out of town counsel). *But see Wilder v. Bernstein,* 975 F.Supp. 276, 283–84 (S.D.N.Y.1997) (reducing award for travel time to compensate for its unproductive nature). The Court finds that plaintiffs do not establish that all transit time, which accounts for a substantial portion of the award,[7] was spent productively. Therefore, the Court will reduce the recovery for travel time by 25%, to compensate for the loss of productivity involved in frequent travel between New York and Washington, D.C.

b. Hours Spent Preparing Complaint
***6** Plaintiffs seek reimbursement for approximately 602 hours that they spent developing the case, prior to filing the complaint. Time spent preparing the complaint is normally recoverable under § 1988, but time spent on optional, pre-litigation tasks is not. *Webb v. Board of Education.* 471 U.S. 234, 241–44 (1985). Defendants concede that plaintiffs should recover some of this time, but they assert that 602 hours is an excessive time to prepare to file a case. The Court agrees with defendants, and will therefore reduce plaintiffs' recovery for pre-complaint time by 25%.

c. Billing Judgment
Time expended is not always synonymous with time reasonably expended, and billing judgment is as important in the setting of fee recovery as it is in the setting of private billing of clients. *See Copeland v. Marshall,* 641 F.2d 880, 891 (D.C.Cir.1980) (*en banc*). A substantial portion of counsel's time was spent in discussions among attorneys, and plaintiffs frequently sent multiple attorneys to the same event.[8] Furthermore, defendants argue that plaintiffs have not documented their counsel's time sufficiently, and that some reduction is necessary to compensate not only for redundancy in billing, but also for uncertainty in record keeping.

The Court agrees with defendants that plaintiffs may have requested recovery for some redundancy in effort. The Court also agrees that plaintiffs' record keeping prevents a thorough consideration of hours worked. The Court will not apply the reduction urged by defendants, but it will compensate for plaintiffs' billing judgment by reducing the total award by 5%.

d. Fee Litigation
Plaintiffs are clearly entitled to recover fees for hours spent litigating the present motion. However, the Court does not wish to reward protracted litigation by providing an extensive award for both the merits and the fee stages of this case. Therefore, the Court will cap plaintiffs recovery for time spent litigating this motion at 15% of the recovery for litigation of the merits. *See e .g., Coulter v. Tennessee,* 805 F.2d 146, 151 (6th Cir.1986) (Imposing similar cap on recovery for attorneys' fees litigation).

e. Summary
The Court will therefore grant plaintiffs recovery for their time spent in litigation, as summarized in their "Revised Request for Interim Attorneys' Fees and Expenses (through October 30, 1997)," and as documented their other exhibits to their motion. However, the Court will subtract 25% of the recovery for travel time and *25%* of the recovery for pre-litigation time. Furthermore, the Court will cap the recovery for time spent litigating this motion at 15% of the recovery for time spent litigating the merits. Finally, the Court will assess a 5% reduction on the total recovery, to adjust for billing judgment.

2. Reasonable Hourly Rate
Having determined the number of hours that plaintiffs' counsel reasonably expended, the Court must determine a reasonable hourly rate, or lodestar, to apply to that time. *Blum v. Stenson,* 465 U.S. 886, 888 (1984). Plaintiffs have suggested hourly rates, based New York rates and the experience of each attorney.

***7** Defendants present five objections to plaintiffs' requested rates. First, defendants argue that counsel should be paid D.C. rates. Second, defendants assert that the *Laffey* index is not properly applied to this case. Third, defendants argue that plaintiffs should not be paid current rates. Fourth, defendants assert that plaintiffs have improperly calculated their counsel's

experience levels. Finally, defendants object to payment of volunteer lawyers and paralegals.

a. Relevant Geographical Market

Normally, § 1988 awards are calculated according to the prevailing market rates in the relevant community, regardless of whether counsel is private or public-interest. *Blum,* 465 U.S. at 895. However, an extra-forum rate may be appropriate where no sufficient local lawyers are available. *Donnell v. United States,* 682 F.2d 240 (D.C.Cir.1982), *cert denied,* 459 U.S. 1204 (1983) (Out-of-town rates for Voting Rights cases). Most Circuits have held that the issue depends on the reasonableness of hiring an out of town specialist. *See, e.g., Public Interest Group v. Windall,* 51 F.3d 1179, 1186 (3d Cir.1995): *Maciera v. Pagan,* 698 F.2d 38, 40 (1st Cir.1983).

In the present case, the relevant community is Washington, D.C, where plaintiffs and defendants are located, and where court proceedings occurred. However, plaintiffs present affidavits that they attempted to find appropriate counsel in the Washington, D.C, area, and that they were unable to do so. They state that other advocacy groups lacked either the time or the resources to take on such a huge case, and that a local law firm may possibly have had the time but would have lacked the expertise necessary to conduct such specialized litigation. Plaintiffs assert that their search identified the Childrens' Rights Project as the only viable group which had the time, resources, and expertise to take on this complex case.[9]

The Court is satisfied that plaintiffs properly selected the Childrens' Rights Project, and that counsel should be paid New York rates, pursuant to *Donnell.* Furthermore, the Court finds that plaintiffs have properly justified their suggested rates as reasonable within the New York legal community.[10]

b. Use of Laffey Index

Plaintiffs have calculated their rates based on an index, created in the case of *Laffey v. Northwest Airlines.* 572 F.Supp. 354 (D .D.C.1983), that sets hourly rates, based on years of litigation experience. The index is kept and updated by the U.S. Attorney's Office for D.C. as a guide to D.C. rates; plaintiffs have used it as a guide for setting New York rates as well. Defendants argue that the index is unreliable, and that plaintiffs should be paid according to a civil rights law index, not a complex litigation one.

Defendants' first argument fails. The index has been relied upon favorably by the Court of Appeals and by-judges on this Court, *See, e.g., Save our Cumberland Mountains, Inc. v. Hodel,* 857 F.2d 1516, 1525 (D.C.Cir.1988); *Park v. Howard University,* 881 F .Supp. 653, 661 (D.D.C.1995) (Gasch, J.); *Shepherd v. American Broadcasting Companies,* 862 F.Supp. at 509 (D.D.C.1995) (Lamberth, J.). The Court of Appeals has consistently affirmed its reliability, stating that the Laffey index is a "useful starting point," which plaintiffs may supplement (as they have done in this case). *Covington v. District of Columbia,* 57 F.3d 1101, 1109 (D .C.Cir.1995).

***8** The Circuit has also rejected defendants' second argument, and has stated that the relevant market for § 1988 awards is that of complex litigation. *Covington,* 57 F.3d at 1112. Furthermore, this litigation has been extremely complex, and the application of a complex litigation index, such as the *Laffey,* table, is entirely appropriate. Finally, plaintiffs have provided ample evidence that their table of rates is reasonable in light of the rates charged by firms that handle these types of cases. Therefore, the Court will calculate its award from plaintiffs' index of rates.

c. Current rates

Plaintiffs ask the Court to award fees at 1997 hourly rates, rather than the prevailing rates in 1989–91, when counsel performed most of this work. They assert that current rates will compensate for the 6–8 year delay in payment. Defendants argue that plaintiffs will receive a windfall, but the Court does not agree. The application of current rates is fair compensation for the wait that plaintiffs and their counsel have endured.

d. Experience

Under plaintiffs' rate index, different attorneys' hours are billed at different rates, according to their litigation experience. The primary error in plaintiffs' calculations is that they compensate according to their attorney's 1997 experience levels, even though most work was performed in 1989–91, when these attorneys were less experienced. This liberal calculation has substantial effects on the fees paid, and nearly all, if not all, of plaintiffs' counsel would be billed at lower rates, if their true experience levels are used.[11]

Plaintiffs argue that they must use 1997 experience levels to compensates for the lapse of time between their work and the payment of fees by defendant. However, the Court's award already compensates plaintiffs for this delay, by calculating billing at 1997 hourly rates, adjusted for 1997 values, instead of at older rates. The use of 1997 experience levels, in addition to the 1997 prevailing rates, would give plaintiffs a substantial windfall—increasing their recovery by almost 40% for certain lawyers.

The Court agrees with defendants, and calculate the fee award at rates set according to the experience possessed by each attorney at the time he or she performed the work. Plaintiffs will therefore need to revise their fee request, to show hours worked and experience attained by each attorney, by year.

e. Volunteer Attorneys and Clerks

Finally, plaintiffs seek to recover fees for work performed by volunteers in this case. These persons include attorney Marilyn Mazur and law clerk/paralegal Tara Sher. Defendants argue that, since they were volunteers, the "prevailing rate" for these persons is $0. However, fees are measured by market value of services rendered, not by the value that was actually charged. *Jordan v. United States Department of Justice,* 691 F.2d 514, 523–24 (D.C.Cir.1982) (granting fees for student legal services). Based on the Circuit's decision in Jordan, the Court will permit recovery for these two volunteer workers.

***9** Plaintiffs have already agreed *to* apply a 25% reduction in Ms. Mazur's hourly rate, to compensate for some non-litigation experience she has had. Plaintiffs should continue to apply this reduction when they recalculate Ms. Mazur's rate based on her experience at the time she performed her work, as described, *supra* .

B. Other Expenses

Plaintiffs have also requested payment for expenses beyond the work of attorneys on the case. Specifically, plaintiffs request payment for the work of four paralegals, for the work of a number of "case readers," and for miscellaneous expenses.

1. Paralegals

Plaintiffs request payment for time spent by three paralegals[12] on the merits litigation, and for one paralegal[13] on the fee litigation. Plaintiffs may recover for expenses that are traditionally part of an attorney's bill, including for paralegal help. *See Missouri v. Jenkins,* 491 U.S. 274, 285 (1989). Thus, plaintiffs may recover a reasonable fee for these persons, even if they worked as volunteers. Furthermore, plaintiffs have established that $85 per hour is a reasonable billing rate, and that their paralegals spent 584 hours on the merits and 88.5 hours on the fee litigation. Therefore, the Court will award plaintiffs fees for this work, at $85 per hour.[14]

2. Case readers

Plaintiffs also seek compensation for approximately 9775 hours spent by nineteen "paralegal case readers." These individuals reviewed the records of several hundred children in the plaintiff class and completed a questionnaire, which outlined the history of defendants' treatment of each child. The resulting data was used by plaintiffs' expert witness, Dr. Theodore Stein, "and formed the basis for the central evidence in the case." Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Interim Attorneys' Fees and Expenses at 27.

Defendants argue that this expense is not compensable under § 1988. The Supreme Court has held that § 1988 does not entitle prevailing parties to recover expert witness fees. *West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83, 86–87 (1991). Instead, the statute permits recovery only of costs, as described at 28 U.S.C. § 1920, and of expenses that have traditionally been included in the attorney's fee, such as the services of secretaries and paralegals. *Id.* Thus, there is no dispute that plaintiffs cannot recover Dr. Stein's fees or time.

Plaintiffs assert that they used data derived from case reader effort in their own presentation of the case, in addition to using it as expert work product. This may be true, but the Court finds that the case readers' primary task was to aid Dr. Stein in preparation of his expert testimony; the additional benefit to plaintiffs' counsel was secondary. As a component of the expert witness fee, the labor of these case readers is therefore unrecoverable under § 1988. *WVUH,* 499 U.S. at 86–87. For this reason, the Court will not award plaintiffs compensation for the 9775 hours expended by the nineteen case readers.

3. Other expenses

***10** Plaintiffs also request $73,583.17 in expenses.[15] They seek reimbursement for such items as deposition transcripts, taxi and air transportation for attorneys, meals for attorneys while traveling, long-distance telephone calls, photocopying, and express postage and courier services.

Plaintiffs are entitled to reimbursement for those items set forth in the costs statute at 28 U.S.C. § 1920 and for those items traditionally billed to clients as part of the attorney's fee. *WVUH,* 499 U.S. at 86–87, 99; *Missouri v. Jenkins,* 491 U.S. 274, 285 (1989). Defendants read *WVUH* to suggest that the plaintiffs can only recover those expenses listed in the costs statute, but their reading of the precedents is incorrect. This Circuit has approved reimbursement of expenditures such as those sought by plaintiffs. *Laffley,* 746 F.2d at 30. Therefore, the Court will approve the award of these expenses.

IV Conclusion

The Court has determined that plaintiffs, as prevailing parties to this litigation, are entitled to attorneys' fees, costs, and expenses under 42 U.S.C. § 1988. In addition, the Court has approved plaintiffs' time records as a base off which to calculate the award. Furthermore, the Court will set plaintiffs' award based on prevailing 1997 hourly rates, to compensate for the time that plaintiffs have spent waiting for payment of these fees and expenses.

The Court finds, however, that plaintiffs have improperly calculated their counsel's hourly rates, because they bill each attorney as if he or she performed all work at a 1997 experience level. The Court also finds that there are other grounds for reduction of awards for travel time, prelitigation time, and for time spent litigating this fee issue. Finally, the Court finds that a 5% reduction should apply to the entire award, to account for some duplicative and unproductive efforts.

The Court cannot, at this time, calculate a final figure for its award of fees, because it does not have a breakdown of hours worked by plaintiffs' attorneys, and because it does not have the proper hourly rates for those attorneys. Plaintiffs' current fee request gives only a single, "lump sum" figure of hours worked for each attorney, and does not break hours down by year. Furthermore, the current request calculates each attorney's hourly rate at his or her 1997 level of experience. The Court will require plaintiffs to revise their request, and to submit a more detailed breakdown of each attorney's billing. This new breakdown should include hours worked by year for each attorney. The revised request should also distinguish time spent each year in transit between New York and Washington from time spent on other tasks.

In addition, the revised request should include each attorney's hourly rate for each year that he or she performed work. That hourly rate may be set from the index that plaintiffs are currently using, which uses prevailing 1997 rates. However, plaintiffs must calculate the applicable rate for the attorneys according to each attorney's experience level at the time he or she performed the work, not according to a 1997 experience level.

***11** Once plaintiffs have submitted this revised fee request, the Court will apply reductions as stated in the opinion, will calculate the appropriate fees, and will enter its award of fees and expenses.

An order will accompany this opinion.

ORDER

For the reasons stated in the Court's Memorandum Opinion, it is hereby **ORDERED** that plaintiffs' motion for interim attorneys' fees is **GRANTED;** it is further

ORDERED that plaintiffs shall submit to the Court a revised fee request, as described in the Memorandum Opinion. The revised request shall include an individual breakdown of hours worked by each attorney in each year, with a further breakdown of hours spent by each attorney in travel and in pre-litigation efforts. The revised request shall include hourly rates calculated at appropriate yearly experience levels.

Footnotes

1	In the present motion, plaintiffs seek recovery only for fees and expenses up to an including the entry of the Consent Judgment in 1991. It also covers fees and expenses for preparing and litigating this fee request. It does not cover fees or expenses for any other task performed after 1991.
2	Congress amended the Social Security Act (of which the Adoption Assistance Act is a part) to state that in all pending and future actions brought to enforce a provision of [the Social Security Act], such a provision is not to be deemed unenforceable because of its inclusion in a section of [the Act] requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M., ...* but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 671(a)(15) of the Act is not enforceable in a private right of action. 42 U.S.C. § 1320a–2 (amended October 20, 1994).
3	Indeed, it is possible that plaintiffs could prevail on their federal statutory claims, after the congressional overturn of *Suter* and subsequent case law. Two courts have examined the congressional amendment in light of § 1983 suits and found that the reach of *Suter* is limited to § 671(a)(15) only. *Jeanine B. ex rel. Blondis v.Thompson,* 877 F.Supp. 1268, 1281–84 (E.D.Wis.1995); *Harris v. James,* 883 F.Supp. 1511, 1519 (M.D.Ala.1995). These decisions suggest that even if the Court were to revisit the federal claims, it would rule in favor of the plaintiffs, except with respect to § 671(a)(15). That provision covers only a small part of the defendants' violations. In its original liability opinion, the Court held that [i]n almost every area of the federal law, the District's child welfare system is deficient. It fails to investigate reports of abuse and neglect in a timely manner; it fails to provide services to children and families; it fails to make appropriate foster care placements; it fails to develop case plans; and it fails to assure a permanent home for the children in its care, among other things. *LaShawn A. ex rel. Moore v. Barry,* 762 F.Supp. 959, 989 (D.D.C.1991). This conclusion implicates other provisions of the Adoption Assistance Act. 762 F.Supp. at 962–64, 989–90.
4	Defendants presented this argument for the first time only one week before the scheduled hearing on this motion. It is unclear why defendants did not make this major argument, which is based on a case that was issued nearly fourteen years ago, at an earlier stage of this four year fee litigation.
5	Defendants also argue that plaintiffs' constitutional claims could not support all of the relief ultimately granted. However, the extent of relief was decided in a consent agreement between the parties; therefore, plaintiffs should not be punished, merely because defendants agreed to give them more relief than the Constitution demanded.
6	This request is found at Exhibit G to Plaintiffs' Fifth Supplemental Memorandum in support of their motion.
7	For example, defendants calculate that plaintiffs' lead attorney spent 20.5 percent of his billed time in travel.
8	Again, defendants calculate that plaintiffs' lead attorney spent 11 percent of his time in conference with other attorneys, and multiple attorneys would attend even the most routine status calls.
9	Among other considerations, plaintiffs had to find counsel that possessed the resources to "front" substantial funds and hours without the prospect of prompt compensation. Indeed, few other firms or organizations would devote such substantial human and economic resources to a case, and wait nearly nine years for payment of their fees.
10	Plaintiffs do not request New York rates for their three D.C. lawyers-Elizabeth Symonds, Arthur Spitzer, and Alvin Bronstein. These attorneys should be billed at D.C. rates, which plaintiffs concede.
11	For example, plaintiffs request that one attorney, Christopher Dunn, be billed at his 1997 experience level of 12 years. However, when he performed work in 1988–1991, he had only 2–6 years of experience. Calculating his billing at this lower experience level reduces his hourly rate from $310 per hour to less than $200 per hour. Of course, Mr. Dunn is entitled to bill at a higher rate for his work after 1990, when he had more experience.
12	Lise Hamlin, Tara Sher, and Katherine Cheung.
13	Sarah Whitsett
14	The Court will, however, apply its 10% billing judgment reduction to paralegal time as well as to attorney time.
15	This amount is comprised of $71,104.02 in expenses for the merits litigation and $2,479.15 in expenses for the fee litigation. Defendants have already paid over $22,000 in expenses; the current figure incorporates that payment.