

FILED

UNITED STATES COURT OF APPEALS

AUG 01 2014

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KA. D., a minor, by her mother, KY. D., as
her next friend; KY. D.; B. D.,

Plaintiffs-counter-defendants-
Appellees/Cross-Appellants,

v.

MARY ELLEN NEST; SOLANA BEACH
SCHOOL DISTRICT,

Defendants-counter-claimants-
Appellants/Cross-Appellees.

Nos. 10-56320, 10-56373

D.C. No. 08-CV-622-W
Southern District of California,
San Diego

ORDER

Before: Peter L. Shaw, Appellate Commissioner

I
Background

Ka. D., an autistic student, and her parents (together, “Ka. D.”), brought this federal action against Mary Ellen Nest and Solana Beach School District (together, “School District”) for review of unfavorable portions of a California Office of Administrative Hearings (“OAH”) Administrative Law Judge (“ALJ”) decision regarding the 2007-08 school year, when Ka. D. was four years old, and for an award of attorneys’ fees and non-taxable expenses as the prevailing party before the California OAH, pursuant to the Individuals with Disabilities Education Act

(“IDEA”), 20 U.S.C. § 1415(i)(2), (3). The district court denied the parties’ cross-motions for summary judgment and affirmed the ALJ decision, and the parties filed cross-appeals. The district court granted the parties’ joint request for a stay of the district court’s determination of attorneys’ fees and non-taxable expenses pending disposition of the appeals.

This court affirmed the district court’s judgment, holding that the record fully supported the ALJ’s and district court’s decisions. *See Ka. D. ex rel. Ky. D. v. Nest*, 475 Fed. App’x 658, 661 (9th Cir. 2012). Regarding the issues appealed by the School District, the court conducted a de novo review and held that the School District failed to provide a free and appropriate public education (“FAPE”) in the least restrictive environment for Ka. D., because the School District’s general education preschool class was an inappropriate educational setting, and also held that that Ka. D.’s chosen private general education preschool with the support of a 1:1 aide was an appropriate setting. *Id.* at 660-61. Regarding the issue appealed by Ka. D., the court held that it was not an abuse of discretion to grant the School District 30 days to provide an aide. *Id.* at 661. The court found the parties’ remaining contentions on appeal unpersuasive. *Id.* The court denied the School District’s petition for rehearing and rehearing en banc.

Ka. D. filed a bill of costs and the court taxed costs against the School District in the amount of \$640.20. *See* 28 U.S.C. § 1920; Fed. R. App. P. 39; 9th Cir. R. 39-1.1 - 1.3. Ka. D. filed an application for attorneys' fees and non-taxable expenses under the IDEA; the School District filed an objection to the amount requested, but did not object to Ka. D.'s entitlement to fees; and Ka. D. filed a reply. *See* 9th Cir. R. 39-1.6, 1.7. Ka. D.'s attorneys billed attorneys' fees and non-taxable expenses in the amount of \$787,029.57 for the representation before the California OAH, the district court, and the court of appeals, as follows:

<u>Forum</u>	<u>Hours</u>	<u>Attorneys' Fees</u>	<u>Expenses</u>	<u>Total</u>
California OAH	674.6	\$327,800.00	\$1,739.53	\$329,539.53
District Court	293.5	\$145,152.50	\$1,187.76	\$146,340.26
Court of Appeals	610.2	\$283,847.00	\$ 455.00	\$284,302.00
<u>Supreme Court</u>	<u>43.7</u>	<u>\$ 26,526.00</u>	<u>\$ 321.78</u>	<u>\$ 26,847.78</u>
Total	1,622.0	\$783,325.50	\$3,704.07	\$787,029.57

The court granted Ka. D.'s motion for attorneys' fees and non-taxable expenses, noting that the School District requested a significant reduction in the fee award, and referred to the Appellate Commissioner the determination of an appropriate award amount. *See* 9th Cir. R. 39-1.9.

The Appellate Commissioner referred the question of the fee award amount to the Circuit Mediator. The School District filed an unsuccessful petition for a

writ of certiorari in the United States Supreme Court, and Ka. D. filed a supplemental motion for attorneys' fees and non-taxable expenses for opposing the petition for a writ of certiorari. The Circuit Mediator released the fee matter, returning it to the Appellate Commissioner. The School District filed a motion for leave to file a supplemental objection, along with the supplemental objection. Ka. D. filed a response opposing the motion for leave, along with a supplemental reply. The School District's motion for leave to file the supplemental objection is granted.

Ka. D. filed a second supplemental motion for attorneys' fees and non-taxable expenses for the fee mediation, the opposition to the motion for leave, and the supplemental reply. The School District filed an objection to the second supplemental fee motion, and Ka. D. filed a second supplemental fee reply.

II Analysis

A. Applicable IDEA Provisions

The IDEA, 20 U.S.C. § 1415(i)(3), provides that “[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys’ fees as part of the costs . . . to a prevailing party who is the parent of a child with a disability.” The court may reduce the fee award where “the

amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience," or "the time spent and legal services furnished were excessive considering the nature of the action or proceeding." *Id.*; see also *Blum v. Stenson*, 465 U.S. 886, 895 & n.11 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

The IDEA, 20 U.S.C. § 1415(i)(3), also provides:

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if --

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement. . . .

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

B. Ka. D.'s Rejection Of School District's Pre-Hearing Settlement Offer

Ten months after Ka. D. filed the court of appeals motion for attorneys' fees and non-taxable expenses, and after an eight-month period of court-ordered mediation of the fee questions, the School District filed a motion for leave to file a supplemental objection to Ka. D.'s fee motion, along with the supplemental objection. Ka. D. filed a response opposing the motion, along with a supplemental reply. The School District's motion for leave to file the supplemental objection is granted in this order.

The School District argues that the supplemental objection was needed to bring to the court's attention a recently unsealed, unpublished district court attorneys' fees decision, *T.B. v. San Diego Unified Sch. Dist.*, No. 08-CV-28-MMA (S.D. Cal. Mar. 21, 2012), *appeal docketed*, No. 12-56060 (9th Cir. 2012).¹ The School District argues that the *T.B.* decision and the IDEA, 20 U.S.C. § 1415(i)(3), support reducing Ka. D.'s requested attorneys' fees for services performed after the School District's pre-administrative hearing settlement offer,

¹ The *T.B.* appeal was argued on July 9, 2014 and has not been decided.

on the grounds that Ka. D. did not obtain relief at the administrative hearing that was more favorable than the School District's settlement offer and that Ka. D. was not substantially justified in rejecting the settlement offer. The School District asserted a similar argument as an affirmative defense in its answer to Ka. D.'s district court complaint.

T.B. does not mandate a reduction in Ka. D.'s requested fees, because the evidence does not support the School District's argument that its settlement offer was more favorable than the ALJ's order. As a result of the ALJ's order, Ka. D. obtained reimbursement for continued attendance and the support of a 1:1 aide at the Hanna Fenichel Center, a private general education pre-school where Ka. D. had already enrolled at her own expense and made substantial and impressive progress. *See Ka. D.*, 475 Fed. App'x at 659-61. In contrast, the School District's settlement offer did not include a school placement of any kind for Ka. D., whose goal -- later achieved -- was full inclusion in a general education kindergarten by the following school year. Ka. D. was substantially justified in rejecting the School District's offer.

1. Coyne & Associates Therapy

The School District argues that Ka. D. did not obtain relief from the ALJ that was more favorable than the 10 hours of 1:1 applied behavioral analysis

(“ABA”) therapy provided by a non-public agency, Coyne & Associates, included in the School District’s pre-administrative hearing offer. The evidence shows, however, that the relief obtained by Ka. D. was more favorable than the School District’s offer in terms of amount, and that the therapy by Coyne & Associates was indistinguishable from the School District therapy that Ka. D. obtained.

The ALJ awarded 10 hours per week of 1:1 ABA therapy provided by a School District employee at a School District site, plus 18.75 hours per week of support by a 1:1 ABA aide from the School District or a non-public agency at Ka.D.’s private general education preschool. (The aide ultimately was provided by the School District.) Ka.D. obtained a total of 28.75 hours per week of ABA therapy, more than the 10 hours per week that the School District offered.

In addition, the ALJ specifically found that “there is no evidence that the District proposed using behavioral instruction that differed significantly from that provided by Coyne,” that “the evidence indicated that the ABA program provided by the District includes the same methodologies used by Coyne,” and that “[t]he weight of the evidence supports the District’s contention its offer of 10 hours of intensive one-on-one ABA services provided to Student at the District’s school site meets Student’s unique needs in the area of behavioral intervention.”

Moreover, although Ka. D.'s district court complaint sought review of the ALJ's decision to provide only School District ABA therapy, Ka. D. did not pursue this issue, suggesting that, as long as the provider of the therapy was qualified, the specific provider was not as important to Ka. D. as the number of hours of therapy and other services obtained.

2. Supervision Of Therapy

The School District argues that Ka. D. did not obtain relief from the ALJ that was more favorable than its pre-administrative hearing offer because the offer included more hours of supervision, and supervision provided by Coyne & Associates. The School District offered 2 hours per month of clinical supervision meetings for 3 tutors and 8 hours per month of supervision by Coyne & Associates of its therapist (totaling 10 hours per month). The School District argues that the ALJ awarded only 1 hour per week (4 hours per month) of supervision of the 1:1 ABA aide from the School District or a non-public agency (ultimately provided by the School District) at Ka.D.'s private general education preschool.

The School District's argument ignores, however, that the ALJ also awarded 10 hours per week of 1:1 ABA therapy by a School District employee at a School District site "as offered in the June 13, 2007 [Individualized Educational Program ('IEP')]." According to the IEP, this therapy included 2 hours per week (8 hours

per month) of supervision by the School District behavior therapist. Thus, Ka. D. obtained from the ALJ a total of 12 hours per month of supervision -- more than the 10 hours per month offered by the School District.

3. Monetary Value Of Relief

The School District argues that Ka. D. did not obtain relief from the ALJ that had a monetary value more favorable than the \$1,264.06 per week of services included in the School District's pre-administrative hearing offer. The School District offered 1.5 hours per week of speech and language therapy (\$93.21 per week), 1 hour per month of occupational therapy consultation (\$13.99 per week), 10 hours per week of 1:1 ABA therapy by Coyne & Associates (\$800 per week), 2 hours of clinical supervision meetings per month for 3 tutors (\$125.91 per week), and 8 hours of supervision by Coyne & Associates (\$230.95 per week).

The School District argues that the ALJ ordered only \$962.76 per week of services: 1.5 hours per week of speech and language therapy (\$93.21 per week), 1 hour per month of occupational therapy consultation (\$13.99 per week), 10 hours per week of 1:1 ABA therapy by a School District employee at a School District site (\$394.40 per week), 18.75 hours per week of a 1:1 ABA aide at Ka.D.'s

private general education preschool (\$437.81 per week),² and 1 hour per week of supervision of the 1:1 ABA aide (\$23.35 per week).

As discussed above, however, the School District fails to include in the services ordered by the ALJ the 2 hours per week of supervision by the School District behavior therapist (\$78.88 per week).³ The School District also fails to include the \$6,100 annual tuition for 2007-08 at Hanna Fenichel Center (\$152.50 per week).⁴ This brings the total monetary value of the services ordered by the ALJ to \$1,194.14 per week -- only \$70 different from the \$1,264.06 per week of services included in the School District's pre-administrative hearing offer.

More important, the School District fails to include the non-quantifiable benefit obtained by Ka. D. As a result of the ALJ's order, Ka. D. was able to continue attending, with reimbursement for tuition and 1:1 aide support, a private general education pre-school where she had made substantial and impressive progress toward her goal of attending a fully inclusive general education kindergarten. *See Ka. D.*, 475 Fed. App'x at 659-61. The School District's pre-hearing settlement offer did not include a school placement of any kind for Ka. D.

² The School District miscalculated the weekly aide amount to be \$391.11.

³ The parties do not state the cost of the School District therapy supervision; as in the supervision of the aide, it presumably cost the same amount as the service.

⁴ The weekly tuition amount is estimated based on a 40-week school year.

In *T.B.*, the court rejected a student's contention that the value of a general education placement instead of home schooling could not be equated with an amount of money, because the evidence showed that the student was willing to accept home schooling in exchange for \$100,000. Here, the evidence shows that Ka. D. wanted a general education placement that met her unique needs, and the non-quantifiable benefit of obtaining such a placement may be considered.

C. Ka. D.'s Attorneys' And Paralegal's Reasonable Hourly Rates

Ka. D. requests the award of hourly rates of \$640 for Michael Kirkpatrick of the Public Citizen Litigation Group ("PCLG") and \$500 for Maureen Graves, \$450 for Cordelia Martinez, \$375 for John Nolte, \$300 for Rhonda Krietemeyer, and \$100 for paralegal Matthew Zerby of the Law Office of Maureen Graves in Fountain Valley, California. Ka. D. submits the attorneys' declarations regarding their education and experience, as well as ten 2012 declarations by Southern and Central California attorneys regarding prevailing market rates in the community for similar services by similar attorneys and paralegals.

The School District objects that Ka. D.'s declarations do not specifically discuss the requested \$450 hourly rate for Martinez, and that the declarations show that Martinez's rate is "extravagant" in comparison to prevailing market rates for similar services. *See Blum*, 465 U.S. at 895 n.11. The School District argues that

the \$375 hourly rate requested for Nolte, a 2004 law school graduate, should be awarded for Martinez, a 1984 law school graduate. The School District's objection lacks merit. The evidence shows that all the requested hourly rates are reasonable, and the rates are awarded.

Although only Martinez's declaration expressly discusses her requested \$450 hourly rate, the declarations submitted by Ka. D. are consistent with awarding the requested \$450 rate for Martinez. Indeed, Martinez has more legal experience than Graves, who graduated in 1987, and Kirkpatrick, who graduated in 1991. Yet the School District does not oppose the higher requested rates of \$500 for Graves and \$600 for Kirkpatrick.

The School District argues that Martinez, who began practicing special education law in 2005, has less special education experience than Steven Wyner (who began practicing special education law in 1993 and charges \$575 for administrative hearings and \$675 for appellate litigation), Cara Lucier (who began practicing special education law in 2002 and charges \$350 per hour), Roberta Savage (who began practicing special education law in 1999 and charges \$350 for administrative hearings and \$400 to \$500 for appellate litigation), Patricia Cromer (who began practicing special education law in 1998 and charges \$375 per hour for

administrative hearings and \$475 to \$575 for appellate litigation), and Eric Freedus (who began practicing special education law in 1997 and charges \$450 per hour).

The School District's argument ignores, however, Martinez's 1984 law school graduation date and significant, relevant experience from 1984 to 2005 in areas of public interest law other than special education. *See, e.g., Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 455 (9th Cir. 2010) (hourly rates based on law school graduation date and years of legal experience). Martinez's years of legal experience are more comparable to the years of legal experience of George Crook (a 1974 law school graduate), Freedus (a 1974 law school graduate), Wyner (a 1977 law school graduate), Marcy Tiffany (a 1977 law school graduate), Bruce Bothwell (a 1980 law school graduate), Graves (a 1987 law school graduate), and Ralph Lewis (a 1989 law school graduate). Contrary to the School District's argument, Martinez's years of experience are not in line with the years of experience possessed by Savage (a 1999 law school graduate), Lucier (a 2002 law school graduate), and Nolte (a 2004 law school graduate).

In addition, Martinez's career experience is similar to the career experience of Wyner (a 1977 law school graduate who began practicing special education law in 1993), Bothwell (a 1980 law school graduate who began practicing special education law in 1997), and Kirkpatrick (a 1991 law school graduate who joined

PCLG in 2001). Courts have approved rates of \$440 for administrative hearings and \$525 for appellate litigation for Wyner, *see William S. Hart Union High Sch. Dist. v. Termine*, No. 04-CV-2930 (C.D. Cal. Feb. 6, 2008) (Order); *Termine v. William S. Hart Union High Sch. Dist.*, No. 02-CV-1114-SVW (C.D. Cal. Jan. 5, 2007) (Order), *aff'd*, 288 Fed. App'x 360, 362-63 (9th Cir. 2008); \$400 for administrative hearings and \$450 for appellate litigation for Bothwell, *see L.M. v. Capistrano Unified Sch. Dist.*, No. 06-CV-3049 (C.D. Cal. July 13 & 19, 2010) (Orders), *aff'd on other grounds*, 462 Fed. App'x 745, 747 (9th Cir. 2011); and \$640 for appellate litigation for Kirkpatrick. *See Compton Unified Sch. Dist. v. Addison*, No. 06-CV-4717-AHM (C.D. Cal. Feb. 24, 2012) (Minute Order), *aff'd*, 598 F.3d 1181, 1185 (9th Cir. 2010); *C.B. v. Garden Grove Unified Sch. Dist.*, No. 08-CV-1047-RSWL, 2012 WL 161806, at *5-6 (C.D. Cal. Jan. 18, 2012) (Order); and *D'Lil v. Best Western Encina Lodge & Suites*, No. 02-CV-9506-DSF (C.D. Cal. Apr. 13, 2010) (Order).

Moreover, the School District submits no evidence to rebut the requested \$450 hourly rate for Martinez. *See Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 980 (9th Cir. 2008) (quoting *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992) ("The party opposing the fee application has a burden of rebuttal that requires submission of evidence . . . challenging the accuracy and

reasonableness of the . . . facts asserted by the prevailing party in its submitted affidavits.”)).

D. Ka. D.’s Attorneys’ And Paralegal’s Time Entries

The School District objects that Ka. D.’s attorneys’ time entries “fail to sufficiently describe and document their time” and “are billed in a block fashion.” The School District contends that the time entries impede the court’s determination whether the requested hours are reasonable, and justify a reduction in the requested hours. But the School District does not identify the specific time entries or hours that should be reduced on this ground, and a review of the time entries shows that Ka. D.’s attorneys’ and paralegal’s time entries are adequate to allow a meaningful determination of the reasonableness of the requested hours. The attorneys and paralegals were not required to record in great detail how each minute of their time was spent. *See Hensley*, 461 U.S. at 436 n.12; *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000). Instead, Ka. D.’s burden to submit evidence supporting the hours claimed is satisfied by listing the attorneys’ and paralegals’ hours and identifying the general subject matter of their work. *Id.*

Ka. D.’s attorneys and paralegal did not block bill disparate tasks to a degree that makes it impossible to evaluate the reasonableness of the requested hours, or that resulted in inflation of the requested hours. *See Welch v. Metropolitan Life*

Ins. Co., 480 F.3d 942, 948 (9th Cir. 2007). Indeed, most of the block-billed time entries involve related or complementary tasks. No across-the-board reduction in the requested hours is warranted to account for block billing. *See Secalt S.A. v. Wuxi Shenxi Constr. Mach. Co.*, 668 F.3d 677, 690 (9th Cir. 2012). In instances where hours spent on certain activities must be disallowed, however, and block billing makes it impossible to determine how much time was spent on the specific activity, the entire block of time will be disallowed. This reduction is sufficient to account for the limited amount of block billing.

E. California OAH (2007-08)

1. California OAH Reasonably Expended Hours

Ka. D. requests attorneys' fees in the amount of \$327,800 for 674.6 hours of work before the California OAH, as follows:

<u>Legal Worker</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Total</u>
Graves	589.9	\$500	\$294,950.00
Martinez	14.5	\$450	\$ 6,525.00
<u>Nolte</u>	<u>70.2</u>	<u>\$375</u>	<u>\$ 26,325.00</u>
Total	674.6		\$327,800.00

Ka. D. requests fees for preparing a hearing request, a settlement offer, a request for an independent educational evaluation, a public records request, a peremptory challenge, a pre-hearing conference statement, an exhibit list, a

response to the School District's pre-hearing conference statement, a response to the School District's request for the telephonic appearance of a witness, and a subpoena. Ka. D. also requests fees for participating in a telephonic trial-setting conference, and for preparing for and participating in an 11-day administrative hearing on Ka. D.'s and the School District's consolidated requests for due process, at which Ka. D. presented 16 witnesses, the School District presented 5 witnesses, and 124 exhibits were admitted. Graves appeared at each day of the hearing, and Nolte appeared at the beginning and on the last day of the hearing. Graves states that she worked from 5:30 a.m. to midnight on hearing days, but capped her billing at 12 hours. Ka. D. also requests fees for preparing a post-hearing closing brief, reply brief, and settlement offer.

a. California OAH Degree Of Success

According to the ALJ's decision, Ka. D. presented the following issues before the California OAH:

(1) Whether the School District denied a FAPE to Ka.D. for the 2007-08 school year and 2008 extended school year by:

(A) Predetermining its offer of placement and related services;

(B) Failing to consider all relevant data concerning Ka. D. including input from her parents, before making an offer of placement and related services;

(C) Failing to offer an ABA therapy program that meets Ka. D.'s unique needs because it is not scientifically based and supported by peer-reviewed research, to the extent practicable, is not offered in a home environment, and fails to provide a sufficient amount of therapy hours;

(D) Offering a placement for a portion of Ka. D.'s school day in a special education day class that does not incorporate adequate ABA principles, fails to include peers with compatible instructional needs, and which is not the least restrictive environment for Ka. D.;

(E) Offering a placement in a School District general education classroom for a portion of Ka. D.'s school day that is an inappropriate instructional setting for her and whose addition to Ka. D.'s program creates a school day that includes too many transitions between classroom settings;

(F) Failing to provide staff capable of implementing the IEP offered by the School District; and

(2) Are the School District's assessments of Ka. D. with regard to her educational placement appropriate and, if not, is Ka. D. entitled to reimbursement from the School District for the independent assessment conducted by Dr. Caroline Bailey?

As required by California Education Code § 56507, the ALJ specified the extent to which each party prevailed on each issue heard and decided in the due process hearing. The ALJ determined that Ka. D. substantially prevailed on issue 1(D), and fully prevailed on issue 1(E), and that the School District fully prevailed on issues 1(A), 1(B), 1(C), 1(F), and issue 2.

The federal courts and not the ALJ, however, determine prevailing party status for the purpose of awarding attorneys' fees under the IDEA. *See Dist. of*

Columbia v. Straus, 607 F. Supp. 2d 180, 183 (D.D.C. 2009), *aff'd*, 590 F.3d 898 (D.C. Cir. 2010). This court has already determined that Ka. D. is a prevailing party entitled to attorneys' fees for this IDEA dispute.

Ka. D. acknowledges, however, that Ka. D. did not prevail on all issues before the California OAH, the district court, and the court of appeals. When a prevailing party succeeds on only some claims, the court must consider whether: (1) the party failed to prevail on claims that were unrelated to the claims on which the party succeeded; and (2) the party achieved a level of success that makes the hours reasonably expended a satisfactory basis for the fee award. *See Hensley*, 461 U.S. 424 at 434; *McCown v. City of Fontana*, 565 F.3d 1097, 1103 (9th Cir. 2009).

Ka. D. requests an award of 100 percent of her attorneys' hours before the California OAH, contending that "all issues were closely intertwined and plaintiffs' counsel needed to assert all the claims presented in order effectively to represent the student." Ka. D. does not support this conclusory statement, though, with a showing that the California OAH claims were sufficiently related or a citation to case authority supporting an award of 100 percent of the hours in such circumstances. *Id.*

Ka. D. proposes in the alternative a reduction of "at most about 10 percent" (\$32,780 in fees) to account for time spent on issues on which Ka. D. did not

prevail at the administrative hearing.⁵ Ka. D. self-imposed similar reductions in the requested hours for the district court and court of appeals litigation to account for time spent on issues on which Ka. D. did not prevail. The School District objects generally that Ka. D.'s requested fees are unreasonable, but does not specifically address the reasonableness of Ka. D.'s proposed reductions in the requested hours to account for her degree of success before the California OAH, district court, or court of appeals.

In light of Ka. D.'s self-imposed reductions in the requested hours for the district court and court of appeals litigation, Ka. D.'s proposed alternative 10 percent reduction is appropriate to account for her degree of success before the

⁵ Graves states that she arrived at the 10 percent reduction by reviewing the record, sampling every tenth page of testimony, and determining that approximately 55 percent of the hearing involved substantive issues on which Ka. D. prevailed, approximately 10 percent of the hearing involved substantive issues relevant to both issues on which Ka. D. prevailed and issues on which Ka. D. did not prevail, approximately 5 percent of the hearing involved alternative theories supporting substantive issues on which Ka. D. prevailed, approximately 19 percent of the hearing involved nonsubstantive issues relevant to both issues on which Ka. D. prevailed and issues on which Ka. D. did not prevail, and approximately 10 percent involved substantive issues on which Ka. D. did not prevail. Graves also determined that about 20 percent of Ka. D.'s closing and reply briefs were devoted to substantive issues on which she did not prevail, but states that this estimate understates her degree of success because it includes portions of the brief devoted to an alternative theory supporting an issue on which Ka. D. prevailed.

California OAH. Ka. D.’s request is reduced by \$32,780 in fees (65.56 hours at Graves’s \$500 hourly rate) to reflect her California OAH degree of success.

b. California OAH Duplication Of Effort

The School District objects to 176.8 hours (\$86,130 in fees), arguing that the hours should be reduced or eliminated because three attorneys billed for the administrative hearing request and reply brief and two attorneys billed for the closing brief:

<u>Service</u>	<u>Graves</u>	<u>Martinez</u>	<u>Nolte</u>	<u>Total</u>
Request	21.6	7.4	3.8	32.8
Closing	97.0	0	6.0	103.0
<u>Reply</u>	<u>32.0</u>	<u>6.0</u>	<u>3.0</u>	<u>41.0</u>
Total	150.6	13.4	12.8	176.8

Ka. D. responds that the staffing of the case saved time, improved quality, and shifted work to lawyers with lower rates, noting that the School District also used multiple lawyers on the case and pleadings.

“The cost effectiveness of various law firm models is an open question. . . . Modeling law firm economics drifts far afield of the Hensley calculus and the statutory goal of sufficiently compensating counsel in order to attract qualified attorneys to do civil rights work. [The] court’s inquiry must be limited to determining whether the fees requested by this particular legal team are justified

for the particular work performed and the results achieved in this particular case. The court . . . may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests.” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1114-15 (9th Cir. 2008).

A review of the time sheets and Graves’s declaration reveals no unreasonable duplication of effort before the California OAH. *See id.* at 1113. Graves reasonably drafted most of the hearing request, closing brief, and reply brief, with her less-involved, lower-paid colleagues performing a moderate amount of issue-spotting, editing, cite-supplying, and shortening of the documents.

Nevertheless, a review of the time sheets and the administrative record shows that Graves reasonably should have been able to prepare the 40-page closing brief in fewer than 97 hours, given the years of experience and special education expertise reflected in her hourly rate. Ka. D. is therefore awarded 60 hours for Graves’s work on the closing brief, and the California OAH fee request is reduced by 37 hours at Graves’s \$500 hourly rate (\$18,500 in fees).

c. California OAH Settlement Work

The School District objects that Ka. D.’s requested hours for settlement attempts and communications are excessive because the School District signaled its

decision to pursue this matter to a conclusion in court to clarify the state of the law. The School District cites seven pages of time entries in support of its objection, but does not specify the objectionable time entries or the hours subject to reduction on this ground.

A review of the time entries shows that Graves reasonably expended before the California OAH approximately 19.2 hours from June 2007 through February 2008 for preparing settlement proposals, reviewing the School District's settlement proposals, corresponding with the School District about settlement, and communicating with Ka. D. about settlement. Notably, 12.7 hours were spent pre-hearing, when the School District continued to make settlement offers of its own, and 6.5 hours were spent after the ALJ's decision. Both time periods were appropriate for settlement discussions, and Graves states that she was not aware at this stage that the School District was not open to settlement. According to Graves, she was not informed that the School District wanted a decision on the merits until the court of appeals mediation.

Reasonable fees for settlement activities may be awarded under federal-fee shifting statutes. *See Cuellar v. Joyce*, 603 F.3d 1142, 1143-44 (9th Cir. 2010) (citing *Michigan v. EPA*, 254 F.3d 1087, 1096 (D.C. Cir. 2001)). Ka. D.'s

requested hours for California OAH settlement attempts and communications are reasonable, and the hours are awarded.

d. California OAH Clerical Work

The School District objects to 11.5 hours billed at Nolte's \$375 hourly rate (\$4,312.50 in fees) and 18.2 hours billed at Graves's \$500 hourly rate (\$9,100 in fees) for clerical work during the California OAH proceedings -- document organization, subpoena preparation, and witness scheduling.

The School District's objection has merit. "[P]urely clerical or secretarial tasks should not be billed at [an attorney or] paralegal rate, regardless of who performs them." *Missouri v. Jenkins*, 491 U.S. 274, 288 n.10 (1989). "It is appropriate to distinguish between legal work, in the strict sense, and . . . clerical work . . . which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it." *Id.*

Ka. D. responds that "[s]ome of this time involves lawyer work in delegating; some could not be delegated efficiently or on short notice, and some involved final approval of documents. [Time billed for e]mergency lawyer assistance with IEP transcription . . . was already sharply reduced." Regardless of the circumstances of the work, it may not be compensated at Nolte's and Graves's

hourly rates. *See Action on Smoking & Health v. CAB*, 724 F.2d 211, 222-23 (D.C. Cir. 1984) (declining to compensate at attorney hourly rates the preparation of an appendix, noting that even where “[a] public interest, non-profit organization, performs its work without the abundant clerical or paralegal support often possessed by private sector law firms; [the court] cannot compensate work not properly performed by attorneys at attorneys’ rates”); *Neil v. Comm’r of Soc. Sec.*, 495 Fed. App’x 845, 847 (9th Cir. 2012) (approving district court decision not to award fees at attorney rates for preparing and serving summons).

Nolte’s reduction of the hours for transcription does not make the work compensable. Ka. D. provides no evidence that separate billing of clerical work is customary in the Southern California market. *See Trs. of the Constr. Indus. & Laborer’s Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253, 1257 (9th Cir. 2006) (“even purely clerical or secretarial work is compensable if it is customary to bill such work separately . . . though such tasks ‘should not be billed at [an attorney or] paralegal rate’”). In the Appellate Commissioner’s experience, separate billing of clerical work is not customary in Southern California or in the Ninth Circuit in general.

Accordingly, Ka. D.'s fee request for the California OAH proceedings is reduced by 29.7 hours and \$13,412.50 in fees to account for Ka. D.'s attorneys' billing of clerical work at attorney rates.

e. California OAH Peripheral Issues

The School District objects to three pages of Ka. D.'s attorneys' California OAH time entries, contending that the work performed involved issues "only marginally related to the advancement of this litigation." The School District does not relate its specific objections to particular time entries, identify the time entries by date or attorney, or cite legal authority in support of the objections.

The School District appears to object to 1.7 hours billed by Graves from August 14 through 27, 2007 for drafting a public records request to the School District and for reviewing and responding to School District responses to the request, on the ground that the work was "outside the scope of discovery." Graves states that the public records request produced helpful information for representing Ka. D. at hearing. Graves's public records request time was useful and reasonably expended in pursuit of success before the California OAH. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 560, 561 (1986); *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982). Graves's public records request time is awarded.

The School District also appears to object to 1.5 hours billed by Nolte and 5.2 hours billed by Graves from October 22 through 24, 2007 for drafting a letter to the School Board, arguing that the letter was “an attempt to influence a settlement the District did not agree to.” Graves states that the letter suggested initiating settlement discussions because the California OAH hearing was postponed due to fire, and that she was not aware at this point that the School District was not open to settlement. Ka. D.’s attorneys reasonably expended this time exploring settlement when the hearing was postponed, and the hours are awarded. *See Del. Valley Citizens’ Council*, 478 U.S. at 561; *Cuellar*, 603 F.3d at 1143-44.⁶

f. California OAH Hearing Length

Ten months after Ka. D. filed the attorneys’ fees motion, at the conclusion of an eight-month period of court-ordered mediation of the fee questions, the School District filed a motion for leave to file a supplemental objection to Ka. D.’s fee

⁶ Ka. D.’s attorneys directly communicated with the School Board rather than with School District counsel because Graves did not believe the School Board was receiving accurate information. This tactic is questionable. The School District’s later objection to the direct communication, and Graves’s research of the ethical questions, are discussed below with respect to Ka. D.’s court of appeals fee request. With respect to the California OAH fee request, however, the settlement letter-related time would have been reasonably expended if the communication had been addressed instead to School District counsel, and the time is awarded.

motion, which is granted in this order. In the supplemental objection, the School District objects that the number of hours that Ka. D. requests for the hearing are excessive because the hearing took 11 days and was longer than average or similar hearings. The School District's objection to the length of the hearing should have been presented to the ALJ in a timely manner. Given that the ALJ allowed an 11-day hearing, Ka. D.'s attorneys' time was reasonably expended in pursuit of success, and it is awarded. *See Del. Valley Citizens' Council*, 478 U.S. at 561; *Moore*, 682 F.2d at 839.

g. California OAH Reasonably Expended Hours Summary

After the reductions imposed for degree of success, excessive time on the closing brief, and clerical work, Ka. D.'s remaining 542.34 hours before the California OAH were reasonably expended and the hours are awarded.

Accordingly, Ka. D. is awarded \$263,107.50 in fees for the representation before the California OAH, as follows:

<u>Legal Worker</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Total</u>
Graves	469.14	\$500	\$234,570.00
Martinez	14.50	\$450	\$ 6,525.00
<u>Nolte</u>	<u>58.70</u>	<u>\$375</u>	<u>\$ 22,012.50</u>
Total	542.34		\$263,107.50

2. California OAH Non-Taxable Expenses

Ka. D. requests the award under the IDEA of non-taxable expenses in the amount of \$1,739.53 for the California OAH representation. Specifically, Ka. D. requests reimbursement for expenditures at gasoline stations, restaurants, hotels, Staples, Office Depot, and FedEx Kinkos in connection with Graves's appearance at the administrative hearing. Graves states that the requested amount of non-taxable expenses was compiled from receipts and payment records.

The School District objects only that Ka. D.'s request for non-taxable expenses is untimely. But the School District relies incorrectly on the deadline for filing a bill of costs in the court of appeals to tax certain limited costs of producing necessary copies of the briefs. *See* 28 U.S.C. § 1920; Fed. R. App. P. 39; 9th Cir. R. 39-1.1 - 1.4; Cir. Advisory Comm. N. to R. 39-1. Ka. D.'s request for an award of non-taxable expenses under the IDEA was timely filed.

An award of reasonable attorneys' fees under the IDEA may include non-taxable litigation expenses when it is the prevailing practice in a given community for lawyers to bill those expenses separately from their hourly rates. *See Grove v. Wells Fargo Fin. Cal., Inc.*, 606 F.3d 577, 580 (9th Cir. 2010); *Trs. of the Constr. Indus. & Laborers Health & Welfare Trust*, 460 F.3d at 1258. Attorneys' fees awards can include reimbursement for out-of-pocket expenses, including travel,

courier, and copying expenses, such as those requested by Ka. D. *See Grove*, 606 F.3d at 580; *Davis v. City & Cnty. of San Francisco*, 976 F.2d 1536, 1556 (9th Cir. 1992). Ka. D. is awarded non-taxable expenses in the amount of \$1,739.53 for the California OAH representation.

F. District Court (2008-10; 2012)

1. District Court Reasonably Expended Hours

Ka. D. requests attorneys' fees in the amount of \$145,152.50 for 293.5 hours of work before the district court, as follows:

<u>Legal Worker</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Total</u>
Graves	277.3	\$500	\$138,650.00
Martinez	5.7	\$450	\$ 2,565.00
<u>Nolte</u>	<u>10.5</u>	<u>\$375</u>	<u>\$ 3,937.50</u>
Total	293.5		\$145,152.50

Ka. D. requests fees for filing a 21-page complaint, a notice of interested parties, a summons, a 25-page amended complaint, two motions for appointment of a guardian ad litem, a 25-page motion for summary judgment, a notice of lodging administrative decisions, a 25-page opposition to the School District's motion for summary judgment, a 10-page reply to the government's opposition to Ka. D.'s motion for summary judgment, a 5-page response to a court order regarding her jury demand, a notice of cross-appeal, a joint motion for an extension of time to

request attorneys' fees, a joint motion to stay attorneys' fees proceedings pending disposition of the cross-appeals, and a joint report regarding the status of the cross-appeals. Ka. D. also requests fees for participating in an in-chambers early neutral evaluation conference, two telephonic settlement conferences, an in-court case management conference, and four telephonic case management conferences.

a. District Court Degree Of Success

According to Ka. D., "time on winning and losing issues was . . . nearly balanced," and Ka. D. "made major deductions for work on unsuccessful issues." Graves states and the time entries show that Ka. D. requests 20 percent of the hours incurred for Ka. D.'s motion for summary judgment, which focused mainly on and failed to achieve reversal of issues that Ka. D. lost before the OAH; 100 percent of the hours incurred for the successful opposition to the School District's motion for summary judgment seeking reversal of the portions of the OAH decision favorable to Ka. D.; and none of the hours incurred for a reply to the School District's opposition to Ka. D.'s motion for summary judgment. Ka. D. requests 100 percent of the remaining time for the district court litigation, but does not request time spent by Graves on other educational issues involving Ka. D. that arose during the litigation. The School District does not address Ka. D.'s reductions, and the reductions are sufficient to account for Ka. D.'s district court degree of success.

b. District Court Duplication Of Effort

The School District objects to 17.3 hours (\$8,365 in fees), arguing that the hours should be reduced or eliminated because two attorneys billed to complete the same project. Specifically, the School District objects to Martinez's billing of 5.7 hours on June 7, 2008 for "Legal research (review of cases regarding individual liability and drafting response to opposing counsel Jennifer Creighton's objection to aspects of complaint) and Graves's billing of 6.3 hours on June 8, 2008 and 3.8 hours on June 10, 2008 for "Legal research; drafting correspondence to Jennifer Creighton re individual liability" and 1.5 hours on June 11, 2008 for "Legal research; finalizing correspondence to Jennifer Creighton."

Fees are not justified for any work on this particular project -- researching opposing counsel's objection to a novel claim of individual liability against a defendant they had named, and concluding that the claim lacked merit. *Id.* This work should not be billed to a client, and therefore it cannot be awarded under the IDEA. *See Hensley*, 461 U.S. at 434; *Moreno*, 534 F.3d at 1111. The fee request is reduced by 5.7 hours at Martinez's \$450 hourly rate (\$2,565 in fees) and 11.6 hours at Graves's \$500 hourly rate (\$5,800 in fees) on this ground.

c. District Court Settlement Work

The School District objects that Ka. D.’s requested hours for settlement attempts and communications are excessive “given the School District’s acknowledged decision to pursue this matter to its conclusion in the Courts.” The School District cites seven pages of time entries in support of its objection, but does not specify the objectionable entries or the hours that should be reduced on this ground.

Reviewing the seven pages cited by the School District in light of the district court’s docket shows that Graves billed a reasonable amount of time in November and December 2008; January, February, March, May, June, July, and August 2009; and August and September 2010 for settlement-related activities performed in response to or contemporaneously with the district court’s scheduling and conduct of settlement, case management, or status conferences.⁷ Notably, Graves did not charge for some of the settlement-related time. As discussed above, Graves states that she was not informed that the School District wanted a decision on the merits until the court of appeals mediation. In the circumstances, where the district court case was pending and not yet submitted for decision, and the court had scheduled

⁷ On another page of the time entries, Nolte also billed a reasonable amount of time in August 2010 for settlement-related activities.

and ordered conferences, the requested district court settlement-related time was reasonable and it is awarded. *See Cuellar*, 603 F.3d at 1143-44; *Michigan*, 254 F.3d at 1096.

d. District Court Peripheral Issues

The School District objects to four pages of Graves's district court time entries, contending that Graves's work involved issues only peripherally related to the advancement of the litigation. Because the School District does not identify the objectionable time entries by date or attorney, it is difficult to discern the precise nature of the School District's objections. In addition, the School District does not cite legal authority for these objections.

The School District objects generally to Ka. D.'s requested hours for "communication with the District governing board, and review of governing board documents." On the relevant pages, Graves billed for reviewing School Board materials provided by Ka. D. (4/8/08 - 0.3 hour); reviewing School Board meeting minutes that revealed Ka. D.'s name in connection with the litigation, researching the matter and counseling Ka. D., and contacting opposing counsel (9/3/09 - 1.8 hours; 11/3/09 - 0.5 hours); and reviewing a School Board meeting agenda that did not mention the litigation; researching open meeting laws, and considering whether to contact the School Board directly (9/13/10 - 0.3 hour; 9/14/10 - 0.4 hours). This

time was sufficiently related to Graves's representation of Ka. D. in the district court litigation, and it is awarded.

The School District also objects generally to Ka. D.'s requested hours for Graves's "research regarding opposing counsel's prior cases." Graves did not charge for e-mails with Ka. D. sharing Google searches regarding the School District's new counsel (5/18/08 - 0.2 hour). On the relevant pages, however, Graves billed twice for research in this category (8/25/10 - 8 hours; 8/29/10 - 8.4 hours). Because the research involved Ka. D.'s fee request, this time is discussed below in the context of the School District's objections to the fee request.

e. District Court Motion For Attorneys' Fees And Expenses

The School District objects that Ka. D.'s request for "approximately 82 hours related to preparing a fee application in District Court" is unreasonable and disproportionate to the substantive work, but the School District does not propose a specific reduction on this basis. In support of the objection, the School District cites eight pages of 2008 through 2010 time entries by Graves, yet the School District does not specify the time entries to which the School District objects. Ka. D. responds generally that the fee-related hours were reasonably incurred. Ka. D. never filed a motion for attorneys' fees and non-taxable expenses in the district court, however, because the district court granted the parties' joint request

for a stay of the district court's determination of attorneys' fees and non-taxable expenses pending this court's disposition of the appeals. Ka. D. later filed a motion for attorneys' fees and non-taxable expenses in the court of appeals.

Ka. D.'s attorney Graves reasonably spent some time related to the fee motion during the district court litigation for the purpose of settlement conferences and before the fee proceedings were stayed. A review of Graves's time entries shows, however, that she should have accomplished this work in significantly fewer hours.

In particular, Graves billed too much time for getting up to speed on general attorneys' fees issues, given the experience reflected in her hourly rate. The following 22.4 hours are subject to reduction on this ground: 7/23/10 - 2.2 hours (. . . legal research re: fee claims; search for model fee claims); 8/21/10 - 5 hours (Reading attorney fees treatise), 1 hour (Reading Ninth Circuit rules); 8/26/10 - 1 hour (. . . research on prevailing party standard and division of fees . . .); 8/28/10 - 2.5 hours (Research on fee determination in split outcome cases; meaning of requirement that there be a change in legal relationship; relevance of alternative legal theories) 9/1/10 - 6.2 hours (Locating and reviewing fee decisions; drafting matrix of fee cases for negotiations and determination of reasonableness); 9/4/10 - 2 hours (Researching fee motion rules and checking motion samples in Southern

District); 9/13/10 - 2 hours (Research on fee orders in IDEA and similar cases); 4/11/12 - 1.5 hours (L[egal] R[esearch] -- fee forum and deadlines).

Graves also spent too much time researching opposing counsel's fee record, particularly because an attorneys' fees request should not result in a second major litigation. *See Hensley*, 461 U.S. at 433. The following 16.4 hours are subject to reduction on this ground: 8/25/10 - 8.0 hours (Research re district counsel handling of and outcomes including merits and fees in prior cases . . .); 8/29/10 - 8.4 hours (Research on opposing counsel's track record on merits and fees).

In addition, Graves spent an excessive amount of time preparing a large number of declarations in support of a fee motion, although some of this time was block billed with preparing a memorandum in support of a fee motion. The following 36.4 hours are subject to reduction on this ground: 8/30/10 - 3 hours (Drafting fee declaration of Maureen Graves); 9/1/10 - 0.1 hour (Reviewing Fee Declaration of Patricia Cromer); 9/2/10 - 0.2 hour (E-mail to George Crook re: fee declaration); 9/10/10 - 4.8 hours (Review of sample fee applications; preparation of declaration re: fees . . .); 9/11/10 - 0.2 (Forwarding of background information to fee declarants), 4 hours (Preparation of declaration re: fees . . .); 9/13/10 - 2.5 hours (Preparation of declaration re: fees . . .); 9/14/10 - 0.2 hour (Phone messages to potential fee declarations), 0.4 hour (Correspondence with attorney preparing fee

declaration and review of materials suggested by her), 3.5 hours (Research on fee orders; requests for declarations); 9/15/10 - 0.5 hour (Preparation of fee declaration . . .), 7 hours (Securing fee declarations from other lawyers; providing background of case . . .); 9/16/10 - 10 hours (Preparation of fee declaration . . .).

In the eight pages of time sheets cited by the School District, Graves reasonably spent the requested time for communicating with her client, co-counsel, and opposing counsel regarding the fee motion during the district court litigation, and some of the requested time for drafting the fee motion and supporting memorandum. Of the 75.2 hours identified above as subject to reduction for excessiveness, however, 25 hours are awarded to reflect a reasonable expenditure of time on the fee motion during the district court litigation. The fee request is reduced by 50.2 hours at Graves's \$500 hourly rate (\$25,100 in fees).

f. District Court Reasonably Expended Hours Summary

After reductions for degree of success, an unmeritorious claim, and excessive time on the fee motion, Ka. D.'s remaining 226 hours before the district court were reasonably expended and the hours are awarded. Accordingly, Ka. D. is awarded \$111,687.50 in attorneys' fees for the district court representation, as follows:

<u>Legal Worker</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Total</u>
Graves	215.5	\$500	\$107,750.00
Martinez	0	\$450	\$ 0
<u>Nolte</u>	<u>10.5</u>	<u>\$375</u>	<u>\$ 3,937.50</u>
Total	226.0		\$111,687.50

2. District Court Non-Taxable Expenses

In connection with the district court representation, Ka. D. requests the award under the IDEA of non-taxable expenses of \$468.43 for an attorney service and \$719.33 for a transcript. As discussed above with respect to California OAH expenses, the School District's objection that Ka. D.'s request for expenses is untimely lacks merit. The School District does not object to the award of non-taxable expenses on any other ground, and the expenses may be included in the attorneys' fees award under the IDEA. *See Grove*, 606 F.3d at 579-82; *Trs. of the Constr. Indus & Laborers Health & Welfare Trust*, 460 F.3d at 1258; *Davis*, 976 F.2d at 1556. Accordingly, Ka. D. is awarded non-taxable expenses in the amount of \$1,187.76 for the district court representation.

G. Court Of Appeals (2010-13)

1. Court Of Appeals Reasonably Expended Hours

Ka. D.'s attorneys billed \$283,847 for 610.2 hours of work before the court of appeals, as follows:

<u>Legal Worker</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Total</u>
Kirkpatrick	2.8	\$640	\$ 1,792
Graves	499.8	\$500	\$249,900
Martinez	26.8	\$450	\$ 12,060
Nolte	41.0	\$375	\$ 15,375
Nolte (Paralegal Rate)	6.6	\$100	\$ 660
Krietemeyer	3.7	\$300	\$ 1,110
<u>Zerby (Paralegal)</u>	<u>29.5</u>	<u>\$100</u>	<u>\$ 2,950</u>
Total	610.2		\$283,847

On Ninth Circuit Form 9, Ka. D. claims the hours were spent as follows:

<u>Services</u>	<u>K'patrick</u>	<u>Graves</u>	<u>Martinez</u>	<u>Nolte</u>	<u>Nolte(P Rate)</u>	<u>K'meyer</u>	<u>Zerby(P)</u>	<u>Total</u>
Conferences	0	65.0	0.6	0	0	0	0	65.6
Records	0	11.6	0	6.3	0	0	0	17.9
Research	0	29.7	0	0	0	0	0	29.7
Briefs	0	139.7	3.3	5.0	0	0	0	148.0
Oral Argument	0	47.5	0	0	0	0	0	47.5
Fee Motion	0	66.1	4.3	20.8	0	0	0	91.2
Fee Reply	0	41.0	2.3	0.8	0	0	0	44.1
Supp. Fee Motion	2.8	3.1	0	0	0	0	0	5.9
Supp. Fee Reply	0	90.3	16.3	8.1	6.6	3.7	29.5	154.5
<u>Fee Mediation</u>	<u>0</u>	<u>5.8</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>5.8</u>
Total Hours	2.8	499.8	26.8	41.0	6.6	3.7	29.5	610.2

Ka. D. requests fees for filing a mediation questionnaire, a 16,492-word, 67-page answering/opening brief, a 6,999-word, 28-page reply brief, a fee motion, a fee reply, a supplemental fee motion, an opposition to the School District's motion for leave to file a supplemental response, and a supplemental fee reply. Ka. D. also requests fees for appearing at oral argument in Pasadena and participating in several telephone conferences with the Circuit Mediator.

In Ka. D.'s second supplemental motion for attorneys' fees, Ka. D. agrees to reduce by 40 percent (\$25,257 in fees) the total requested for the opposition to the motion for leave and the supplemental fee reply, excluding time for determining whether to file two documents, request corrections, and request sanctions. Ka. D. does not request fees for filing the second supplemental fee motion, or for filing a reply to the School District's objection to the motion.

a. Court Of Appeals Degree Of Success

Graves states that she deducted 19.5 research and briefing hours for Ka. D.'s unsuccessful cross-appeal, which addressed only the decision to allow the School District 30 days to provide an aide. Graves states that most of her time was spent defending against the School District's appeal, and that she devoted only 3 pages of the 67-page answering/opening brief and the reply brief to Ka. D.'s cross-appeal. Graves's oral argument preparation focused almost entirely on the School

District's appeal, and her preparation and argument were minimal regarding the cross-appeal. The School District does not address Ka. D.'s reduction to account for her degree of success in the court of appeals, and the reduction is sufficient.

b. Court Of Appeals Settlement Work

The School District objects that Ka. D. requests an excessive amount of time for settlement attempts and communications regarding the appeals, given that the School District "clearly indicated its interest in pursuing this matter to its conclusion to clarify the state of the law." The School District cites five pages of time entries in support of the objection, without specifying the objectionable entries or the hours that should be reduced on this ground.

The School District's objection lacks merit. The court required the parties to participate in mediation at the outset of the cross-appeals. As discussed above, Graves states that she learned for the first time during this mediation that the School District wanted a decision on the merits. Court-ordered mediation time may be awarded under federal fee-shifting statutes. *See Cuellar*, 603 F.3d at 1143-44; *Michigan*, 254 F.3d at 1096.

A review of the time records reveals that Graves billed a reasonable amount of time for preparing a mediation questionnaire required by the court, reviewing the School District's mediation questionnaire, preparing for and participating in a

court-ordered telephone mediation conference, discussing mediation with her colleagues and client, reviewing the court's order stating that the cross-appeals were not selected for the mediation program, and researching and communicating with opposing counsel regarding mediation. Ka. D.'s requested mediation-related time was reasonably expended, and it is awarded.

c. Court Of Appeals Clerical Work

The School District objects to 21.4 hours in the briefs category at Graves's \$500 hourly rate (\$10,700 in fees) and 6.3 hours in the records category at Nolte's \$375 hourly rate (\$2,362.50 in fees) for clerical work in connection with preparing the excerpts of record and supplemental excerpts of record before the court of appeals. *See* 12/16/10 - 1.4 hours (Brief); 12/23/10 - 4.2 hours (Brief); 1/24/11 - 0.4 hours (Brief); 1/25/11 - 8.4 hours (Brief); 1/30/11 - 5.3 hours (Brief); 2/18/11 - 6.3 hours (Records); 2/25/11 - 0.2 hours (Brief); 2/27/11 - 1.5 hours (Brief).

As discussed above with respect to the California OAH representation, the School District's objection has merit, and the hours are disallowed. *See Missouri*, 491 U.S. at 288 n.10; *Trs. of the Constr. Indus & Laborer's Health & Welfare Trust*, 460 F.3d at 1257; *Action on Smoking & Health*, 724 F.2d at 222-23.

d. Court Of Appeals Peripheral Issues

i. Court Of Appeals Amicus Curiae Brief

The School District objects to Ka. D.'s request for 8 hours that Graves spent communicating with counsel for amicus curiae Council of Parent Attorneys and Advocates, Inc., contending that amicus curiae briefs allow evasion of brief-length limitations. *See, e.g., Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003). Yet the Ninth Circuit has awarded attorneys' fees for counsel communications with amicus curiae under the Civil Rights Act, 42 U.S.C. § 1988, and under the Equal Access to Justice Act, 20 U.S.C. § 2412. *See Nadarajah v. Holder*, 569 F.3d 906, 921-22 (9th Cir. 2009); *Suzuki v. Yuen*, 678 F.2d 761, 764 (9th Cir. 1982). Also, the Third Circuit has held that consultations and discussions with amicus curiae are compensable under § 1988, noting that amici curiae briefs assist the court. *See Tenaflly Eruv Ass'n v. Borough of Tenaflly*, 195 F. App'x 93, 99 & n.8 (3d Cir. 2006). Graves's 8 hours for communicating with amicus curiae were reasonably expended and they are awarded.

ii. Court Of Appeals Public Records Request

The School District objects to Ka. D.'s request for 0.8 hour that Graves spent on a public record request for information regarding the School District's representation and attorneys' fees, contending that this work was outside the scope

of discovery and performed in an attempt to influence settlement. *See* 2/25/11 - 0.3 hour (Conference); 3/7/11 - 0.2 hour (Conference); 4/1/11 - 0.1 hour (Conference); 4/11/11 - 0.2 hour (Conference). Graves states that the School District's opening brief did not show what court-ordered resolution the School District desired, as well as misunderstood the ALJ's and district court's decisions, and therefore she thought resuming settlement discussions was appropriate. In the circumstances, Graves's public records request work was useful and reasonably expended in pursuit of settlement of the cross-appeals, and the time is awarded. *See Del. Valley Citizens' Council*, 478 U.S. at 561; *Moore*, 682 F.2d at 839.

iii. Court Of Appeals School Board Contact

The School District objects to Ka. D.'s request for Graves's hours spent reviewing School District governing board documents, communicating with her client, and communicating directly with the School District governing board regarding the School District's representation and attorneys' fees, contending that these activities were unrelated to the litigation and performed to influence settlement. *See* 8/30/10 - 2 hours (Research); 9/1/10 - 0.1 hour (Conference); 3/16/11 - 1.3 hours (Conference); 4/11/11 - 0.2 hours (Conference); 4/15/11 - 1.9 hours (Research); 5/31-6/2/11 - 8.5 hours (Conference); 6/11/11 - 0.1 hour (Conference); 6/13/11 - 0.3 hours (Conference); 6/22/11 - 0.3 hours (Conference);

6/26/11 - 0.3 hours (Conference); 6/27/11 - 0.1 hour (Conference); 8/18/11 - 1.9 hours (Conference); 10/5/11 - 0.4 hours (Conference); 10/31/11 - 0.2 hours (Conference); 4/26/12 - 1.5 hours (Conference).

As discussed above, Graves thought that resuming settlement discussions was appropriate when the School District's opening brief did not show what court-ordered resolution was desired and misunderstood the ALJ's and district court's decisions. Thus, Graves's communication was useful and reasonably expended in pursuit of settlement, and the hours are awarded. *See Del. Valley Citizens' Council*, 478 U.S. at 561; *Moore*, 682 F.2d at 839.

But the School District questioned Graves's communicating directly with the governing board, rather than with counsel, and Graves billed additional hours for correspondence and research regarding the ethical issues. *See* 1/19/11 - 5.5 hours (Conference); 1/20/11 - 4.8 hours (Conference); 6/3/11 - 0.4 hours (Conference). Graves's work on the ethical issues involved her own professional obligations. The work should not be billed to a client, and it cannot be awarded under the IDEA. *See Hensley*, 461 U.S. at 434; *Moreno*, 534 F.3d at 1111. Accordingly, 10.7 hours in the conference category at Graves's \$500 hourly rate (\$5,350 in fees) for Graves's ethics work are disallowed.

iv. Court Of Appeals Communication

The School District objects to Ka. D.'s requested hours for Graves's communication with colleagues and the press, but identifies only the page number of the objectionable time records without specifying the exact dates. A review of the time records reveals that Graves billed only a limited, reasonable amount of time for necessary conferencing with co-counsel for the cross-appeals, and that co-counsel did not also bill the time themselves. *Cf. Welch*, 480 F.3d at 949. Graves's appeal-related time for conferencing with co-counsel is not unreasonably duplicative and is allowed. In addition, a review of the time records shows that Graves recorded, but did not charge for or include in the fee request, her time spent communicating with the press. Graves billed 0.8 hours for communicating with her client regarding the press, and this work is compensable.

But Graves also billed for communicating with lawyers other than co-counsel. *See* 11/22/10 - 0.4 hour (Briefing); 8/14/11 - 0.3 hour (Research); 8/26/11 - 0.6 hour (Conference). Given the experience reflected in Graves's hourly rate, it was not reasonable for Graves to bill for consulting with outside counsel about the cross-appeals. Accordingly, 1.3 hours at Graves's \$500 hourly rate (\$650 in fees) are disallowed.

e. Court Of Appeals Oral Argument

i. Listening To Oral Arguments

The School District objects to Ka. D.'s request for 7.8 hours that Graves spent listening to oral arguments by the School District's law firm in other IDEA appeals, contending that this work was for Graves's self-improvement and continuing legal education rather than for Ka. D.'s benefit and therefore should not be billed to Ka. D. or compensated by the School District. Ka. D.'s requested hours for listening to the arguments must be reduced, but on another ground.

In response to the School District's objection, Graves states that she listened to the arguments "to be prepared for defense counsel's specific approach and plan my own remarks [as well as] to anticipate questions and make sure that my prepared remarks, in case I got to deliver them, touched on the matters that seem to be of greatest concern." Although this work tangentially benefitted Graves and future clients, as any litigation experience does, Graves reasonably performed the work in pursuit of success at the oral argument in Ka. D.'s case. *See Del. Valley Citizens' Council*, 478 U.S. at 561; *Moore*, 682 F.2d at 839.

It was not reasonable, however, for Graves to listen to so many arguments or spend so much time listening to arguments. Accordingly, Ka. D. is awarded 4.3

hours for listening to oral arguments on February 6, 2012, but not 2.4 hours (\$1,200 in fees) for listening to oral arguments on February 7, 2012.

ii. Traveling To Baltimore Moot Court

The School District objects to Ka. D.'s request for 9 hours that Graves billed on February 8, 2012 for: "Travel to and from Baltimore for, prep for, participation in, and incorporation of comments from moot argument; drafting different argument." The School District argues that Graves's travel to Baltimore was not a litigation task, and that only the time spent on the moot court should be compensated.

Here, however, Graves states that she was temporarily living in New Jersey when she arranged the moot court in preparation for oral argument. The moot court was staffed by and held in the offices of experienced IDEA litigators in the Baltimore area, where counsel for amicus curiae is located. Graves traveled by train between New Jersey and Baltimore and worked on the case the entire day. Graves apparently spent 5-1/2 hours traveling, 2 hours talking with the participants and rewriting her argument, and 1-1/2 hours presenting the argument. Graves also states that she personally absorbed the expense of round-trip travel between New Jersey and California for the actual oral argument.

Graves's moot court travel time was entirely productive in relation to Ka. D.'s case, and the 9 hours cited by the School District are awarded. In addition, Ka. D.'s remaining requested hours for oral argument were reasonably expended and they too are awarded.

f. Court Of Appeals Fee Pleadings

The School District objects to Ka. D.'s request for 91.2 hours for preparing the court of appeals motion for attorneys' fees and expenses, contending generally that the number of hours requested is one-quarter of the time spent on the 11-day administrative hearing and grossly disproportional to the number of hours requested for the substantive legal representation. The School District does not object to Ka. D.'s requests for 44.1 hours for the fee reply, 5.9 hours for the supplemental fee motion, and 5.8 hours for the fee mediation. But the School District also objects to Ka. D.'s request for 154.5 hours for the opposition to the School District's motion for leave to file a supplemental response and supplemental fee reply, although Ka. D. agreed to reduce by 40 percent (\$25,257 in fees) the amount requested for the opposition and supplemental reply.

The School District's objections have merit. *See Hensley*, 461 U.S. at 437 (attorneys' fees request should not result in a second major litigation). Not including 5.8 reasonably expended hours (\$2,900 in fees) for the court-ordered fee

mediation, Ka. D.'s attorneys and paralegal billed 295.4 total hours for the fee motion, fee reply, supplemental fee motion, and opposition to the School District's motion for leave to file a supplemental response, and supplemental fee reply, before Ka. D.'s agreed 40-percent reduction in the fees for the latter two pleadings. After applying the 40-percent reduction, Ka. D. requests \$110,859.78 for the fee pleadings. Ka. D. requests more time for the supplemental fee reply alone (154.5 hours) than for both briefs on appeal (148 hours). Ka. D.'s requested hours for the fee pleadings are excessive, and must be substantially reduced to reflect a reasonable number of hours.

i. Court Of Appeals Fee Expert Communication

The School District objects that Graves spent 0.8 hour in the conference category and 8.3 hours in the fee motion category on communication with two attorneys' fees experts, who did not join the litigation team or serve as experts but provided informal, unpaid guidance. *See* 4/17/12 - 0.8 hour (Conference); 5/10/12 - 0.1 hour (Fee Motion); 5/21/12 - 2.2 hours (Fee Motion); 5/22/12 - 6 hours (Fee Motion). The communication with outside attorneys' fees experts was excessive given the experience reflected in Graves's hourly rate. Accordingly, 0.8 hours in the conference category at Graves's \$500 hourly rate (\$400 in fees) are disallowed,

and Ka. D.'s total requested hours for the fee pleadings are subject to reduction on this ground.

ii. Court Of Appeals Fee-Related Duplication Of Effort

With regard to the supplemental fee reply, the School District objects that, before Ka. D. applied the 40 percent discount, Martinez, Nolte, and Krietemeyer billed 37.3 hours for editing and proofreading, Graves billed a portion of 10 hours for editing, and paralegal Zerby billed 10 hours for cite-checking and 3 hours for proofreading. The School District contends that this work was duplicative. As discussed above, a court cannot impose its own judgment regarding the best way to operate a law firm, or determine if different staffing decisions might have led to different fee requests. *See Moreno*, 534 F.3d at 1115. But the court may consider whether the fees requested by the legal team are justified for the particular work performed and the results achieved. *Id.* Here, the four attorneys' total hours for the editing, proofreading, and cite-checking the supplemental fee reply were unjustified, and Ka. D.'s requested hours for the fee pleadings are subject to reduction on this ground.

iii. Court Of Appeals Fee-Related Clerical Work

Ka. D.'s attorneys and paralegal improperly billed clerical work at attorney and paralegal rates for the fee pleadings, before the 40 percent discount was

applied. *See Missouri*, 491 U.S. at 288 n.10; *Trs. of the Constr. Indus. & Laborer's Health & Welfare Trust*, 460 F.3d at 1257. With respect to the opposition to the School District's motion for leave to file a supplemental response and the supplemental reply, the School District correctly objects to Krietemeyer billing 0.4 hours at her \$300 hourly (\$120 in fees) for finding page numbers for the table of contents and table of authorities and to Nolte billing 0.6 hours at his \$375 hourly rate for e-filing (\$225 in fees) and 6.6 hours at the \$100 paralegal rate (\$660 in fees) for formatting and for checking the table of contents and table of authorities. *Id.*; *Davis*, 976 F.2d at 1543.⁸ In addition, Krietemeyer impermissibly billed 0.2 hours at her \$300 hourly rate (\$60 in fees) for checking the docket for dates and finding a document for the exhibits, and Zerby impermissibly billed 10.5 hours at the \$100 paralegal rate (\$1,050 in fees) for preparing the exhibits to the opposition and reply. *Id.*; *Action on Smoking & Health*, 724 F.2d at 222-23.

Despite Ka. D.'s application of a paralegal rate to some of the clerical work, when the attorney and paralegal hourly rates implicitly incorporate as overhead the cost of clerical work, the court should not compensate the cost of clerical work in addition to the reasonable attorneys' fee award. *See Trs. of the Constr. Indus. &*

⁸ In reply, Ka. D. agreed to remove Krietemeyer's 0.4 hours and Nolte's 6.6 hours from the fee request. But the unpublished district court case that Ka. D. cites to argue that e-filing is not clerical work is not persuasive or authoritative.

Laborer's Health & Welfare Trust, 460 F.3d at 1256-57. As discussed above with respect to the California OAH representation, there is no evidence that separate billing of clerical work is the custom or prevailing practice in Southern California or in most of the Ninth Circuit. *Id.* In light of the award of the requested attorney and paralegal hourly rates, which include overhead costs, the requested hours for the fee pleadings are subject to reduction to account for Ka. D.'s attorneys' and paralegal's billing of clerical work at the attorneys' and paralegal's hourly rates.

iv. Excessive, Unnecessary Court Of Appeals Fee Pleadings

Ka. D.'s fee pleadings and the accompanying declarations and exhibits are voluminous and contain an excessive and unnecessary amount of repetitive detail from Graves's perspective about the substance, procedural history, interpretation, and strategy of the case. Much of the content of Ka. D.'s fee pleadings was not helpful to the court's fee determination, and Ka. D.'s fee pleadings failed to focus on the issues most important to the court's analysis. Ka. D.'s fee motion includes ten declarations by outside counsel in support of the requested hourly rates, when fewer declarations would have been sufficient.

Graves's 42-page declaration accompanying the fee motion discusses at unnecessary length the School District's briefing errors, Graves's litigation and negotiation strategy, and Graves's perception of the litigation and settlement

negotiations. Graves's 15-page declaration accompanying the opposition to the School District's motion for leave to file a supplemental reply is similarly verbose and unnecessarily detailed. Graves's 25-page declaration accompanying the fee reply also contains unnecessary detail "describing some legal thinking which affected [her] work," and impermissibly contains argument in response to the School District's objections. *See* Fed. R. App. P. 27(a)(2)(B)(ii). Graves's 5-page declaration accompanying the second supplemental fee motion contains a detailed, largely unnecessary discussion of the School District's briefing errors and the School District's and Graves's staffing of the fee litigation. Graves also filed a wordy, argumentative 4-page declaration with the second supplemental reply, which the court advised Ka. D. was optional and limited as to length.

Graves's declarations appear to be, at least in part, an attempt to circumvent the court's page-length limits. Graves "consider[ed] whether to seek permission for additional pleadings when student had run out of 'turns' to respond (or never had any, as with the petition for rehearing)." Graves states that she sought to maximize the allowable briefing pages by filing the cross-appeal and both an opposition to the School District's motion for leave to file a supplemental fee response and a supplemental fee reply. Moreover, Ka. D.'s reply exceeded the allowable page length. *See* Fed. R. App. P. 27(d)(2). In sum, Graves's

declarations unreasonably increased the hours requested for the fee pleadings, and Ka. D.'s requested hours for the fee pleadings are subject to reduction to account for the filing of excessive, unnecessary fee pleadings.

v. Court Of Appeals Fee Pleadings Summary

The Appellate Commissioner's experience reviewing fee pleadings in similar cases suggests that Ka. D.'s attorneys and paralegal should have expended far fewer than the requested 295.4 hours for the fee pleadings, given the experience reflected in their hourly rates. In comparison, Kirkpatrick and Graves needed only 5.9 hours to complete the supplemental fee motion requesting fees for the opposition to the School District's petition for a writ of certiorari. Graves could not reasonably have billed a client 295.4 hours (\$110,859.78 in fees) for the fee pleadings, and the School District should not have to pay this amount. *See Hensley*, 461 U.S. at 434; *Moreno*, 534 F.3d at 1111.

The reductions offered by Ka. D. -- \$25,257 for the opposition to the School District's motion for leave to file a supplemental response and supplemental fee reply, the elimination of Krietemeyer's and Nolte's fee-related clerical hours, and the withdrawal of the request for fees for filing the second supplemental fee reply -- are insufficient. To reflect a reasonable number of hours for the fee pleadings, further reductions are necessary for fee expert communications, unjustified editing

hours, duplication of effort, fee-related clerical hours, and excessive, unnecessary fee pleadings. Accordingly, Ka. D. is awarded 2.8 hours for Kirkpatrick, 60 hours for Graves, 10 hours for Martinez, and 10 hours for Nolte for the fee pleadings. Ka. D.'s fees are reduced by \$62,905.50 (in addition to Ka. D.'s \$25,257 agreed reduction) to account for excessive time on the fee pleadings.

g. Court Of Appeals Reasonably Expended Hours Summary

Ka. D.'s attorneys reasonably expended the remaining hours for the court of appeals litigation, and Ka. D. is awarded 354.4 hours and \$175,022 in attorneys' fees before the court of appeals, as follows:

<u>Legal Worker</u>	<u>Hours</u>	<u>Hourly Rate</u>	<u>Total</u>
Kirkpatrick	2.8	\$640	\$ 1,792
Graves	322.7	\$500	\$161,350
Martinez	13.9	\$450	\$ 6,255
Nolte	15.0	\$375	\$ 5,625
Krietemeyer	0	\$300	\$ 0
<u>Zerby</u>	<u>0</u>	<u>\$100</u>	<u>\$ 0</u>
Total	354.4		\$175,022

<u>Services</u>	<u>K'patrick</u>	<u>Graves</u>	<u>Martinez</u>	<u>Nolte</u>	<u>Nolte(P Rate)</u>	<u>K'meyer</u>	<u>Zerby(P)</u>	<u>Total</u>
Conferences	0	52.9	0.6	0	0	0	0	53.5
Records	0	11.6	0	0	0	0	0	11.6
Research	0	29.4	0	0	0	0	0	29.4
Briefs	0	117.9	3.3	5.0	0	0	0	126.2
Oral Argument	0	45.1	0	0	0	0	0	45.1
Fee Motion	0	60.0	10.0	10.0	0	0	0	80.0
Fee Reply	0	0	0	0	0	0	0	0
Supp. Fee Motion	2.8	0	0	0	0	0	0	2.8
Supp. Fee Reply	0	0	0	0	0	0	0	0
<u>Fee Mediation</u>	<u>0</u>	<u>5.8</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>5.8</u>
Total Hours	2.8	322.7	13.9	15.0	0	0	0	354.4

2. Court Of Appeals Non-Taxable Expenses

Ka. D. requests the award under the IDEA of the \$455 fee for filing the notice of appeal in the district court. As discussed above with respect to the California OAH expenses, there is no merit to the School District's objection that Ka. D.'s request for expenses is untimely. The fee for filing the notice of appeal, however, is taxable in the district court. *See* Fed. R. App. P. 39(e)(4). Therefore, the filing fee may not be awarded here.

H. Supreme Court

1. Supreme Court Reasonably Expended Hours

Ka. D. requests attorneys' fees in the amount of \$26,526 for 43.7 hours of work preparing the 12-page brief in opposition to the School District's petition for a writ of certiorari in the Supreme Court. This represents 10.3 hours of work at \$500 per hour (\$5,150 in fees) by Graves and 33.4 hours of work at \$640 per hour (\$21,376 in fees) by Kirkpatrick. The School District does not object to the number of hours requested by Ka. D. for the brief in opposition to its petition for a writ of certiorari. A review of the brief, the attorneys' time records, and the attorneys' declarations shows that the requested 43.7 hours were reasonably expended, and the hours are awarded.

2. Supreme Court Non-Taxable Expenses

Ka. D. also requests \$321.78 in expenses for printing and serving the brief in opposition to the School District's petition for a writ of certiorari, and the School District does not object to the award of these expenses. The brief-printing and service expenses are not taxable in the Supreme Court. *See* Sup. Ct. R. 43. But these non-taxable expenses may be awarded under the IDEA. *See Grove*, 606 F.3d at 579-82. Accordingly, Ka. D. is awarded \$321.78 in non-taxable expenses for the brief in opposition to the School District's petition for a writ of certiorari.

I. Attorney's Fees And Non-Taxable Expenses Award

Ka. D. is awarded attorneys' fees and non-taxable expenses for representation before the California OAH, the district court, the court of appeals, and the Supreme Court, as follows:

<u>Forum</u>	<u>Hours</u>	<u>Attorneys' Fees</u>	<u>Expenses</u>	<u>Total</u>
California OAH	542.34	\$263,107.50	\$1,739.53	\$264,847.03
District Court	226.00	\$111,687.50	\$1,187.76	\$112,875.26
Court of Appeals	354.40	\$175,022.00	0	\$175,022.00
<u>Supreme Court</u>	<u>43.70</u>	<u>\$ 26,526.00</u>	<u>\$ 321.78</u>	<u>\$ 26,847.78</u>
Total	1,166.44	\$576,343.00	\$3,249.07	\$579,592.07

III Conclusion

The motion of Mary Ellen Nest and the Solana Beach School District for leave to file a supplemental objection is granted. Pursuant to the Individuals with Disabilities in Education Act, 20 U.S.C. § 1415(i)(2), (3), attorneys' fees and non-taxable expenses in the amount of \$579,592.07 are awarded in favor of Ka. D., by her mother, Ky. D., as her next friend; Ky. D.; and B. D.; and against Mary Ellen Nest and the Solano Beach School District, for the representation before the California OAH, the district court, the court of appeals, and the Supreme Court. This order amends the court's mandate. *See* Fed. R. App. P. 41.