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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Candeo Schools, Inc.,

10 Plaintiff,

11 vs.

12 Larry Bono and Ruth Bonno, et al.,

13 Defendants.

No. CV-12-00632-PHX-NVW

ORDER

14 Before the Court is Plaintiff's Motion for Partial Summary Judgment on Liability
15 (Doc. 37) and the Kirsch Defendants' Cross Motion for Summary Judgment and Motion
16 to Strike (Doc. 51).¹

17 **I. LEGAL STANDARD**

18 Summary judgment is proper if the evidence shows there is no genuine issue as to
19 any material fact and the moving party is entitled to judgment as a matter of law. Fed. R.
20 Civ. P. 56(a). A material fact is one that might affect the outcome of the suit under the
21 governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

22 Plaintiff filed this action to recover attorney's fees incurred related to an
23 administrative proceeding under the Individuals with Disabilities Education Act
24 ("IDEA"), 20 U.S.C. § 1400 *et seq.*, which allows a prevailing school district to recover
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27 ¹ Plaintiff voluntarily dismissed its claims against Defendants Larry Bono and
28 Ruth Bonno with prejudice on May 8, 2012. (Doc. 11.) "Kirsch Defendants" refers to all
 of the remaining defendants.

1 attorney's fees in certain rare circumstances. *R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d
2 1117, 1124 (9th Cir. 2011). It can recover fees from an attorney who filed a complaint
3 that is "frivolous, unreasonable, or without foundation" or "continued to litigate after the
4 litigation clearly became frivolous, unreasonable, or without foundation"; it also can
5 recover fees from the parents or their attorney if the suit was presented for "any improper
6 purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost
7 of litigation." *Id.*; 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III). If an action is not "frivolous,
8 unreasonable, or without foundation," it could not have been filed for an improper
9 purpose. *Prescott Unified*, 631 F.3d at 1126.

10 Under the IDEA, a state must provide a disabled child with a free appropriate
11 public education, which is satisfied by procedural compliance and the development of an
12 individualized educational program ("IEP") "reasonably calculated to enable the child to
13 receive educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 947 (9th
14 Cir. 2010) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982)). "The proper
15 standard to determine whether a disabled child has received a free appropriate public
16 education is the 'educational benefit' standard set forth by the Supreme Court in *Rowley*."
17 *Id.* at 951. The phrases "educational benefit," "some educational benefit," and
18 "meaningful educational benefit" refer to the same standard. *Id.* at 951 n.10; *accord*
19 *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1058 n.2 (9th Cir. 2012).

20 Therefore, the question here is whether a due process action filed by Defendants
21 Lori Kirsch-Goodwin and Hope Kirsch claiming Plaintiff Candeo Schools Inc. did not
22 provide MB a free appropriate public education, *i.e.*, an IEP that was reasonably
23 calculated to enable her to receive educational benefits, was frivolous, unreasonable, or
24 without foundation. The material facts are not disputed.

25 **II. UNDISPUTED FACTS**

26 Larry and Ruth Bonno's daughter MB attended Candeo for second through fourth
27 grade from Fall 2008 through Spring 2011. MB is bi-polar, suffers from attention deficit
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1 hyperactivity disorder, and has other learning disabilities. The dispute between the
2 Bonnos and Candeo began when the Bonnos did not think MB was making adequate
3 progress with her social and academic skills.

4 On April 26, 2010, the Bonnos filed a formal complaint against Candeo with the
5 Exceptional Student Services division of the Arizona Department of Education alleging
6 that certain portions of MB's pending IEP for the 2009-2010 school year were
7 insufficient. On May 7, 2010, the Bonnos and Candeo engaged in mediation during
8 which they resolved the complaint through an Agreement executed the same day. The
9 Agreement identifies five issues and states their resolution. Regarding a functional
10 behavior assessment, the Bonnos and Candeo expressly agreed: "The Bonnos will pay
11 for an FBA behavior assessment, and both parties agree to the recommendations &
12 findings of the psychologist. The findings of the FBA will help assess the social skills
13 that may be added into the IEP. The school will implement these recommendations."
14 The Agreement was signed by the Bonnos, Candeo, and the mediator.

15 During September 2010, Dr. Joseph Gentry conducted a functional behavior
16 assessment of MB. On October 7, 2010, Dr. Gentry issued a report stating his
17 observations on three occasions, the results of assessments of MB's social skills by her
18 parents and teacher, and his recommendations for interventions. Among other things, Dr.
19 Gentry's recommendations included that MB receive daily social skills training in the
20 form of weekly individual sessions with a teacher, participation 2-3 times weekly in a
21 lunch group with a small group of peers and a teacher, and participation 2-3 times weekly
22 in activities at recess with peers and a teacher. Dr. Gentry also recommended academic
23 interventions, including that MB receive a full education evaluation to determine her
24 current academic strengths and weaknesses and be provided accommodations such as
25 testing in a quiet environment, extra time on tests, and modified homework assignments.
26 He further identified specific social skills to be taught to MB and recommended
27 consequence interventions, such as teaching staff and peers to ignore when MB
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1 interrupted or talked out of turn inappropriately and to redirect her to more appropriate
2 behaviors. The Bonnos wanted MB's IEP to include all of Dr. Gentry's
3 recommendations verbatim; the subsequently amended IEP did not include all of Dr.
4 Gentry's recommendations verbatim.

5 Defendants Lori Kirsch-Goodwin and Hope Kirsch are the lawyers who
6 represented the Bonnos in litigation and administrative proceedings against Candeo. On
7 January 18, 2011, the Bonnos filed an action in Maricopa County Superior Court alleging
8 that Candeo breached the Agreement as a result of the way it implemented Dr. Gentry's
9 recommendations.

10 On September 12, 2011, the Bonnos filed a due process action alleging that
11 Candeo had not provided MB a free appropriate public education during MB's third and
12 fourth grade school years. On November 17 and 18, 2011, a due process hearing was
13 held. On February 24, 2012, the administrative law judge issued a decision resolving the
14 due process action in Candeo's favor. On March 23, 2012, Candeo filed the present
15 action seeking award of attorney's fees incurred in the due process action.

16 In May 2012, the Bonnos and Candeo stipulated to dismiss the action in Maricopa
17 County Superior Court with each side to bear its own attorney's fees and costs. On May
18 11, 2012, the action was dismissed with prejudice.

19 **III. ANALYSIS**

20 Candeo contends that the filing of the Bonnos' due process action was frivolous,
21 unreasonable, and/or without foundation because Defendants knew prior to filing that "a
22 showing of progress would defeat the claim," were aware of the Bonnos' admissions and
23 other evidence of progress, and the Bonnos testified at the due process hearing that they
24 were not contesting MB's progress. Although the parties dispute whether, when, and
25 how much MB showed progress, those issues are not material here. The foundation for
26 filing the due process action claiming denial of a free appropriate public education was
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1 that MB's IEP was not reasonably calculated to enable her to receive educational
2 benefits.

3 It is undisputed that Candeo agreed to implement Dr. Gentry's recommendations
4 without qualification. Under the circumstances, it cannot be concluded that the Bonnos'
5 belief that all of Dr. Gentry's recommendations would be implemented verbatim was
6 unreasonable. Nor was it unreasonable for the Bonnos and Defendants to believe that Dr.
7 Gentry's recommendations needed to be incorporated into MB's IEP in order for it to be
8 reasonably calculated to enable her to receive educational benefits. After eight months of
9 litigation to enforce the Agreement and little progress, Defendants' attempt to obtain
10 compensatory services through a due process action was not frivolous, unreasonable, or
11 without foundation.

12 Moreover, because the filing of the due process action was not "frivolous,
13 unreasonable, or without foundation," it could not have been filed for an improper
14 purpose. *See Prescott Unified*, 631 F.3d at 1126. Therefore, Candeo is not entitled to
15 award of attorney's fees under 20 U.S.C. § 1415(i)(3)(B)(i)(II) or (III).

16 Defendants moved to strike Exhibits G and N from Candeo's Statement of Facts
17 (Doc. 38) as hearsay. Exhibit G is the Administrative Law Judge Decision. Exhibit N is
18 email correspondence between the Bonnos and Dr. Gentry, not Candeo's expert's report.
19 Exhibit O is Dr. Gentry's Confidential Social Skill Assessment Summary dated August 6,
20 2011. Because the content of these exhibits is not relevant to deciding the motions for
21 summary judgment, the Court has not considered any of them and will deny Defendants'
22 motion to strike as unnecessary and moot.

23 IT IS THEREFORE ORDERED that Plaintiff's Motion for Partial Summary
24 Judgment on Liability (Doc. 37) is denied.

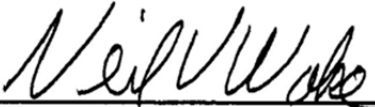
25 IT IS FURTHER ORDERED that the Kirsch Defendants' Motion to Strike (Doc.
26 51) is denied as unnecessary and moot.

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IT IS FURTHER ORDERED that the Kirsch Defendants' Cross Motion for Summary Judgment (Doc. 51) is granted.

IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Defendants Kirsch-Goodwin & Kirsch PLLC, Hope N. Kirsch, Barry Kluger, Lori Kirsch-Goodwin, and Jeff Goodwin and against Plaintiffs and that Plaintiffs take nothing. The Clerk shall terminate this case.

Dated this 15th day of March, 2013.



Neil V. Wake
United States District Judge