UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA

Plaintiffs,

v. **Case No. 4:09CV00033 JLH**

STATE OF ARKANSAS, et al.,

Defendants.

_____/

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

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I. INTRODUCTION

Defendants' Brief and accompanying Appendices are submitted in support of Defendants' Motion for an Award of Attorneys' Fees and Costs. The Defendants seek $4,306,704.95 from the Plaintiff as reimbursement for reasonable and necessary attorneys' fees and costs incurred in the defense of this litigation. See Appendix A-Declaration of Thomas B. York. The Court should grant Defendants' Motion, pursuant to 42 U.S.C. §1997a(b), because Defendants were the prevailing party in this matter; the claims advanced by the Plaintiff were pursued without merit; and the fees and costs associated with this litigation are reasonable.

Plaintiff commenced this action against Defendants pursuant to the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. §§1997-1997j ("CRIPA"). 42 U.S.C. §1997a(b) provides: "In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs."

The fact that the Defendants prevailed on every issue raised by the Plaintiff at trial is sufficient in itself to justify an award to Defendants. The Defendants note the following aggravating factors to demonstrate that this case is especially appropriate for an award of attorneys' fees:

a. The Plaintiff was, or should have been, aware that its litigation was unnecessary and unjustified because it had investigated the Conway Human Development Center ("CHDC") for seven (7) years before it filed the Complaint in this matter, and it conducted approximately eighteen (18) months of discovery before trial commenced. The information gathered during this lengthy period of time did not support the Plaintiff's claims.

b. The Complaint contained allegations that CHDC was failing to provide a free and appropriate education to its students as required by the Individuals with Disabilities Education Act ("IDEA"). [Docket #1 at 8]. The Plaintiff knew or should have known that the Arkansas Department of Education ("ADE") is the regulatory agency responsible for ensuring that each education program is compliant with the IDEA and that the ADE was the only party from whom Plaintiff could obtain the relief it sought. However, the Plaintiff failed to identify the ADE as a party to this lawsuit. Also, the Plaintiff failed to consider and rely upon the actions being taken by the ADE to address any concerns under the IDEA.

c. The Plaintiff relied on numerous mistakes, exaggerations, and misrepresentations made by its experts, which Defendants were forced to address. The Plaintiff also failed to ensure that its experts understood and applied "generally accepted professional standards," and allowed its experts to testify knowing that those experts were unable or unwilling to apply that concept, thereby adding unnecessary costs and complexity to the litigation.

d. The Plaintiff conducted this litigation in a manner that unnecessarily increased the fees and costs incurred by the State of Arkansas and its agencies to defend their lawful administration of services at CHDC. The Plaintiff filed meritless or unnecessary motions that required extensive responses from Defendants, not because the Plaintiff's position was justifiable, but because if those motions were unopposed they could have had a significant negative impact on Arkansas' administration of services to its disabled citizens.[1] In those motions and during the trial in this matter, Plaintiff's representation went well beyond any rational, reasonably zealous representation.

[1] Docket [#27 (United States Motion to Compel Entry Upon Land), 42 (United State Motion for Preliminary Injunction), 78 (United States Motion for Summary Judgment), 145 (United States Motion in Limine)].

e. At trial, the Plaintiff also pursued its claims without regard for the truth, or even contradictory evidence offered by its own experts.[2] At a minimum, Plaintiff's position was contrary to common sense, and disconnected from the legal standards it claimed to enforce. Unlike typical plaintiffs, the Special Litigation Section of the Civil Rights Division of the Department of Justice is specifically charged with investigating and litigating the type of case it purportedly pursued against the Defendants. 42 U.S.C. §1997a-b.[3] Yet, the Plaintiff failed to produce any evidence necessary to satisfy its burdens of proof.

For all the aforementioned reasons, the Defendants should be deemed the prevailing party in this matter and an award for attorneys' fees and costs should be entered in their favor.

[2] As the Court noted in its Findings of Fact, DOJ expert, Ms. Osgood, testified that there was a "culture of silence," but offered no evidence in support of her position, which was contradicted by the testimony of another DOJ expert, Dr. Matson, that CHDC personnel are good people, who try to do their best in their work. [Docket # 228 at 22].

[3] Describing its expertise, the Department of Justice notes:

> The Section has initiated investigations of conditions of confinement in more than 30 facilities for people with mental retardation across the country and in the Commonwealth of Puerto Rico. The Section currently monitors conditions in 22 facilities that operate under court orders or settlement agreements with the United States.
>
> The investigations have focused on residents' constitutional rights to reasonable safety, adequate medical and mental health care, habilitation, freedom from unreasonable restraints, and education. The investigations also focus on violations of rights guaranteed by the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq., the Individuals with Disabilities Education Act, 20 U.S.C. § 400 et seq., and Section 504 of the Rehabilitation Act of 1974, 29 U.S.C. § 794. Several of the cases have involved allegations of staff abuse, preventable injuries and deaths, and excessive use of restraints. The Section has made a priority of enforcing the ADA's integration regulation, which requires that placement be offered in the most integrated setting appropriate to the needs of the individual.

Available at: http://www.justice.gov/crt/about/spl/mr.php (last accessed July 21, 2011).

II. FACTUAL BACKGROUND

This litigation was initiated by Complaint on January 16, 2009, but the Plaintiff began investigating the Conway Human Development Center in 2002. For nearly seven years, Defendants cooperated in good faith with sporadic investigative tours announced by the Plaintiff on short notice. Those tours routinely included Plaintiff's legal counsel and their clinical consultants touring CHDC to search for evidence to use in litigation against the Defendants. The Plaintiff selectively produced information from those tours to Defendants. In the Complaint, the Plaintiff alleged that conditions at CHDC violated the constitutional rights of its residents, and that the Defendants were violating the Americans with Disabilities Act, 42 U.S.C. §12131 et seq., ("ADA") and the Individuals with Disabilities Education Act, 20 U.S.C. §400 et seq., ("IDEA") by failing to provide services and programs to individuals in the most integrated setting appropriate to their needs. The Defendants retained the York Legal Group, LLC, to represent them in this litigation. This practice group has substantial experience in defending states in civil rights litigation including, but not limited to, successful defenses of the Commonwealth of Pennsylvania and the State of Florida against the Plaintiff in CRIPA litigation. See United States v. Commonwealth of Pennsylvania, 902 F. Supp. 565 (W.D. Pa. 1995); Johnson v. Murphy, 2001 U.S. Dist. LEXIS 24013 (M.D. Fla. June 28, 2001).

Discovery consisted of extensive document production, numerous responses to interrogatories, multiple tours of CHDC, and many depositions. The document discovery in this matter can only be described as exceptionally burdensome. The Plaintiff was given free access to patient records and other documents at CHDC, and even placed copiers and private contractors at CHDC to scan and bates stamp the CHDC records. Defendants produced well over a million pages of documents. Discovery from the Plaintiff was contentious, as

demonstrated by the refusal of the United States to answer interrogatories with anything more than blanket objections. To a large extent, discovery only flowed from the Defendants to the Plaintiff, except for expert reports and depositions, which temporarily obscured many of the significant weaknesses to Plaintiff's claims until the time of trial.

The DOJ retained nine (9) experts who toured the facility, provided reports, and testified in areas of psychiatry, psychology, medicine, protection from harm, discharge and community services, nutritional management, physical therapy, occupational therapy, and education. In order to address these issues and to rebut the Plaintiff's experts, the Defendants also retained experts, who conducted tours and provided reports in areas essentially corresponding to those addressed by the Plaintiff's experts. Each of Defendants' experts was typically accompanied by two attorneys, one representing the Defendants and one representing the Plaintiff. The length of each tour ranged from two (2) to five (5) days. Some experts for the Defendants conducted only one tour, but most of the DOJ experts and Defendants' experts toured twice.

A total of 25 expert reports were submitted by 24 experts. Each of these experts was deposed. Some of the experts were deposed on multiple days, for example, Defendants' experts, Dr. Kastner and Dr. Walsh, were both deposed twice. State employees were also deposed multiple times, such as Carol Cromer who was deposed twice. The depositions for experts took place in the state in which they lived and depositions of State employees took place in Little Rock, Arkansas.

Trial commenced on September 8, 2010, and lasted until October 15, 2010. The Plaintiff and the Defendants agreed to submit post-trial briefs and agreed upon a briefing schedule. On June 8, 2011, United States District Judge Leon Holmes issued an Opinion and Order granting judgment in favor of the Defendants. On June 8, 2011, the Clerk for the United States District

Court of the Eastern District of Arkansas entered a judgment on the docket in favor of the Defendants. On June 16, 2011, Judge Holmes granted to the Defendants an extension of time to file a motion for attorneys' fees and costs until July 22, 2011.

III. ATTORNEYS' FEES REQUESTED

A. Defendants' Reasonable Attorneys' Fees

Time records of the York Legal Group, LLC, document that attorneys for the State of Arkansas spent a total of 13,500 hours on this case up to June 30, 2011.[4] In support of their motion for attorneys' fees and expenses, the Defendants have attached the following as appendices:

Appendix A: Declaration of Thomas B. York, Esquire

Appendix A – Attachment 1: State of Arkansas Professional/Consultant Services Contract

Appendix B: Detailed Summary of Attorneys' Fees

Appendix B – Attachment 1: Invoices for Attorneys and Paralegals (July 2004 through September 2005)

Appendix B – Attachment 2: Invoices for Attorneys and Paralegals (January 2006 through June 2011)

[4] The York Legal Group, LLC, will supplement this fee application at a later date to include the time spent and the costs incurred after June 30, 2011. Courts have consistently held that attorneys may be awarded, under statutory fee authorizations, compensation for the expenses of and time spent litigating the issue of a reasonable fee, i.e. for time spent on the fee application and successful fee appeals. See, e.g., Jones v. MacMillan Bloadel Containers, Inc., 685 F. 2d 236, 239 (8th Cir. 1982) (citations omitted) ("It would be inconsistent with the purpose of the Fees Act to dilute a fees award by refusing to compensate the attorney for the time reasonably spent in establishing and negotiating his rightful claim to the fee."); Souza v. Southworth, 564 F.2d 609 (1st Cir. 1977); Panior v. Iberville Parish School Board, 543 F.2d 1117 (5th Cir. 1976); Hairston v. R & R Apartments, 510 F.2d 1090 (7th Cir. 1975); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972); Parker v. Matthews, 411 F. Supp. 1059 (D.D.C.1976), aff'd, 182 U.S.App.D.C. 322, 561 F.2d 320 (1977); Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D.Cal.1974), aff'd, 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 547, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978) (The Supreme Court specifically declined to consider the propriety of the fee award, 436 U.S. at 553 n.3, 98 S. Ct. 1975, 56 L. Ed. 2d 525); Torres v. Sachs, 69 F.R.D. 343 (S.D.N.Y.1975), aff'd, 538 F.2d 10 (2d Cir. 1976); Lund v. Affleck, 587 F.2d 75, 76-77 (1st Cir. 1978); see also Gagne v. Maher, 594 F.2d at 344 (2nd Cir. 1979).

Appendix C: Detailed summary of Costs - Appendices C-1 through C-13 (deposition transcripts; trial transcripts; witness fees; photocopying; filing fees; overnight mail; telephonic conference calls; computerized legal research; process service; miscellaneous out-of-pocket and litigation expenses; attorney travel expenses; and expert fees and expenses)

Appendix C – Attachments C-1 through C-13: Supporting Documentation for Appendices C-1 through C-13.

Defendants' appendices, attachments, and exhibits are too voluminous to be filed electronically. On the advice of the Office of the Clerk of Courts, Defendants have shipped the appendices, attachments, and exhibits to the Clerk's Office for filing as well as copies to the Court and Plaintiff's counsel by overnight parcel.

B. Fees For Attorneys And Paralegals

Defendants respectfully request a total of $2,806,123.00 in attorney and paralegal fees, which represents fees for a reasonable number of hours. This amount was calculated using low reasonable hourly rates which were actually billed to the State of Arkansas, summarized as follows for the individual attorneys and paralegals of York Legal Group, LLC, and Dilworth Paxson, LLP See App. A. Reasonable attorneys' fees should compensate for the work of paralegals, as well as that of attorneys. Missouri v. Jenkins, 491 U.S. 274 (1989).

1) $1,131,676.50 for attorney Thomas B. York, calculated at $220.00-$230.00 hours x $220.00 – $230.00 per hour for litigation on the merits and work on this fee petition. See Appendix B for time entries for "TBY."

2) $464,591.50 for attorney Christine Consiglio, calculated at 2,032.65 hours x $220.00 - $230.00 per hour for litigation on the merits and work on this fee petition. See Appendix B for time entries for "CDC."
3) $711,195.00 for attorney Donald Zaycosky, calculated at 3806.20 hours x $150.00 - $195.00 per hour for litigation on the merits and work on this fee petition. See Appendix B for time entries for "DBZ."
4) $455,910.00 for attorney Cordelia Elias, calculated at 2605.20 hours x $175.00 per hour for litigation on the merits and work on this fee petition. See Appendix B for time entries for "CME."
5) $420.00 for attorney Steven B. Goodman, calculated at 2.1 hours x $200.00 per hour for assistance with the early stages of this case. See Appendix B for time entries for "SG."
6) $39,610.00 for paralegal Maura Caddell, calculated at 396.10 hours x $100.00 per hour for paralegal assistance in connection with this case. See Appendix B for time entries for "MC".
7) $2,720.00 for paralegal Karen Mills - Reinhart, calculated at 51.10 hours x $50.00 – $100.00 per hour for paralegal assistance in connection with this case. See Appendix B for time entries for "KMR".

The Defendants request that travel time be included in an award of attorneys' fees. The York Legal Group negotiated the same billing rate from the State of Arkansas for in-court work, out-of-court work, and travel time. See App. A - Attachment 1. The Eighth Circuit has permitted recovery of travel time at an attorneys' full hourly rate. Crazik v. Minnesota State University Board, 738 F. 2d 348, 350 (8th Cir. 1984). It is reasonable here for the Defendants to be

compensated at a rate of 100% for their attorneys' travel time. Defendants' counsel negotiated travel time at 100% of their rate with their clients. If the State of Arkansas had disagreed with full compensation for travel time and had requested a reduced travel rate, Defendants' counsel would have requested a higher overall rate for their fees, particularly their in-court rate, which would have been reasonable. As such, the requested fees in this petition for other than travel time would have been much higher. Also, much, if not most, of the time spent traveling by counsel involved legal work with attorney work product being created during travel.

Defendants are not seeking a windfall in this matter through an award of attorneys' fees and costs. As noted above, Defendants seek reimbursement for the rate negotiated between Defendants and their counsel. If the Court deems it more appropriate to reduce counsel's hourly rate for travel, Defendants request permission to supplement their motion to submit documentation, including affidavits, to demonstrate that Defendants' counsel's market rate is significantly higher than the actual rate paid by Defendants in this matter.[5]

Litigation Costs And Expenses

Defendants respectfully request a total of $1,500,581.95 in costs and other expenses, which were necessarily and reasonably incurred by the Defendants in the course of litigation in this matter, summarized as follows (see Section IV.C.) below for details of expenses):

IV. ARGUMENT

A. The Defendants Are Entitled To Reasonable Attorneys' Fees Pursuant to 42 U.S.C. §1997 a(b)

[5] If the Court deems is appropriate for Defendants to submit supplemental materials to demonstrate counsel's market rate, they will include documentation such as Plaintiffs' counsel's request for an award of attorneys' fees in Messier v. STS, et al., 3:94-cv-1706 (D. Conn.) [Docket #1067]. In that matter, Plaintiffs' counsel, who has significantly less experience than Defendants' counsel in similar civil rights litigation, is seeking reimbursement at a rate of $450 an hour for all work, including travel time. Among the affidavits Plaintiffs' counsel in that matter has used to support his requested fees is an affidavit from, Robert B. Stern, who is a former attorney for the Plaintiff, DOJ. Messier v. STS, et al., 3:94-cv-1706 (D. Conn.) [Docket #1067-22, Exhibit J]).

1) CRIPA's Plain Language Dictates that Attorneys' Fees may be Awarded to A Prevailing State Defendant in the Sole Discretion of the Court Without any other Limitation

Section 42 U.S.C. §1997 a(b) provides: "In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs." Defendants clearly are the prevailing party in this litigation, since the court found in their favor and against the United States on each and every claim and contention raised in this litigation.

If attorneys' fees are not awarded in this case, where the Defendants so clearly prevailed and where the DOJ inappropriately increased the complexity and costs of this litigation with repeated groundless claims, it is doubtful that such fees will ever be awarded to a CRIPA defendant, thereby rendering the statutory section authorizing such an award meaningless. The Court should construe this statute to avoid rendering any element of that statute meaningless. Wilder v. Virginia Hospital Association, 496 U.S. 498, 514 (1990); See also, Pennsylvania v. United States Department of Health and Human Services, 928 F.2d 1378, 1385 (3d Cir. 1991) (citing United States v. Menasche, 348 U.S. 528, 538-39, 99 L. Ed. 615, 75 S. Ct. 513 (1955)); In re Co Petro Marketing Group, 680 F.2d 566, 569-70 (9th Cir. 1982).[6]

The plain language of CRIPA allows for an award of fees, as part of costs, to a prevailing party, other than the United States. For over 200 years, courts havenoted that the first approach to statutory interpretation is the "plain language" of the statute in question. See, e.g., B & D Land & Livestock Co. v. Veneman, 332 F. Supp. 2d 1200, 1210 (N.D. Iowa 2004); Kinkaid v. John Morrell & Co., 321 F. Supp. 2d 1090, 1103 n. 3 (N.D. Iowa 2004) (citing such reiterations); Accord United States v. Cacioppo, 460 F.3d 1012, 1016 (8th Cir. 2006). The Supreme Court

[6] The only Circuit Courts that have addressed the question of whether or not a state defendant should be awarded costs in cases against the United States are divided on the issue, as discussed below.

describes this rule as the "one, cardinal canon before all others." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." Id. (citing United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241-42, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989); United States v. Goldenberg, 168 U.S. 95, 102-03, 18 S. Ct. 3, 42 L. Ed. 394 (1897); Oneale v. Thornton, 10 U.S. (6 Cranch) 53, 68, 3 L.Ed. 150 (1810)). When the language of the statute is plain**,** the inquiry also ends with the language of the statute, for in such instances "the sole function of the courts is to enforce [the statute] according to its terms." Ron Pair, 489 U.S. at 241 (quoting Caminetti v. United States, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917)); Cacioppo, 460 F.3d at 1016 ("Where the language is plain**,** we need inquire no further.") (citing Ron Pair, 489 U.S. at 241).

The provision for the award of attorneys' fees under CRIPA is plain and clear, and, as such, there is no need to look to legislative history or case law to discern its meaning or import. This Court has the discretion to award attorneys' fees to the Defendants. As described both above and below, the award of attorneys' fees to the Defendants is particularly appropriate in the circumstances of this case, especially due to the Plaintiff's conduct.

2) Even if the Court should find the Statutory Language as to Attorneys' Fees to be Less than Certain, a Consideration of its Context, Object, and Policy Supports an Award of Attorneys' Fees to the Defendants in the Circumstances of this Case

Determining the meaning of a statute may sometimes require "examining the text of the statute as a whole by considering its context, 'object, and policy.'" Harmon Indus., Inc. v. Browner, 191 F.3d 894, 899 (8th Cir. 1999) (quoting Pelofsky v. Wallace, 102 F.3d 350, 353 (8th Cir. 1996)). In such circumstances, the court must "effectuate the intent reflected in the language of the enactment and the legislative process," Colorado v. Idarado Mining Co., 916

F.2d 1486, 1494 (10th Cir. 1990), cert. denied, 499 U.S. 960 (1991), and should not "produce a result demonstrably at odds with the intentions of [the statute's] drafters." Ron Pair Enters., Inc., 489 U.S. at 242 (internal quotation marks omitted).

As the Eighth Circuit has noted, "plain meaning, like beauty, is sometimes in the eye of the beholder." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 737, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985). That court observed that readers may well disagree on the "plain meaning" of a statute**,** because more than one reading of the statute may be reasonable or at least possible. Id. at 736. Consequently, when a statute is capable of more than one reasonable reading (even readings that have been taken by different courts to be the "plain meaning" of the statute), it is ambiguous on its face. Id.; United States v. White Plume, 447 F.3d 1067, 1074 (8th Cir. 2006) ("Under statutory interpretation, a statute is ambiguous if it is 'capable of being understood in two or more possible senses or ways.'") (quoting Chickasaw Nation v. United States, 534 U.S. 84, 90, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001) (citations omitted)). When a statute is ambiguous, the court may seek guidance in the statutory structure, relevant legislative history, congressional purposes expressed in the pertinent act, and general principles of law applicable to the circumstances of the statute to determine the appropriate interpretation. Id. at 737. Courts will also construe an ambiguous statute to avoid serious constitutional problems. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) (citing NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501, 504, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979)).

CRIPA is the standing statute by which the United States is bound. In fact, the Plaintiff has argued the obligations and limits of the statute in previous cases. See e.g. United States v. Pennsylvania, 863 F. Supp. 217, 218 (E.D. Pa. 1994) (The United States argued that §1997a(a) is

merely a standing statute giving it the right to bring suit but not affecting the standard of proof at trial). The court in U.S. v. Pennsylvania found that "decisional law interpreting §1997a(a) is virtually nonexistent." Id. at 218. CRIPA does not provide for any substantive rights as would other civil rights statutes such as §1983 or the ADA. United States v. Tennessee, 798 F. Supp. 483 (W.D. Tenn. 1992) (Court held that CRIPA establishes no substantive rights, but merely gives the Attorney General standing to bring suit.) Id.

Because CRIPA does not establish any substantive rights, like other civil rights statutes, the Court should not automatically interpret its provisions in the same way as traditional civil rights statutes. CRIPA was enacted in response to several federal court decisions holding that the United States Attorney General did not have standing to sue state institutions for violating the rights of institutionalized persons. See e. g. United States v. Oregon, 839 F.2d 635, 636 (9th Cir. 1988); United States v. New York, 690 F. Supp. 1201, 1204 (W.D.N.Y. 1988). CRIPA's certification requirement indicates that Congress was concerned with issues of federalis. The Attorney General was authorized to file suit only in "grievous and flagrant" cases and after giving the states involved a reasonable opportunity to attempt negotiation and conciliation. United States v. New York, 690 F. Supp. at 1204. Congress was ensuring that the federal government would not become overly involved in an area that was typically regarded as within the purview of the states. Id. The legislative history of CRIPA also identified that concern. The Joint Explanatory Statement of the Committee Conference states "the adoption by the conference committee of the language 'egregious or flagrant' establishes a standard for the Department of Justice's involvement that reflects Congressional sensitivity to the fact that a high degree of care must be taken when one level of sovereign government sues another in our Federal system." H.R. Conf. Rep. No. 897, 96th Cong., 2d Sess. 11 (1980) (hereinafter "Conf. Rep.".) This

language speaks of the standard for the involvement of the Department of Justice and implies that the Department is to intrude into this traditionally state-controlled area only in very serious cases. The Committee also noted that §1997a(a) creates no new substantive rights but rather gives the Attorney General standing to ensure that institutionalized persons will be afforded the full protections of the Constitution of the United States. Conf. Rep. at 9. It is clear that without CRIPA, the Plaintiff would not have the authority to bring an action to enforce constitutional standards in institutions, an ADA action, or an action to enforce the IDEA. The Plaintiff is completely bound by the four corners of the CRIPA statute, which specifically states that a prevailing party "other than the United States may recover a reasonable attorneys fees, against the United States as a part of the costs." See above.

In addition to the plain language of CRIPA and the fact that it is merely a standing statute, the legislative history is also a clear indication that fees may be awarded to a prevailing state defendant without any further showing of proof. In drafting 42 U.S.C. §1997 a(b), Congress anticipated that State defendants could recover attorneys' fees in litigation under CRIPA where the DOJ's allegations were unproven at trial. Other than requiring that a State defendant be the prevailing party in such litigation and that the courts exercise discretion, Congress imposed no additional requirements on the recovery attorneys' fees.

> The House of Representatives' Conference Report on CRIPA stated that:
>
> [I]n both the initiation and intervention sections the Act makes clear the liability of the United States to opposing parties for attorneys' fees whenever it loses. The award is discretionary with the court and it is intended that the present standards used by the courts under the civil rights laws will apply.

H.R. Conf. Rep. No. 96-897 at 12 (1980) (emphasis added).

The mention of "present standards used by the courts under the civil rights laws," refers to the standard set forth in Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968), because it was the governing standard in most of the civil rights cases at the time CRIPA was passed. Under the Piggie Park standard, attorneys' fees would ordinarily be awarded to the prevailing party in the absence of special circumstances. Id. at 402. This interpretation is supported by the first sentence of the above-quoted language from the legislative history, which suggests that the United States will be liable to the prevailing State defendant "whenever it loses." It is also supported by the federalism concerns of Congress in passing the legislation regarding the "high degree of care [which] must be taken when one level of sovereign government sues another in our Federal system." H.R. Conf. Rep. No. 96-897 at 12 (1980). The language of the legislative history of CRIPA thus suggests that Congress was concerned about upsetting the balance between federal and state governments when enacting the legislation. Recognizing that litigation would impose substantial costs on the states which might be justified if the state was found to be violating constitutional rights, Congress also recognized that it would be inequitable for a state to bear these considerable costs if it prevailed in the litigation. CRIPA's fee-shifting provision thus reflects congressional concern for preserving federalism and comity. In short, the United States is held to a higher standard than a typical plaintiff, and the United States should be held responsible for attorneys' fees more easily than other plaintiffs.

It is also imperative for this Court to recognize CRIPA's uniqueness among federal civil rights statutes, and, in particular, to address concerns about federalism. The legislative history of 42 U.S.C. §1997 supports the contention that attorneys' fees can be assessed against the United States in certain cases. An examination of the legislative history of §1997 reveals that one of its goals was to provide fee awards to prevailing state government defendants in the defense of

Department of Justice actions against them. The Court must look to the primary objectives Congress intended to implement through 42 U.S.C. §1997 et seq. in order to determine those parties that properly should bear the burden of the fees provision. In passing CRIPA, Congress imposed "a higher standard" for involvement by the DOJ than that required of plaintiffs other than the United States, "which reflect[ed] Congressional sensitivity to the fact that a high degree of care must be taken when one level of sovereign government sues another in our Federal system." H.R. Conf. Rep. on CRIPA, No. 96-897, Joint Explanatory Statement of the Committee of Conference, at 11 (1980). When Congress intends to exclude certain parties from fee entitlement or fee liability, it states so specifically. For example, like §1997, §706(k) of Title VII of the Civil Rights Act expressly excludes the federal government from fee entitlement. See also Fair Labor Standards Act, 29 U.S.C. §216(b) (authorizing fee liability only for "defendants" who are "employers"); Civil Rights Act of 1968, 42 U.S.C. §3612(c) (authorizing fee entitlement only for "plaintiffs"). If Congress intended to burden the state governments with a heightened burden of proof with regard to fees, it would have stated so specifically within the statute. Congress included no such language in 42 U.S.C. §1997, so it would be improper to interpret the statute to require a higher burden.

The plain language of CRIPA allows for attorneys' fees to be awarded to state defendants as part of their cost award and at the discretion of the court. This plain language, paired with the fact that CRIPA is merely a standing statute, which provides no substantive rights like other civil rights statutes, and the legislative history of the statute, all lead to the conclusion that CRIPA was designed to protect states from unnecessary, extensive and expensive litigation. The instant matter is precisely that type of litigation and this Court should award fees to the Defendants as part of their reasonable litigation costs.

3) The Application of Christiansburg is not Appropriate under the CRIPA Statutory Language as to the Award of Attorneys' Fees

Courts have reached different conclusions on the issue of whether the United States should have the same protections as a private civil rights plaintiff. In Miller Frank Johnson v. Murphy, 348 F.3d 1334, 1338 (11th Cir. 2003), the District Court for the Middle District of Florida questionably applied the standard set forth in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) in a CRIPA case where the State of Florida prevailed on all of the claims brought by the United States Department of Justice. The Eleventh Circuit Court of Appeals found that the District Court did not abuse its discretion.

Nevertheless, there is a distinct difference that must be recognized between cases in which private plaintiffs sue under 42 U.S.C. §1983 and cases where the DOJ is suing under 42 U.S.C. §1997. In Christiansburg Garment Co., 42 U.S.C. §1988 was interpreted to limit fee awards to prevailing defendants in cases where the private plaintiff's claims were "frivolous, unreasonable or without foundation." Christiansburg, 434 U.S. 412. However, that higher standard, set forth in Christiansburg, was derived from public policies that supported §1988, and was created specifically to protect private plaintiffs in bringing a lawsuit under the Civil Rights Act. That standard does not apply to other fee-shifting statutes, including CRIPA, absent specific statutory language. Geier v. United States of America, 871 F.2d 1310 (6th Cir. 1998) (observing that "[there's absolutely no element in this case where the awarding of fees against the United State could chill anybody's activity in the assertion of civil rights," rejecting the government's contention that fees could not be awarded unless action was "frivolous, unreasonable or without foundation" under the Christiansburg standard, and ultimately awarding attorneys' fees and costs to state defendants as prevailing parties in Title IX action against the

United States). See also, O'Neal v. Commissioner, 1:08-cv-723, 2011 U.S. Dist. LEXIS 7855 (W.D. Mich.).

In Johnson v. Murphy, the Eleventh Circuit's reasoning also indicate that it lacked information as to how the United States would use CRIPA to bring civil rights actions against the states, and specifically as to how the United States would continue baseless actions against states around the country, in some circumstances filing or threatening multiple actions against the same state at the same time.[7] Congress, when enacting CRIPA, had no insight into how CRIPA could be abused by the Department of Justice, as it has been recently in the State of Arkansas and in other states. Defendants also note that the Eleventh Circuit's Johnson v. Murphy decision is not binding on this Court, and this Court has discretion to apply the correct standard set forth in Geier v. United States.

Another reason not to apply Christiansburg is that there are no prevailing plaintiffs entitled to fees in a CRIPA case. In that way, CRIPA is further distinguished from the substantive civil rights statutes. The only "prevailing party" in a CRIPA case that could be entitled to a fee award is the State government that is able to prevail against the Department of Justice. Thus, the dual standard and the concomitant policies articulated in Christiansburg simply do not apply in CRIPA cases. In a CRIPA case, the equitable and political considerations differ markedly from other civil rights cases. Under CRIPA, it is the United States Attorney

[7] Among the Eleventh Circuit's questionable analysis, the Court reasoned that "since only a government entity can be sued under CRIPA**,** the equities on the defendant's side are also weaker, as we need not worry that the expense of this litigation will put the State of Florida out of business." Johnson v. Murphy, 348 F.3d 1334, 1351 (11th Cir. 2003). The Eleventh Circuit did not have the advantage of looking into the future to see how the DOJ would bring massive pieces of litigation requiring the expenditure of excessive resources, and sometimes multiple suits or a suit involving multiple facilities in the same state. The financial impact, as evidenced by the total amount being requested by Defendants in fees and costs, is great on the State's budget and on its ability to provide services to the residents of CHDC and to other disabled persons. Not only is the State of Florida's budget greater than the State of Arkansas' budget, but economic times are far worse now with reduced revenues. In any case, whether or not a state will be "put…out of business" is not a correct standard to apply under any statutory fee provision.

General and not a "private attorney general" of "limited means" who brings suit against a state actor. The private attorney general of limited means has a markedly different need for legal counsel's compensation as compared to the United States Attorney General, for whom the recovery of fees is not a consideration. Additionally, CRIPA's legislative history supports the interpretation that State governments who prevail against the United States should naturally be reimbursed for attorneys' fees, rather than be held to the onerous standard constructed in Christiansburg.

Despite the Eleventh Circuit's reasoning in Johnson v. Murphy. Christiansburg was not settled law impliedly secreted into CRIPA's attorneys' fees provisions. To the contrary, it is clear that Christiansburg was not a bright line rule at the time that CRIPA was passed. As noted above, if any standard was a backdrop for Congress' enactment of CRIPA's attorneys' fees provision, it was Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968). This conclusion is inevitable with an examination of case law history. For example, in Huges v. Rowe, 449 U.S. 5 (1980), the District Court awarded fees for the Illinois Attorney General and against individual plaintiff/prisoner whose case was dismissed. That decision was affirmed by the Seventh Circuit. The Supreme Court reversed the Circuit Court, based on its decision in Christiansburg. If district and circuit courts in 1980 had not accepted Christiansburg as the relevant standard by which civil rights defendants should be awarded fees, certainly the passing comments from authors of the congressional record were not meant to convey that Christiansburg, in particular, was intended to govern the award of counsel fees in these matters. If it had intended so, Congress would have found a less obtuse expression of that standard. The case of Hanrahan v. Hampton, 446 U.S. 754 (1980), is a further illustration of the confusion about awarding attorneys' fees to prevailing parties in civil rights actions. In Hanrahan, the Circuit Court improperly awarded attorneys' fees

solely because of plaintiff's success on appeal. Further proof that Christiansburg was not a widely accepted standard at the time CRIPA was passed also appears in the case of Supreme Court of Virginia, et al. v. Consumers Union of United States et al., 446 U.S. 719 (U.S. 1980), where the District Court assessed attorneys' fees against the Supreme Court of Virginia pursuant to civil rights statutes. The United States Supreme Court had to reverse that decision, noting the qualified immunity of the Supreme Court of Virginia. Again, the courts did not recognize the Christiansburg standard in Obin v. International Ass'n of Machinists & Aerospace Workers, 651 F.2d 574 (1981), where the Eighth Circuit reversed the Eastern District of Missouri with regard to the appropriate standard to apply. The Eighth Circuit ultimately awarded attorneys' fees to defendants based on Christiansburg. The District Court decision in Obin was made on March 4, 1980, but the Circuit Court decision occurred on June 11, 1981.

So, despite Christiansburg being decided in January of 1978, it was not held to be dispositive of those issues in the District Court for the Eastern District of Missouri until June 11, 1981. The assumption of Johnson v. Murphy that the House and Senate committee notes impliedly pronounced Christiansburg to be "the present standards" in 1979 and 1980 respectively, was incorrect. Subsequent to the Christiansburg decision, district and circuit courts continued to define a prevailing defendant in the same way they defined a prevailing plaintiff. Those decisions were subsequently distinguished and, in some cases, reversed, but one cannot conclude that the House and Senate Committee notes for the CRIPA statute in 1979 and 1980 were intended to be a futuristic reference to interpretations of Christiansburg that had not yet occurred. The authors of the House and Senate committee notes were not members of the judicial branch of government. The language in their notes appropriately reflects their deference to the courts. If any interpretation beyond this general deference is to be made of the

congressional notes, it should be that "the present standards used by the courts under the civil rights laws" were varied at the time the congressional notes were prepared. Christiansburg was not instantly adopted as a clear, blanket rule across the nation as soon as it was published. The precedential weight of that decision continues to evade courts. See e.g. Fox v. Vice, 2011 U.S. LEXIS 4182, 2-3 (U.S. June 6, 2011); Martin v. Franklin Capital Corp., 546 U.S. 132, 134 (U.S. 2005); Obin v. International Asso. of Machinists & Aerospace Workers, 487 F. Supp. 368, 369 (E.D. Mo. 1980). Therefore, in light of the language used by Congress in CRIPA's attorneys' fee provision, coupled with the inapposite purposes of Christiansburg (to prevent the chilling of private citizens pursuing their civil rights), the language in CRIPA should be construed as it reads on its face, to award Defendants attorneys' fees because they are the prevailing party.

The Christiansburg standard indicates that it was designed to protect, and to prevent the chilling, of the assertion of rights by private citizens trying to assert their constitutional rights, and to endorse the reluctance of courts to award the defendant fees against such private plaintiffs. There is absolutely no element in this case where the awarding of fees against the Plaintiff could chill any individual's assertion of his or her civil rights. The only possible limiting affect that awarding attorneys' fees to the State of Arkansas would have is on the United States in pursuing lawsuit where it cannot meet its burden of proof. The Contrary result would be to elevate the Department of Justice to the same plane as private plaintiffs, and undermine Congress' determination that Title VII plaintiffs alone are "the chosen instruments" for vindicating the national policy against discrimination. Christiansburg at 418.

4) The Appropriate Standard for Awarding Attorneys' Fees to the Defendants is Set Forth in Geier v. United States

In Geier v. United States, supra, the United States intervened on the side of the plaintiffs in a school desegregation case against the State of Tennessee, but later reversed its position and

challenged the parties' consent decree, thereby multiplying the cost and complexity of the litigation. The District Court awarded attorneys' fees to the State and the private plaintiffs as "prevailing parties" under Section 1988. 871 F.2d at 1314. The Court also rejected the United States' claim that because the State was a prevailing defendant, Christiansburg prevented awarding fees. Id. The Sixth Circuit Court of Appeals affirmed, observing that the policies behind Christiansburg's rationale are an interest in protecting civil rights by "private attorneys general" and a concomitant reluctance to award fees to defendants in civil rights cases which might chill the assertion of those rights by plaintiffs. Those concerns were not present and did not justify the application of Christiansburg. Id.

The Court of Appeals in Geier stated:

> This Court might well find that the actions of the Justice Department in this case were frivolous, vexatious and without foundation. I have not made such a finding and won't make such a finding because it's unnecessary. The parties who applied for fees in this case are in fact, the prevailing party before the Sixth Circuit Court of Appeals.

Id. at 1314.

Like Geier, this Court should not allow the Department of Justice to hide behind its nominal status as "plaintiff."[8] The policy considerations of Christiansburg do not apply under these circumstances, making it neither necessary nor equitable to require proof that the United States' case be "frivolous, unreasonable or groundless." Geier demonstrates that the considerations that operate in most civil rights cases do not preclude an award of attorneys' fees when the conduct of the United States is unreasonable and unjustified, even absent a finding of "frivolousness." Christiansburg only applies to prevailing defendants against private plaintiffs

[8] In its final opinion, this Court noted: "Those parents and guardians, so far as the record shows, oppose the claims of the United States. Thus, the United States is in the odd position of asserting that certain persons' rights have been and are being violated while those persons—through their parents and guardians—disagree." So in essence, the DOJ had no real clients in this case, and they are not "plaintiffs" in its traditional sense.

who were attempting in good faith to protect their civil rights. In contrast, the Christiansburg standard cannot be appropriately applied to the Department of Justice, in a CRIPA case, as the DOJ is not in need of the same protections that the Christiansburg court meant to ensure. Simply put, the standard set forth in Geier is the logical and appropriate standard for this case.

B. Even if Christiansburg Applied, the Defendants Should Still be Awarded Reasonable Attorneys' Fees

1) The Plaintiff's Conduct in Continuing Litigation after it Became Unreasonable Supports an Award of Fees

Even if it is argued that the Plaintiff's position was not unreasonable at the outset, i.e., when it started its investigation or before it engaged in extensive discovery, it is clear that the Plaintiff "continued to litigate after it clearly became" evident that its uncompromising litigation approach was unreasonable. For example, the Plaintiff refused to ask for any specific relief throughout the entire litigation. Also, after several discovery requests by Defendants asking the Plaintiff to provide them with documentation and facts to support its claims, the Plaintiff produced blanket objections and refused to explain how its claims were supported. Also, after the extensive discovery, including over 50 depositions which produced little to no evidence to support their allegations, the Plaintiff attempted to file for a preliminary injunction, again, based on evidence which did not support such relief. Another attempt by the Plaintiff to advance groundless and unreasonable litigation occurred when they attempted to join the ADA claim with a statewide action at United States v. Arkansas, 2011 U.S. Dist. LEXIS 7231 (E.D. Ark. Jan. 24, 2011). It is presumed that the DOJ realized the extent of their lack of evidence in the present case and made a desperate effort to advance claims against other state agencies and programs,

again, without any foundation and coupled with a complete disregard for the requirements of CRIPA that must precede the filing of a lawsuit.

If Defendants are not awarded fees and costs, it would result in allowing the Plaintiff to continue litigating cases based on faulty evidence and bad faith at the cost of the state defendants. Congress clearly did not intend such a situation to be allowed without the consequences of a fee award against the Plaintiff. The severe financial burden on the State of Arkansas in order to prevail against the Plaintiff's attempt to bring lawsuits in bad faith and unsupported by evidence, should be borne by the United States. If the United States wishes to continue litigation once it is clear to both parties that the evidence does not support their claims, then it is only appropriate that the United States bear those costs. The Christiansburg Court would have had no way to anticipate how this standard would or could be abused by the United States in an attempt to bankrupt state agencies through lawsuits of this nature while inappropriately being equated to a private plaintiff. Many states have been coerced into settlement by the Plaintiff through its investigation tactics wherein it sends experts such as Carla Jo Osgood and Carly Crawford to make preliminary reports which contain inaccurate information and unfounded accusations. Many states, after receiving these reports, believe that they have no choice but to settle these cases and enter into overly burdensome and poorly defined settlement agreements which require the state expend excessive sums and to submit to intrusive monitoring for many years. Several states who have entered into these massive settlements with the DOJ are now suffering budget crises.[9]

[9] In 2009, Texas settled with the Department of Justice, entering into a five year agreement to allow the DOJ to dictate how Texas would operate its programs for the developmentally disabled.[1] The additional cost to Texas was estimated at $112 million.[2] Since it entered its agreement with the DOJ, the Texas legislature has appropriated all funds requested and Texas' Department of Aging and Disability Services has implement all of the programs demanded by the DOJ. Yet, those changes have not yielded positive results for Texas' disabled citizens.[3] The DOJ

It is quite clear even from the record of pleadings in this matter that the DOJ was attempting to advance claims even after it had become evident to them that those claims were groundless and lacking evidentiary support. Therefore, the Defendants should be compensated for the attorneys' fees and costs which were necessary to defend this case.

2) The Department of Justice Claims were Frivolous, Groundless and Unreasonable

The Court may award defendants their attorneys' fees, pursuant to Christiansburg, if a plaintiff's "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co. v. Equal Employment

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is holding Texas accountable for those shortcomings. Texas now has a budget crisis that will not allow it to fund the DOJ's unreasonable demands.[4] The state has conceded that it may default on its agreement with the DOJ.[5]

Exhibit A (containing references listed below)

[1] DOJ 2009 Settlement with Texas
[2] Texas Legislative Budget Board Report January 2011 at 13
[3] SSLC Monitor Report prepared for DOJ - The remaining monitoring reports can be found by visiting: http://www.disabilityrightstx.org/who-we-are/press-room/DOJ-monitoring-reports
[4] Texas Legislative Budget Board Report January 2011
[5] April 2011 Statesmen article

In 2010, the State of Georgia entered into a settlement agreement with the Department of Justice to resolve the DOJ's allegations regarding conditions at the Georgia Regional Hospital in Atlanta and allegations that the state was failing to comply with the U.S. Supreme Court's decision in Olmstead v. Zimring, et al.[1] By the terms of the agreement, Georgia agreed to allow the DOJ to dictate the state's delivery of services to its developmentally disabled and mentally ill citizens from 2011 through 2015. In 2011, Georgia will spend over $13 million to begin to implement the DOJ's programs.[2] In 2012, it will spend nearly $60 million.[3] Those expenses are in addition to the state's $2 billion expenditures on Olmstead related services.[4]

That agreement is set to expire in 2015, by which time the State of Georgia will likely spend over $250 million delivering services solely for the satisfaction of the Department of Justice, rather than delivering those services based on the needs of its citizens. If past practice is a guide, Georgia will not be able to comply with the onerous terms of its agreement with the DOJ and the DOJ will sue Georgia to compel its compliance, raising the total cost of that settlement agreement, extending the life of the agreement indefinitely, and hindering Georgia's ability to provide services to its citizens.

Exhibit B (containing references listed below)

[1] DOJ 2010 Settlement with Georgia
[2] Georgia Budget and Policy Institute 2011 Report at 2-3.
[3] Governor's Budget Report for Fiscal Year 2012 at 31.
[4] Governor's Budget Report for Fiscal Year 2012 at 32-33.

Opportunity Comm., 434 U.S. 412, 421 (1978); Flowers v. Jefferson Hosp. Assn., 49 F.3d 391, 392 (8th Cir. Ark. 1995); See also Am. Family Life Assurance Co. of Columbus v. Teasdale, 733 F.2d 559, 569 (8th Cir. 1984); Fisher v. Wal-Mart Stores, Inc., 619 F.3d 811, 819 (8th Cir. Mo. 2010). Under a Christiansburg analysis, the Supreme Court cautioned that a court should avoid "post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." Christiansburg, 434 U.S. 412, 421-22, 98 S. Ct. 694, 54 L. Ed. 2d 648. However, "proof that a plaintiff's case is frivolous, unreasonable, or groundless is not possible without a judicial determination of the plaintiff's case on the merits." Marquart v. Lodge 837, Int'l. Ass'n. of Machinists & Aerospace Workers, 26 F.3d 842, 852 (8th Cir. 1994) (citing Keene Corp. v. Cass, 908 F.2d 293, 298 (8th Cir. 1990) ("To be a prevailing party [for purposes of §1988], a party must succeed on some claim or significant issue in the litigation which achieves some benefit the parties sought…."); See also Emery v. Hunt, 272 F.3d 1042, 1047 (8th Cir. 2001).

In this matter, the Plaintiff pursued three broad claims against the Defendants – violations of due process protections of the Fourteenth Amendment of the United States Constitution; violations of the Americans with Disabilities Act; and violations of the Individuals with Disabilities in Education Act [Docket #1]. The Defendants succeeded in defending against all of those claims when the Court dismissed all of Plaintiff's claims with prejudice after a full trial [Docket #229]. Defendants do not dispute that the claims asserted by Plaintiff involve important rights and privileges. The importance of those rights and privileges, however, should not be blurred with the Plaintiff's obligation to pursue only meritorious claims. The Plaintiff's inability to meet its burdens of proof cannot be overlooked merely because its claims invoked individual

rights and privileges. Whether or not the Christiansburg standard is met, depends whether the evidence merited Plaintiff's pursuit of its claims.

Unlike a typical lawsuit, only the Department of Justice can initiate litigation pursuant to the Civil Rights of Institutionalized Persons Act. The Department of Justice's Civil Rights Division, Special Litigation Section, is tasked exclusively with investigating and litigating the type of case it purportedly pursued against the Defendants here. 42 U.S.C. §1997a-b. Yet, the Plaintiff did not produce basic evidence necessary to satisfy its burdens of proof. As the Court found in its Findings of Fact and Conclusions of Law, many of Plaintiff's claims were simply unsupported by the evidence. The Plaintiff knew what evidence it had, and did not have, well before the trial in this matter. In advance of trial, it took at least (55) fifty-five depositions in this case; requested and received thousands of documents through discovery; and marked over two thousand trial exhibits and sub-exhibits, constituting tens of thousands of pages. Because this matter depended heavily on clinical expertise, the Plaintiff was well aware of Defendants' position regarding the evidence when Defendants' expert reports were produced, months before trial began.

The purpose of Plaintiff's lawsuit was "to enjoin the named Defendants from egregiously and flagrantly depriving individuals housed in Conway Human Development Center (the "Center") of rights, privileges, or immunities secured and protected by the Constitution and laws of the United States." [Docket #1 at 1-2]. Yet, Plaintiff produced no testimony from any guardian or CHDC resident to claim that rights, privileges, or immunities were being violated. As the Court noted in its Findings of Fact, the record showed that guardians and family members of CHDC residents actually disagreed with and opposed the Plaintiff's claims.[10]

[10] Plaintiff did compel the testimony of Mr. Alan Fortney, the stepfather of a CHDC resident, but Plaintiff knew that Mr. Fortney would not testify in support of any of its claims because Plaintiff had previously deposed Mr. Fortney.

Plaintiff's lack of testimony or other evidence was particularly significant to its ADA claim. Part of the standard from Olmstead requires a Plaintiff to produce evidence that the resident of an institution, or his or her guardian, would not oppose transfer from the facility to an alternative residence. Olmstead v. L.C., 427 U.S. 581 (1999). Plaintiff initiated its lawsuit and proceeded through trial without any testimony or other evidence from CHDC residents or their guardians. In Brooks v. Central Arkansas Nursing Center, 31 F. Supp. 2d 1151 (1997), the Eastern District of Arkansas awarded the Defendant its attorney's fees and costs, in part, because the Plaintiff failed to testify on his own behalf and failed to call any other witnesses necessary to substantiate his claims. Brooks at 1153.

Because the Court is well aware of the evidence presented in this case, Defendants will not reargue their defense of Plaintiff's claims. Defendants note, though, as to its allegations of Fourteenth Amendment violations, that the Department of Justice never disputed that it was required to meet the standards identified in Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). Yet, the evidence produced at trial indicated that Plaintiff never had evidence of a practice or pattern or any substantial departure from accepted professional standards. For example, Plaintiff relied on its witness, Ms. Osgood, to allege that rates of injuries at CHDC were unusually high. Plaintiff knew Ms. Osgood had limited credentials, but rather than rely on published data, Plaintiff allowed Ms. Osgood to opine subjectively. Plaintiff knew that Defendants would offer evidence of published rates of substantiated abused in facilities like CHDC to rebut Ms. Osgood's allegations. Plaintiff's counsel deposed Defendants' experts months before trial. Yet, Plaintiff made no effort to limit its allegations to defensible claims, and, rather, Plaintiff argued Ms. Osgood's allegation at length in its post-trial pleadings as if it was uncontroverted fact. [Docket #218 at 97-124].

Similarly, Plaintiff repeatedly claimed that CHDC residents die too young and never tempered that allegation, despite the obvious lack of support for that claim. [Docket #43 at 5 ("According to comparative studies, 72 years of age is the approximate normal life span for individuals with developmental disabilities who live in an institution, a quarter of a century longer than residents of CHDC." (citing Declaration of Dr. Edwin Mikkelsen)); Tr. at 10 ("residents of CHDC die, on average, at the strikingly young age of 46 years old. As its residents die, CHDC is repopulating itself with young children."); [Docket #218 at 4] ("This substandard medical care system explains why people confined to CHDC die an average of 25 years earlier than residents at comparable state facilities."). These claims were patently false. The facilities to which Dr. Mikkelsen compared CHDC have significantly older populations than CHDC, so a comparison of the average ages of death at those facilities relative to CHDC, is meaningless. [Docket #228 at 33-34]. Defendants repeatedly demonstrated Plaintiff's flawed reasoning, but Plaintiff made no effort to limit or drop that claim. [Docket #50 at 14-17]. The Department of Justice pursued that claim, like all of its claims, without regard for the facts. [Docket #218 at 4].

By way of further example, the Court found that the Department of Justice's expert, "Dr. Mikkelsen's opinion regarding CL depend[ed] upon findings for which there [was] no evidence and blame[d] the staff at Conway Human Development Center for failing to record evidence that would have supported those findings." [Docket #228 at 36]. The Court noted further that Dr. Mikkelsen's criticism of CL's medical care was "an assumption unsupported by evidence." [Docket #228 at 36].

Plaintiff similarly had no basis for claiming that CHDC's provision of psychological services violates CHDC residents' federal constitutional rights. The Plaintiff pursued its claims

regarding psychological services because CHDC was not engaging in best practices, as defined by Plaintiff's experts. Plaintiff never offered any evidence that CHDC's provision of psychological services substantially departed from generally accepted professional standards. Plaintiff's experts evaluated CHDC to determine whether CHDC was complying with their subjective "best practices" and Plaintiff adopted that position as if it were the same as minimally accepted professional standards. "The fact that psychology services at Conway Human Development Center could be improved does not mean, however, that the professionals who provide those services have departed so substantially from generally accepted standards that it cannot be said that they are exercising professional judgment." [Docket #228 at 29].

Prior to trial, the Department of Justice filed a Motion to Compel Entry Upon Land, which sought to have a physical therapist review services at CHDC well beyond the deadline for conducting such reviews. [Docket #27]. Defendants opposed that motion, and the Plaintiff's attempted to add a physical therapy expert was appropriately prohibited by Magistrate Judge Jones. [Docket #37]. Rather than forego allegations that CHDC's physical therapy services did not meet constitutional standards, the Plaintiff proceeded to have its occupational therapy expert, Ms. Crawford, offer evidence regarding physical therapy. Plaintiff had no basis to believe that CHDC's physical therapy services were substandard because it never had a physical therapy consultant evaluate those services, but even if it believed those services were inadequate, Plaintiff knew that it needed a physical therapist to offer expert testimony about physical therapy services at CHDC. Plaintiff's belated request to have a physical therapist review services at CHDC reveals that Plaintiff knew it lacked sufficient means to prove that those services were deficient. Because Plaintiff's request was denied, it gathered no further evidence, but it proceeded through trial claiming CHDC's physical therapy services were deficient, which

Defendants were required to defend. Similarly, Plaintiff pursued claims at trial regarding nutritional management and speech language pathology services at CHDC based solely on the testimony of their occupational therapist, Ms. Crawford, who lacked the expertise to render a reliable opinion in those areas.

Despite Magistrate Judge Jones' decision forbidding the late identification of expert witnesses, the Department of Justice subsequently attempted to elicit new expert opinions from five belatedly identified witnesses regarding the issue of fundamental alteration. The Court agreed with Defendants that those witnesses were not timely identified and could not testify at trial. [Docket #147]. In its decision, the Court noted:

> The United States says that it needs the testimony of these witnesses in order to rebut that 'fundamental alteration' defense and that it supplemented its witness list in a timely fashion so as to respond to that defense. The report to which the United States refers does not reach its conclusions by means of an analysis of the experience in other states, so it is difficult to see how the testimony of the five persons who were not disclosed before discovery could constitute rebuttal of the opinion expressed in that report. Nor does it appear that the opinion expressed in the report should have come as a surprise to the United States. There is no circumstance here that would justify permitting testimony from these five persons who were not disclosed in a timely fashion.

[Docket #147 at 2].

Because of Plaintiff's late disclosure of those additional expert witnesses, and the Defendants need for a ruling on the availability of these witnesses to prepare properly and efficiently for trial, Defendants also filed a Motion to Compel Plaintiff's Response to Defendants' Motion to Exclude. That same day, Plaintiff filed a Response in Opposition to Defendants' Motion to Compel, opposing an early response to Defendants' Motion to Exclude. Plaintiff proceeded to take the full allotted time to respond to Defendants' Motion to Exclude., including extra days that should not have been allowed by a strict interpretation of the Local

Rules. Because of Plaintiff's actions, Defendants had to conduct, while awaiting a ruling, written discovery on those witnesses, and prepare for and take the depositions of several of those witnesses in the weeks immediately before trial. Plaintiff's actions consumed considerable resources from Defendants at a time when they should have been able to focus on trial preparation. The Department of Justice, after the Court had already rejected its earlier attempt to obtain the same type result with a belatedly identified physical therapist, continued to knowingly pursue a meritless position without regard to its prejudicial impact and undue expense on the Defendants. Pulaski County Republican at 6-7.

Like Plaintiff's decision to proceed without proper evidence regarding CHDC's physical therapy services, Plaintiff's failed attempt to bolster its Americans' with Disabilities Act claim with additional witnesses indicates that Plaintiff proceeded with that claim with less evidence than it knew it needed. Plaintiff may have had other bases for proceeding with its ADA claim through trial and through its post-trial pleadings, but the attempt to belatedly add those witnesses means that the Plaintiff knew its case was less meritorious than it had wished. Plaintiff's decision to disclose those witnesses belatedly also indicates a tacit admission that Plaintiff needed more evidence to pursue its ADA claims against defendants.

As noted above, Plaintiff's attempt to withdraw its ADA claims in this matter and renew them in U.S. v. Arkansas, et al., No. 4:10-cv-00327 also indicates that Plaintiff knew, at that time, it lacked sufficient evidence to proceed with any meritorious ADA claims. On May 5, 2010, Plaintiff filed a Motion to Dismiss its ADA claims and litigate those claims anew in U.S. v. Arkansas, et al., No. 4:10-cv-00327. The Court denied that motion, noting, in part, "[a] plaintiff is not permitted voluntary dismissal merely to escape an adverse decision or seek a more

favorable forum. [Docket #60 at 2] (citing Hamm v. Rhone-Poulenc Rorer Pharm., Inc., 187 F.3d 941, 950 (8th Cir. 1999) (citations omitted)).

Plaintiff's pursuit of its ADA claims was based on its assumption that CHDC was necessarily the most restrictive setting for every person residing at CHDC. Plaintiff produced no evidence to prove its assumption. The Court noted that lack of necessary evidence in its Findings of Fact. [Docket #228 at 61-68]. The dearth of evidence was noted by Defendants repeatedly, so Plaintiff's oversight could not have been accidental. [Docket #103 at 21, 27; #104 at 7-9]. Plaintiff proceeded with its ADA claim despite knowing that it did not have the evidence necessary to make its claims.

Like its other claims in this matter, Plaintiff should have known that it could not obtain the relief it sought regarding its IDEA claims. Defendants repeatedly pointed out to Plaintiff that the Arkansas Department of Education was responsible for overseeing educational services at CHDC and ensuring that those services comply with federal law. [Docket #103, 104]. Many of Plaintiff's IDEA claims, if true, could not have been remedied without compelling the Arkansas Department of Education to take action. For example, none of the Defendants could compel a public school district to send an LEA to an IEP meeting at CHDC. Only the Arkansas Department of Education could do so. The Department of Justice did not name the Arkansas Department of Education, or any local school district, as a party in this matter, so it could not have obtained any relief on those claims. Those claims, regardless of why they were pursued, were frivolous. Furthermore, as the Court recognized, the ADE was responsible for addressing any alleged deficiencies under the IDEA and was in fact appropriately addressing those concerns. The Plaintiff made no reasonable attempt to consider and to rely upon the efforts of

the ADE in resolving any alleged issues. In short, there was no need for the Plaintiff to bring or to pursue an IDEA claim.

The Plaintiff knew what evidence it had, and did not have, well before trial commenced. As the Court noted in Flowers v. Jefferson Hosp. Ass'n., 1993 U.S. Dist. LEXIS 20992 (E.D. Ark. Nov. 23, 1993), the "Plaintiff is responsible for satisfying himself that the evidence upon which he relies is in fact reliable prior to trial." Flowers at 4, FN 1. Yet, in this matter, the Plaintiff proceeded with all of the claims originally pled in its boilerplate Complaint without regard for the evidence it actually had.

The Christiansburg standard does not require that the Plaintiff have acted in bad faith, but that Court noted that it was "needless to say, if a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." Christiansburg, 434 U.S. at 421. Defendants need not show that Plaintiff brought or continued any of its claims in bad faith. Christiansburg, 434 U.S. at 412 ("No statutory provision would have been necessary had an award of attorney's fees to a prevailing defendant been based only on the plaintiff's bad faith in bringing the action, for even under the American common-law rule (which ordinarily does not allow attorney's fees to the prevailing party) such fees can be awarded against a party who has proceeded in bad faith. (citation omitted)). However, there were several instances throughout this litigation where Plaintiff's actions were not taken in good faith.

For instance, the timing of the Department of Justice's Motion for Preliminary Injunction also suggests its filing was not in good faith. The Plaintiff had investigated CHDC for nearly seven (7) years and filed its preliminary injunction only after its experts had completed their reports and while Defendants' experts were working to prepare their rebuttal reports. As

Defendants noted in their Response to Plaintiff's Motion for Preliminary Injunction, and the Court found, "[b]y its own delay in requesting a preliminary injunction, the United States has tacitly shown that it does not believe the threat of irreparable harm is so great as to warrant preliminary injunctive relief." [#52 at 7]. The United States had agreed to allow Defendants' experts a specified period of time to prepare their rebuttal reports, but Defendants and their experts were taken away from that task in order to respond substantively to Plaintiff's detailed motion, memorandum of law, and expert witnesses' reports and affidavits.[11] Plaintiff's motivation for filing a motion for preliminary injunction was not to prevent irreparable harm or preserve the status quo. The possible reason for submitting such an extensive pleading at that inappropriate point in time would be to disrupt Defendants' work with their experts, and to take time and resources away from Defendants' trial preparation. This conclusion is further supported by Plaintiff's subsequent attempt to sever its ADA claims and litigate them anew in U.S. v. Arkansas, et al., No. 4:10-cv-00327, which would have only served to delay litigation of those issues.

Similarly, Plaintiff did not produce its trial exhibits to Defendants until September 1, 2010 and then, only in an electronic format, which was uniquely difficult to access, where each document was separately stored in its own folder, requiring each folder and document to be opened separately, and printed in order for Defendants and their counsel to review them. Defendants were only able to determine that there were hundreds of unidentified documents embedded within those electronic files, which contained no identifying exhibit numbers, two days before trial. Plaintiff also supplemented its trial exhibits with hundreds of additional documents after the commencement of trial. Plaintiff's lack of good faith in this regard became

[11] Plaintiff submitted affidavits from its experts in support of its motion for preliminary injunction, but at trial objected to Defendants' efforts to introduce such materials as hearsay.

apparent when Defendants determined that many of those exhibits were not even introduced at trial.[12]

During trial, Plaintiff's counsel repeatedly attempted to introduce manufactured documents that it had buried among hundreds of exhibits that were never introduced. The Department of Justice falsely represented documents that it claimed were Defendants' discovery responses. On the third day of trial, Department of Justice counsel introduced Plaintiff's exhibit 264. Tr. at 556. That document was represented to be Defendants' response to Plaintiff's Request for Production of Documents number 36. Yet, it added language indicating that CHDC only informed guardians and families of alternative placement close to the guardian or family when they became available. Plaintiff's witness, Ms. Richardson, testified that the Plaintiff had represented to her that Defendants prepared that response. In fact, Plaintiff did not use the formal discovery response served by the Defendants, but instead used an informal shorthand incomplete cover sheet used to organize the documents that were being produced. Certainly, the Plaintiff's counsel knows that the formal complete discovery responses are to be used in considering the evidence. However, the Plaintiff incorrectly represented it to its own witness, the Court, and the public, that an informal cover sheet was all the information provided by the Defendants. Even worse, the informal cover sheet was used by Plaintiff's expert to falsely imply that the Defendants were mistaken in information they had provided or had concealed information.

Similarly, the Plaintiff misrepresented Defendants' response to Plaintiff's Second Request for Production of Documents, number seven, and introduced it through its witness, Ms.

[12] Indeed, Defendants did not introduce at trial all the exhibits they had marked. However, this was solely because the Plaintiff did not timely identify its exhibits and other evidence in response to discovery, thereby forcing the Defendants to try to anticipate the need for more exhibits than proved to be necessary. If the Plaintiff had provided timely and adequate discovery responses, the Defendants could have greatly narrowed their exhibit list before trial.

Osgood, as Plaintiff's Exhibit 39-1. Defendants' actual response to that discovery request stated: "[t]here have been no injuries resulting from restraint use since June 1, 2007." (emphasis added). The Department of Justice misrepresented Defendants' response to read: "There have been no injuries resulting from restraint use." At trial, Department of Justice counsel described its Exhibit 39-1 to its witness.

> Exhibit 39-1, on the front page of that indicates the United States requests any list, roster, summary, or report of all residents injured during or as a result of restraint used at CHDC including the date of the incident. On the back page, the facility's response is there have been no injuries resulting from restraint use.

Tr. at 148. Defendants' counsel subsequently noted the errors by Plaintiff's counsel, but Plaintiff's counsel gave no indication to the Court that it made a mistake, or that it was willing to substitute or withdraw its inaccurate exhibits. Defendants actual discovery responses and Plaintiff's exhibits are attached here as Exhibits C-F for comparison.

Much of the evidence adduced by Plaintiff at trial was expert testimony. Plaintiff selected those witnesses, many of whom testified on behalf of the Department of Justice previously and continue to enjoy an ongoing relationship with the Plaintiff, and had an obligation to elicit trustworthy evidence from those witnesses. Blue Dane Simmental Corp. v. American Simmental Ass'n., 178 F.3d 1035, 1040 (8th Cir. 1999) (it is not the general acceptance of the methodology that is relevant, but "rather, it [is] the reasonableness of using such an approach, along with [the expert's] particular method of analyzing the data thereby obtained, to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant." (quoting Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167, 1177, 526 U.S. 137, 153 (1999)). Nevertheless, Plaintiff allowed, or maybe even encouraged, its witnesses to persist in their allegations in spite of evidence to the contrary and common sense. For instance, Ms. Osgood,

persisted in her allegation that a "culture of silence" existed at CHDC, but the only support she had for her allegation was that she could not find any evidence to the contrary. [Docket #228 at 16-24]. Ms. Osgood's defiance of contrary evidence and logic would be her own, but Plaintiff adopted Ms. Osgood's position as if it was uncontroverted fact. [Docket #218 at 110-11]. Plaintiff's lack of good faith in this regard is apparent given the contrary evidence from its own witnesses. [Docket #228 at 22-24].

Similarly, during trial Plaintiff's counsel, Mr. Cheng, cross-examined Defendants' psychologist, Dr. Walsh, regarding data that Dr. Walsh had collected from records of a CHDC resident with the initials R.C. Dr. Walsh identified R.C. and dozens of other CHDC residents, whose records he reviewed in a chart that was personally presented to Mr. Cheng when Mr. Cheng deposed Dr. Walsh. During the cross-examination, Mr. Cheng presented a compilation of records from another resident at CHDC with the initials R.C. Mr. Cheng represented to the Court, Defendants, and Dr. Walsh that Plaintiff's exhibits were records of the same individual referenced in Dr. Walsh's report.[13] Mr. Cheng was wrong. A closer look at Mr. Cheng's examination of Dr. Walsh reveals that Mr. Cheng did not have Dr. Walsh identify the records, but rather Mr. Cheng actively misrepresented that his exhibit was a collection of records for the same R.C. referenced in Dr. Walsh's report.

Mr. Cheng's reaction to Defendants' counsel's redirect examination where the misrepresentation was brought to light further suggests that Mr. Cheng's error was not in good

[13] A close review of the trial transcript reveals that Mr. Cheng did not have Dr. Walsh identify the records, but rather Mr. Cheng actively represented that he was putting the records of the same R.C. referenced in Dr. Walsh's report into evidence.

Mr. Cheng: Now, if you would take a look at Government's Exhibit KW-4, CON-US-7597, this is RC's safety plan. Do you see RC's aggression and restraint data chart in the middle?

Dr. Walsh: Yes.

Tr. at 6014:19-22

faith. Mr. Cheng admitted that he received Dr. Walsh's list of residents' initials and corresponding names when he deposed Dr. Walsh. Tr. at 6174:6-7. Then, Mr. Cheng proceeded with what could only be described as a litany of previous prepared reasons why his error was actually Dr. Walsh's fault. Tr. at 6174-76. Mr. Cheng's effort to demonstrate in Dr. Walsh's recross-examination that his misrepresentation was reasonable is belied by his extreme attention to detail elsewhere in the trial record.

There are many other examples of the inaccuracies advanced by the Plaintiff and of the thorough rebuttal by the Defendants of claims made by the Plaintiff that demonstrate that this litigation was groundless. See Defendants' Post-Trial Brief, Defendants' Response to Plaintiff's Post-Trial Brief, and Defendants' Response to Plaintiff's Appendix Attached to "United Sates' Post-Trial Brief". The Defendants believe that the Court is already very familiar with these facts and that they need not be repeated here. The record demonstrates that the Plaintiff has violated Christiansburg, if the Court finds that Christiansburg is at all applicable.

C. The Defendants should be Entitled to Attorneys' Fees under Federal Rule of Civil Procedure 11

Because the distinction between the Plaintiff and Plaintiff's counsel in this matter is difficult to identify, it is difficult to discern whether the Plaintiff or its counsel was responsible for the pursuit of claims that lacked merit. To the extent that claims were pursued or continued at the behest of Plaintiff's counsel, those actions constituted violations of Federal Rule of Civil Procedure 11.

> Rule 11 provides that appropriate sanctions such as reasonable expenses and attorney's fees shall be imposed if the Court finds that the attorneys violated their duty to "have conducted a reasonable inquiry and have determined that any papers filed with the court are well-grounded in fact, legally tenable, and 'not interposed for any improper purpose.'" Determining whether an attorney has violated Rule 11 involves a consideration of three

> types of issues. The court must consider factual questions regarding the nature of the attorney's prefiling inquiry and the factual basis of the pleading or other paper. Legal issues are raised in considering whether a pleading is 'warranted by existing law or a good faith argument' for changing the law and whether the attorney's conduct violated Rule 11. Finally, the district court must exercise its discretion to tailor an 'appropriate sanction.'"

Pulaski County Republican Committee v. Pulaski County Bd. of Election Comm.'rs., 1991 U.S. Dist. LEXIS 19971, 3-4 (E.D. Ark. Feb. 15, 1991) (citing Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2454, 2457 (1990), quoting Fed. R. Civ. P. 11), rev'd on other grounds 956 F.2d 172 (8th Cir. 1992).

In this matter, the Department of Justice persisted in its claims throughout the litigation. In its post-trial pleadings, its claims were all amplified, rather than the Plaintiff limiting or abandoning its meritless claims. From the beginning of this litigation, the Plaintiff had to have determined that some of its claims lacked merit, but rather than tailoring its claims to the evidence or making a good faith argument for changing the law, Plaintiff proceeded to blindly pursue its claims. "Rule 11 sanctions 'are designed to discourage the filing of frivolous court papers or those that are 'legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith.'" Crenshaw v. Nucor Corp., 2008 U.S. Dist. LEXIS 115389 (E.D. Ark. Aug. 7, 2008) (citing Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 124 (8th Cir. 1987) (quoting Lieb v. Topstone Indus., Inc., 788 F.2d 151, 154 (3rd Cir. 1986)). Some time before it filed its post-trial pleadings, the Plaintiff knew, or should have known, that many or all of the claims that it was pursuing were baseless, or so anemic that they could not be sustained by the evidence. For the same reasons, Plaintiff's pursuit of its claims satisfy the Christiansburg standard, Plaintiff's counsel has violated Rule 11.

D. Defendants are Entitled to Costs Associated with this Litigation

While costs are within the Court's discretion, Defendants, as the prevailing party, should be allowed recovery of all their costs. "A prevailing party is presumptively entitled to recover all of its costs." Thompson v. Wal-Mart Stores, Inc., 472 F. 3d 515, 517 (8th Cir. 2006). The Defendants are requesting recovery of the following reasonable litigation costs, totaling $1,500,581.95, as documented by detailed receipts provided herewith as attachments (detailed summaries are provided herewith as appendices) (see also Appendix A, Declaration of Thomas B. York, Esquire):

- Deposition Transcripts ($72,720.72) Appendix C-1; Attachment C-1
- Trial Transcripts ($23,377.10) Appendix C-2; Attachment C-2
- Witness Fees ($614.52) Appendix C-3; Attachment C-3
- Photocopying ($52,367.67) Appendix C-4; Attachment C-4
- Filing Fees ($465.00) Appendix C-5; Attachment C-5
- Overnight Mail ($4,582.81) Appendix C-6; Attachment C-6
- Telephonic Conference Calls ($474.75) Appendix C-7; Attachment C-7
- Computerized Legal Research ($10,037.31) Appendix C-8; Attachment C-8
- Process Service ($1,040.00) Appendix C-9; Attachment C-9
- Miscellaneous Out-of-Pocket and Litigation Expenses ($5,064.82) Appendix C-10; Attachment C-10
- Attorney Travel Expenses ($16,911.26) Appendix C-11; Attachment C-11
- Expert Fees and Expenses (Plaintiff's experts' fees for depositions and expenses, $9,367.81) Appendix C-12; Attachment C-12; (Defendants' experts' fees and expenses, $1,303,558.18) Appendix C-13; Attachment C-13.

1) Defendants Are Entitled To Costs And Expenses Pursuant To CRIPA

The CRIPA statute does not specifically address the parameters for the award of costs.[14] In general, the Federal Rules of Civil Procedure provide a framework for the recovery of costs by a prevailing party. Fed. R. Civ. P. 54(d) provides:

> Except when express provision therefore is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, …. shall be imposed only to the extent permitted by law.

Fed. R. Civ. P. 54(d)(1). This rule codifies the 'presumption that the prevailing party is entitled to costs.' Bathke v. Casey's Gen. Stores, Inc., 64 F. 3d 340, 347 (8th Cir. 1995).

The general statute regarding the taxation of costs, 28 U.S.C. §1920, defines costs as follows:

> (1) Fees of the clerk and marshal;
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title ….

28 U.S.C. §1920. "When an expense is taxable as a cost …, there is a strong presumption that a prevailing party shall recover it 'in full measure'." Concord Boat Corp. v. Brunswick Corp., 309 F.3d 494, 498 (8th Cir. 2002) (citations omitted) (finding that the district court reduced the

[14] CRIPA allows for a discretionary award of attorney fees, stating:

> In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs.

42 U.S.C.A. § 1997a(b) (emphasis added).

photocopying cost award to the prevailing party based on unsupported factors and reduced the award to merely reflect reduction for convenience copies). Pursuant to the plain language of §1920, the Defendants, at the bare minimum, are entitled to an award of costs for trial transcripts, deposition transcripts, witness fees, photocopying, and filing fees.

28 U.S.C. §1920(2) authorizes the award of transcripts "necessarily obtained for use in the case." "This language embraces both deposition transcripts and trial transcripts." Price v. GKN Aerospace North America, Inc., 2006 U.S. Dist. LEXIS 89736 at 3,4 (E.D. Mo. 2006) (citing Manildra Milling Corp. v. Ogilvie Mills, Inc., 76 F.3d 1178, 1184 (Fed. Cir. 1996) (a patent case where the Court found the daily transcripts to be necessary and invaluable for both parties and thus a recoverable cost). Investigatory deposition transcripts are usually not taxable. However, the deposition need not be used at trial to be taxable. Deposition transcripts are taxable where the "deponents were potential trial witnesses who had substantial connection to the case." Porter v. McDonough, 2011 U.S. Dist. LEXIS 20855 at 7, 8 (D. Minn. 2011) (citation omitted). "Unless the opposing party interposes a specific objection that a deposition was improperly taken or unduly prolonged, deposition costs will be taxed as having been "necessarily obtained for the use in the case" within the meaning of 28 U.S.C. §1920." Price v. GKN Aerospace North America, Inc., 2006 U.S. Dist. LEXIS 89736 at 4 (E.D. Mo. 2006) (quoting Meder v. Everest & Jennings, Inc., 553 F. Supp. 149, 150 (E.D. Mo. 1992) (the Court awarded defendants, as the prevailing party, costs taxed against the plaintiffs). The deposition transcripts for which the Defendants are seeking costs were reasonably necessary or expected to be used at trial. See Emmenegger v. Bull Moose Tube Co., 33 F. Supp. 2d 1127, 1134 (E.D. Mo. 1998) (an ERISA case where the Court awarded costs for deposition transcripts pursuant to §1920 for those depositions reasonably expected to be used at trial and for preparation of the case rather than

mere discovery). Costs associated with deposition transcripts are recoverable as long as they were used in the litigation of the case. Craftsmen Limousine, Inc. v. Ford Motor Co., 579 F.3d 894, 897 (8th Cir. Mo. 2009) (ruling that even video deposition costs were recoverable since all deposition transcripts are recoverable under §1920 as long as they were used in the litigation of the case).

Defendants took the depositions of eighteen (18) individuals. Nine (9) of the depositions taken by Defendants were Plaintiff's experts (Osgood, Manikham, Mikkelsen, Matson, Holloway, Crawford, Richardson, Thibadeau, Gettings) and the transcripts of said experts were used directly for cross-examination questions and impeachment of those experts at trial. (While Gettings did not ultimately testify, he was scheduled to testify and Defendants fully expected Gettings to be called by the Plaintiff.) The remaining nine (9) depositions were for individuals identified by Plaintiff as trial witnesses. Four (4) were those of lay (quasi-expert) witnesses (Provencal, Rucker, Zaharia, Kriebel) which were ultimately stricken by court order on August 26, 2010, because Plaintiff failed to disclose them before the close of discovery on June 8, 2010. Defendants were nevertheless compelled to take these four (4) depositions and obtain the transcripts because Defendants had not yet received a ruling from the Court on their motion to strike and needed to conduct these depositions since the time frame was so close to the start of trial. Four (4) others were individuals identified by Plaintiff in its Rule 26 disclosure. Although these four (4) were not ultimately called to testify at trial, they were the only potential witnesses identified through the disclosure, and, thus, the Defendants believed their deposition testimony to be necessary to prepare for trial. (Defendants had asked for the identification of potential trial witnesses in August of 2009. Other than its Rule 26 disclosure, no other witnesses were identified until near the close of discovery in May and June of 2010.) Plaintiff eventually

belatedly identified over one hundred (100) potential trial witnesses. Deposing only eighteen (18) individuals was very reasonable.

Plaintiff on the other hand took approximately fifty-five (55) depositions for which the Defendants defended and obtained transcripts for use at trial. Most of these individuals were state employees working at CHDC or DDS. Individuals who were deposed by the Plaintiff appeared on Plaintiff's witness list. Those who did not ultimately testify were nonetheless expected to testify at trial and Defendants were required to obtain and review their transcripts. The Defendants used all of these deposition transcripts to prepare trial questions and possible rebuttal to questioning by the Plaintiff. Since each of these transcripts was used for the purpose of preparing for trial and defending the case at trial, Defendants should be reimbursed 100% for all of the costs of these transcripts. Defendants seek reimbursement in the amount of $72,720.72 for all of these deposition transcripts. App. C-1; Att. C-1.

Trial transcripts were imperative for the drafting of the post-trial briefs. They were "necessarily obtained" for use in this case, as the briefs would not have been able to be completed without the facts presented at trial. The citations to the trial testimony from the transcripts provided the foundation of post-trial briefs. The parties both agreed to expedited unofficial transcripts during the trial which were essential to the tailoring of evidence to meet the issues that were being addressed. This was especially important where the Plaintiff chose to abandon some sections of its experts' reports, not to call certain witnesses (including its expert, Robert Gettings), not to use many exhibits it had marked, and otherwise altered its expected presentation of evidence. The Defendants needed the expedited transcripts to focus on the evidence that was actually offered in contrast to what they had reasonably expected might be offered. The Defendants assume that the Plaintiff also needed expedited transcripts as it agreed

to join in the request for such transcripts during the trial. The cost of the trial transcripts was $23,377.10. App. C-2; Att. C-2.

Pursuant to 28 U.S.C. §1920(2), deposition and trial transcripts are recoverable costs. The Defendants incurred $72,720.72 in deposition transcripts (App. C-1) and $23, 377.10 (App. C-2) in trial transcripts, amounting to $96,097.82 in transcript costs.

28 U.S.C. §1920(3) allows for the fees and disbursements for witnesses. The Defendants incurred $614.52 in attendance fees to depose Rule 26 witnesses and witnesses belatedly identified by the Plaintiff. App. C-3; Att. C-3.[15] The Rule 26 witnesses were identified by the Plaintiff as those likely to be called to testify at trial. The belatedly identified witnesses were characterized by Plaintiff as fact witnesses; the Defendants characterized them as expert witnesses. These Defendants found it necessary to depose these individuals for use of their deposition testimony at trial. The belatedly identified witnesses were Lyn Rucker, Eric Zaharia, William Krieble, and Gerald Provencal. Plaintiff also identified Keith Vire at the close of discovery as a potential witness. Defendants requested that Rucker, Zaharia, Krieble, and Provencal be prohibited from testifying at trial (as well, as John Agosta, motion dated 8/3/10), as they were belatedly identified. The Court granted Defendants' motion (order dated 8/26/10) after the depositions had taken place (8/11/10 and 8/12/10). (Mr. Agosta's deposition was cancelled per the 8/26/10 order). Mr. Vire did testifying and his deposition was necessary for cross-examination.

[15] Should Defendants' request for recovery of expert fees pursuant to § 1988 (civil rights) or § 12205 (ADA) be denied (see arguments below), Defendants request $40 a day plus mileage and subsistence for each of Plaintiff's and Defendants' experts for each day attended at deposition and/or trial. Defendants request additional time to calculate the exact amount of such witness fees. Defendants would be requesting recovery of witness fees and disbursements for Plaintiff's experts for their depositions and for their own experts for trial.

The Defendant, as the prevailing party, may recover "the costs of making copies of any materials where the copies are necessarily obtained for the use in the case." 28 U.S.C. §1920(4). The Defendants are requesting copying costs for copies sent to a professional copy service, in the amount of $52,367.67. App. C-4; Att. C-4. These copies were mostly for exhibits (copies to the DOJ and 3 copies as requested by the Court); one discovery item for the 9th Request for Production where the DOJ requested all items the experts relied on; and one item for the Department of Education documents which the DOJ subpoenaed for trial**.** Recovery of expenses for copies used in this litigation for such things as correspondence, pleadings, discovery, and sharing of documents are not being requested here by the Defendants, as Defendants' counsel are considering such copying costs as part of their overhead. Copies such as for exhibits and medical records are recoverable, even if not introduced during trial. Courtesy copies of proposed exhibits required by Local Rules are recoverable. Similarly, copies of materials used as potential impeachment of witnesses during trial are recoverable. Porter v. McDonough, 2011 U.S. Dist. LEXIS 20855 at 8 (D. Minn. 2011) and Price v. GKN Aerospace North America, Inc., 2006 U.S. Dist. LEXIS 89736 at 6 (E.D. Mo. 2006) (citing U.S. Andrews v. Suzuki Motor Co., Ltd., 161 F.R.D. 383, 386 (S.D. Ind. 1995) ("only costs associated with extravagant, useless, or obviously unnecessary copies" are not taxable, whereas, copying costs for proper preparation for trial are recoverable). Generally, copies made for the convenience of counsel "including those incurred in serving pleadings or motions on opposing counsel, producing documents in discovery, or copying research material" are not recoverable. Price v. GKN Aerospace North America, Inc., 2006 U.S. Dist. LEXIS 89736 at 6 (E.D. Mo. 2006) (citations omitted). The Defendants are not seeking any costs for copies which would fall into those categories. The requested copy costs are those which were "necessarily obtained for use in the case". 28 U.S.C. §1920(4).

Pro hac vice fees may be recoverable pursuant to §1920(5). Defendants are requesting $465.00, App. C-5; Att. C-5, for *pro hac vice* fees for counsel. Craftsman Limousine, Inc. v. Ford Motor Co., 579 F. 3d 894, 898 (8th Cir. 2009).

The Defendants argue that all of the requested photocopy costs ($52,367.67; App. C-4) fall under §1920(4), as they were copied by an outside professional copy service, not part of counsel's general overhead, normally charged to their clients, and necessarily obtained for use in the case. If the Court deems only some of the photocopied items to fall under §1920(4), then, Defendants request that the remaining photocopy costs requested be awarded as legitimate out-of-pocket expenses. Legitimate out-of-pocket expenses, such as photocopies for work on the case, are recoverable if it is the prevailing practice in the community for the attorney to receive reimbursement for such expenses. See Emmenegger v. Bull Moose Tube Co., 33 F. Supp. 2d 1127, 1134 (E.D. Mo. 1998) (awarding legitimate copying expenses as part of a reasonable attorney's fee).

In civil rights actions brought under 42 U.S.C. §§1981, 1981a, 1982, 1983, 1985 or 1986, the Court may allow costs not available under 28 U.S.C. §1920. 42 U.S.C. §1988(b). If the standards for evaluating fees and costs under CRIPA are to be analogized to those of general civil rights §§1981, 1981a, 1982, 1983, 1985 or 1986 actions, then §1988 applies here. Prevailing parties in civil rights actions may recover costs pursuant to 42 U.S.C. §1988(b). "Postage, express mail, travel, meals, and lodging are not compensable under §1920, but are properly included as part of the reasonable attorney's fees." Luckert v. Dodge County, 2010 U.S. Dist. LEXIS 122666 at 8 (D. Neb. 2010). "Attorney's out-of-pocket expenses which are ordinarily charged to fee paying clients may be recovered under 42 U.S.C. §1988." Lalla v. City of New Orleans, 161 F. Supp. 2d 686, 712-713 (E.D. La. 2001) (citing Leblanc-Sternberg v.

Fletcher, 143 F.3d 748, 763 (2d Cir. 1998). Recoverable out-of-pocket expenses include those for 'duplicating, postage, telephone, computerized legal research and other expenses'. Id.;[16] see also, Pinkham v. Camex, Inc., 84 F.3d 292, 294-295 (8th Cir. 1996) (per curiam) (citations omitted).

"There are two separate sources of authority to award out-of-pocket expenses." Some are awarded pursuant to §1920; others are "included in the concept of attorney's fees." Northcross v. Board of Education of the Memphis City Schools, 611 F.2d 624, 639 (6th Cir. 1979). These fees include:

> 'incidental and necessary expenses incurred in furnishing effective and competent representation,' and thus are authorized by *section 1988.*

Id. (citing remarks of Congressman Drinan, 122 Cong. Rec. H12160 (daily ed. Oct. 1976) (other citation omitted)).

> The authority granted in *section 1988* to award a 'reasonable attorney's fee' included the authority to award those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services. Reasonable photocopying, paralegal expenses, and travel and telephone costs are thus recoverable pursuant to the authority of *section 1988.*

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[16] The Eighth Circuit generally does not allow the recovery of computerized research. Luckert v. Dodge County, 2010 U.S. Dist. LEXIS 122666 at 8 (D. Neb. 2010). However, here, computerized legal research costs were part of a negotiated contract where such fees were charged by counsel and paid by the clients. Counsel would have negotiated a higher attorney rate with the State had computerized legal research not been part of their reimbursement. Other courts have allowed the inclusion of computerized legal research in the costs award. See Burns v. Anderson, 2006 U.S. LEXIS 59150 at 36, 37 (E.D. Va.). Just as in the Burns case, counsel here separately billed its clients the expense associated with computerized legal research. As quoted by the Burns Court:

> [T]he use of online research services likely reduces the number of hours required for an attorney's manual research, thereby lowering the lodestar, and that in the context of a fee-shifting provision, the charges for such online research, may properly be included in the fee award.

Id. (citing Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 369 F.3d 91, 98 (2d Cir. 2004). 'The government urges us to deny any recovery for computer research charges, but we decline to do so because such services presumably save money by making legal research more efficient.' Id. (citing Role Models America, Inc. v. Brownlee, 359 U.S. App. D.C. 237, 353 F.3d 962, 975 (D.C. 2004).

Id.

Attorney travel expenses are considered recoverable out-of-pocket expenses. Sturgill v. United Parcel Service, Inc., 512 F.3d 1024, 1036 (8th Cir. 2008) (referring to this Title VII case and 42 U.S.C. §2000e-5(k), in the context of an employment discrimination statute, and citing Moto v. Univ. of Tex. Houston Health Sci. Cir., 261 F.3d 512, 529 (5th Cir. 2001) (quotation omitted); accord LeBlanc-Sternberg v. Fletcher, 143 F.3d 748, 763 (2d Cir. 1998) and stating: "We conclude that this rule is consistent with the Supreme Court's decision in Missouri v. Jenkins, 491 U.S. 274, 285, 109 S.Ct. 2463, 105 L. Ed. 2d 229 (1989), as construed in W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 99-100, 11 S. Ct. 1138, 113 L. Ed. 2d 68 (1991)").

Thus, the expenses incurred for photocopying (anything deemed not covered by §1920(4); App. C-4); overnight mail ($4,582.81; App. C-6; Att. C-6)**;** telephonic conference calls ($474.75**;** App. C-7; Att. C-7); computerized legal research ($10,037.31; App. C-8; Att. C-8); process service ($1,040.00; App. C-9; Att. C-9); miscellaneous out-of-pocket and litigation expenses (these expenses include conference room rental for Plaintiff's experts' depositions; computer technician support to prepare documents requested by the Plaintiff for trial; truck rental for delivery of documents and exhibits to the courthouse, and counsel's hotel for trial ($5,064.82; App. C-10; Att. C-10); and attorney travel expenses (including airfare, other transportation expenses, lodging, and meals ($16,911.26; App. C-11; Att. C-11) should all be included as part of the reasonable attorneys' fee. These expenses were out-of-pocket expenses, actually incurred and paid by the State of Arkansas, the fee-paying client, to its attorneys.

It may be argued that since the State is a prevailing Defendant, that they may only be awarded out-of-pocket expenses, not as costs but as part of their attorneys' fees, under the

Christiansburg standard.[17] If deemed so, the Defendants argue that they meet this standard. See Argument IV.B. above.

Expert fees and expenses are recoverable under the amended §1988(c) with respect to §§1981 or 1981a Civil Rights Act actions. If CRIPA is to be analogized to other civil rights actions, this provision should apply. "Plaintiff correctly argues that expert witness fees may be included as part of the attorney fees award." See 42 U.S.C. §1988(c) ("In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court in its discretion, may include expert fees as part of the attorney's fees.")" See Robins, 928 F. Supp. 1027, 1034 (D. Or. 1996).

In 1991, the United States Supreme Court ruled that fees for expert witnesses were not recoverable as part of §1988 attorneys' fees, absent explicit statutory language to the contrary. West Virginia Univ. Hosps., 499 U.S. 83, 86 (1991). Immediately thereafter, as part of the Civil Rights Act of 1991, Congress added a new subsection (c) to §1988. It provided:

> In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

42 U.S.C. §1988. See also Landgraf v. USI Film Products, 511 U.S. 244, 251, 114 S.Ct. 1483,

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[17] In *Christiansburg*, the Supreme Court, in interpreting 42 U.S.C. § 2000e-5(k) of Title VII, n5 held that "a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless…" 434 U.S. at 422; accord *American Federation of State County and Municipal Employees, AFL-CIO v. County of Nassau*, 96 F.3d 644, 650 (2d Cir. 1996). We see no reason, however, to apply the same type of heightened standard to the assessment of costs. See *Poe v. John Deere Co.*, 695 F.2d 1103, 1108 (8th Cir. 1982) (declining to extend *Christiansburg* standard to costs assessment); *Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 906 (5th Cir. 1987) (holding that the fact that Title VII suit was not frivolous did not preclude award of costs to defendant).

Cosgrove v. Sears, Roebuck, & Co., 191 F.3d 98, 101 (2d Cir. N.Y. 1999). The Poe Court, held that "costs, unlike attorney's fees, are awarded to a prevailing party as a matter of course, unless the district court directs otherwise; unusual circumstances need not be present." Poe v. John Deere Co., 695 F.2d 1103, 1108 (8th Cir. 1982) (citation omitted).

1490, 128 L.Ed.2d 229 (1994). At the same time that Section 1988(c) was passed, Congress also added statutory language ensuring expert fees in the employment discrimination context. Congress added the following language to Title VII:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. §2000e-5(k).

And Congress incorporated the same remedy into the Americans with Disabilities Act, which was passed into law in 1991:

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

42 U.S.C. §12117(a). Thus, Defendants are requesting expert fees and expenses in the amount of $1,303,558.18. App. C-13; Att. C-13. This request includes recovery of fees and expenses for Defendants' experts who testified at trial or whom the Defendants reasonably anticipated would testify at trial. The requested recovery includes Defendants' expert fees for all aspects of this litigation such as touring, document review, report writing, deposition testimony, and trial testimony. It also includes their expenses associated with their fees including transportation, lodging, and meals. Att. C-13.

Defendants are also requesting fees and expenses for the monies incurred in deposing Plaintiff's experts. These fees and expenses include their deposition fees and expenses, which were out-of-pocket litigation expenses for the Defendants, and amount to $9,367.81. App. C-12; Att. C-12.

It may be argued that since the State is a prevailing Defendant, that they may only be awarded expert fees and expenses under §1988(c), as part of their attorneys' fees, under the Christiansburg standard. If deemed so, Defendants meet this standard. See Argument IV.B. above.

The Americans with Disabilities Act (ADA) also allows for recovery of expert fees. As discussed below, the ADA statute allows recovery of costs in addition to what is afforded by 28 U.S.C. §1920. Under the ADA, Defendants are not only allowed additional costs, such as those provided during the course of litigation, but also, they are allowed expert fees and travel expenses.

2) Defendants Are Entitled To Costs And Expenses Pursuant To The ADA

The ADA specifically allows for the award of litigation expenses and costs. The statute states:

> In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

42 U.C.S.A. §12205. Under the ADA, a party may be reimbursed for litigation expenses in addition to those taxable as costs under 28 U.S.C. §1920 alone.

Under 42 U.C.S.A. §12205, a prevailing party may recover miscellaneous costs in addition to those prescribed to §1920. If out-of-pocket expenses are not deemed appropriate for

recovery under §1988 to the Defendants, Defendants are requesting their recovery pursuant to §12205. Thus, the expenses incurred for photocopying (anything deemed not covered by §1920(4); App. C-4); overnight mail ($4,582.81; App. C-6; Att. C-6)**;** telephonic conference calls ($474.75**;** App. C-7; Att. C-7); computerized legal research ($10,037.31; App. C-8; Att. C-8); process service ($1,040.00; App. C-9; Att. C-9); miscellaneous out-of-pocket and litigation expenses (these expenses include conference room rental for Plaintiff's experts' depositions; computer technician support to prepare documents requested by the Plaintiff for trial; truck rental for delivery of documents and exhibits to the courthouse, and counsel's hotel for trial ($5,064.82; App. C-10; Att. C-10); and attorney travel expenses (including airfare, other transportation expenses, lodging, and meals ($16,911.26; App. C-11; Att. C-11) should all be considered reimbursable litigations expenses . These expenses were reasonable litigation expenses, actually incurred and paid by the State of Arkansas, the fee-paying client, to its attorneys.

Such costs include "all necessary litigation expenses, so long as they are not overhead expenses absorbed by counsel." Robins v. Scholastic Book Fairs, 928 F. Supp. 1027, 1036-1037 (D. Or. 1996) (citing Thornberry v. Delta Air Lines, 676 F. 2d 1240, 1244 (9th Cir. 1982). These costs such as for photocopying, telephonic conference calls, computerized research, process service, conference room rental for depositions, computer technician support, transportation of trial documents and exhibits, and attorney travel expenses, were all necessary litigation expenses.

Under 42 U.C.S.A. §12205, such costs also include expert witness fees and travel expenses. Robins, 928 F. Supp. at 1036. Litigation expenses pursuant to the ADA include recovery of the costs of expert witnesses. Lovell v. Chandler, 303 F.3d 1039, 1058 (9th Cir. 2002).

> The preamble to the ADA Title II regulations explains that 'litigation expenses include items such as expert witness fees,

> travel expenses, etc.' 28 C.F.R. Pt. 35, App. A., Section-by-Section Analysis, *§35.175*. This construction of the statute is consistent with its legislative history. According to committee reports, Congress included the term 'litigation expenses' in order to authorize a court to shift costs such as expert witness fees, travel expenses, and the preparation of exhibits. See H.R. Rpt. No. 101-485 (III) at 73, *reprinted in* 1990 U.S.C.C.A.N. 445, 496 (Report of the Committee on the judiciary) …. H.R. Rpt. No. 101-485 (II) at 140, *reprinted in* 1990 U.S.C.C.A.N. 303, 423 (Report of the Committee on Education and Labor) ….

Lovell, 303 F.3d at 1058.

Defendants are requesting $1,303,558.18 in expert fees and expenses. App. C-13. This request includes recovery of fees and expenses for Defendants' experts who testified at trial or whom were reasonably anticipated to testify at trial. Att. C-13. Defendants are also requesting $9,367.81 for the expert fees and expenses incurred in taking Plaintiff's experts' depositions. App. C-12.; Att. C-12.

It may be argued, that since the State is a prevailing Defendant, that they may only be awarded litigation expenses and expert fees and expenses under ADA, as part of their attorneys' fees, under the Christiansburg standard. If deemed so, Defendants meet this standard. See Argument IV.B. above.

3) Defendants Are Entitled To Costs And Expenses Pursuant To The IDEA

The IDEA states that in general, in any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs:

> **(I)** to a prevailing party who is the parent of a child with a disability;
> **(II)** to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a

> complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
> **(III)** to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

20 U.S.C.S. §1415(i)(3)(B). Even though the IDEA refers to an award against a parent or an attorney of the parent, since the Plaintiff improperly brought this IDEA action against the State, the fee provisions should be applied against it. The Plaintiff sought to assert the rights of the parents and it should not now escape liability for its action that lacked any foundation. Essentially, the Plaintiff put itself in the position of an "attorney of a parent."

The Court may award fees to Defendants pursuant to 20 U.S.C.S. §1415(i)(3)(B), as DDS (Division of Developmental Disabilities Services) is recognized by the Arkansas Department of Education as a local educational agency (LEA).

The Eighth Circuit has held that expert witness fees are not recoverable under the IDEA. The Eighth Circuit appears to disallow recovery of expert fees and merely allow recovery of appearance fees pursuant to 28 U.S.C. §1821(b) (witnesses shall be paid an attendance fee of $40 for each day's attendance). J.T. v. Independent School District No. 701, 2006 U.S. Dist. LEXIS 95886. However, this area law is unsettled and other circuits have held otherwise. In the Seventh Circuit, for example, fees for expert witnesses are recoverable costs under the IDEA. TD v. La Grange School District No. 102, 222 F. Supp. 2d 1062, 1065 (N.D. Ill. 2002) (citing Brandon K. v. New Lenox School District, 2001 U.S. Dist. LEXIS 19138, 2001 WL 149499 (N.D. Ill. 2001)). Persuasive to the TD Court was the Brandon K. Court's reference to the House of Representative Conference Report which stated:

> The conferees intend that the term 'attorneys fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the parent or guardian's case in the action or proceeding, as well as traditional costs incurred in the course of litigating the case. (H.R. Conf. Rep. No. 99-687 at 5 (1986).

TD v. La Grange School District No. 102, 222 F. Supp. 2d at 1065.

Even if this Court decides that it cannot follow another Circuit's rulings, per day attendance fees and subsistence allowances should nonetheless be recoverable under the IDEA for IDEA expert witnesses. Pursuant to 28 U.S.C. §1821(c)(1): "A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence …." A subsistence is also provided for pursuant to 28 U.S.C. §1821(d)(1): "A subsistence allowance shall be paid to a witness when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto day to day."

V. CONCLUSION

The State of Arkansas was attacked by the Plaintiff with a boilerplate of accusations that the Conway Human Development Center was in violation of the 42 U.S.C. §1997, the ADA and the IDEA. Not only were these accusations not supported by any reliable evidence, but they were also frivolous. Rather than withdrawing their claims, the Plaintiff continued litigation after it became clear that their claims had no support in fact or in law.

This case was brought under 42 U.S.C. §1997, which is a standing statute for the Plaintiff. This Statute establishes no substantive civil rights. For this reason, the tenants of Christiansburg do not apply, and, thus, the Christiansburg standard should not be applied to this

case. However, even if this Court believes that Christiansburg is appropriately applied to this case, the Defendants still have proven that this case was without foundation after the Plaintiff became aware that their claims were not supported by evidence. The Plaintiff made multiple mistakes, exaggerations, and misrepresentations to the Court. Whether or not Christiansburg applies, the Defendants should be awarded their attorneys' fees.

The Defendants expended an enormous amount of resources on this case which would otherwise have been spent on services for the disabled. As a prevailing party, Defendants are entitled to a reimbursement for part of those costs pursuant to 28 U.S.C. §1920. Additionally, since the Defendants have proven that Christiansburg does not apply to this case, and have alternatively proven that the Plaintiff claims were without foundation as required by Christiansburg, the Defendants are entitled to the remaining costs pursuant to 42 U.S.C. §1988, ADA, and the IDEA.

Therefore, the Defendants ask that this Court award Defendants reasonable attorneys' fees and costs associated with the litigation of this case in the amount of $4,306,704.95.

Respectfully submitted,
YORK LEGAL GROUP, LLC

_____
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Donald B. Zaycosky, Esquire
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CERTIFICATE OF SERVICE

I, Thomas B. York, hereby certify that on this 22nd day of July 2011, I served a true and correct copy of Defendants' Brief in Support of Motion for an Award of Attorneys' Fees and Costs via the Court's electronic filing system upon the following:

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/s/Thomas B. York
Thomas B. York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA

Plaintiffs,

v. **Case No. 4:09CV00033 JLH**

STATE OF ARKANSAS, et al.,

Defendants.

_____/

DEFENDANTS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

The Defendants request an award of attorneys' fees and costs against the Plaintiff, and aver the following:

1. On June 8, 2011, the Honorable Leon Holmes issued an Opinion and Order granting final judgment in favor of the Defendants and against the Plaintiff.
2. The United States had commenced this civil action against the Defendants by filing a Complaint against the Defendants pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. §§1997 (2000).
3. Pursuant to 42 U.S.C. §1997a(b): "In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs."
4. The Defendants are the prevailing party in this litigation and may be awarded reasonable attorneys' fees, as well as costs and other expenses.

5. While the fact that the Defendants prevailed on every issue raised by the Plaintiff is sufficient in itself to justify an award of attorneys' fees, the discretionary award of attorneys' fees is also appropriate in this case for the following reasons:

    a. The Plaintiff was or should have been aware that its Complaint was unnecessary and unjustified because it had been investigating the Conway Human Development Center ("CHDC") for nearly seven (7) years before the Complaint was filed.

    b. The Complaint contained allegations that CHDC was failing to provide a free and appropriate education to its students as required by the Individuals with Disabilities Education Act, 20 U.S.C. §400 et seq., ("IDEA"). The Plaintiff knew or should have known that the Arkansas Department of Education ("ADE") is the regulatory agency responsible for ensuring that each education program is compliant with the IDEA and that the ADE was the only party able to provide the relief sought by the Plaintiff, and yet, the Plaintiff failed to include the ADE as a party to this lawsuit. The Plaintiff also failed to consider and rely upon the fact that the ADE was already appropriately addressing the alleged concerns.

    c. The Plaintiff relied upon numerous mistakes, exaggerations, and misrepresentations by its experts which Defendants were forced to address. The Plaintiff also failed to ensure that its experts understood the meaning of the term "generally accepted professional standards" and allowed its experts to testify knowing that those experts did not apply this legal requirement, thereby adding unnecessary costs and complexity to the litigation.

d. The Plaintiff pursued meritless motions and strategies that unnecessarily increased the costs of litigation.

e. The Plaintiff pursued claims that were frivolous and unfounded.

6. The amount of attorneys' fees and costs requested is as follows:

Attorneys' fees:	$2,806,123.00
Litigation costs and expenses:	$1,500,581.95

Documentation of these fees and expenses is provided in the accompanying memorandum of law in support of this motion.

WHEREFORE, Defendants request that this Court issue an award of attorneys' fees and costs against the Plaintiff in the total amount of $4,306,704.95.

Respectfully submitted,
YORK LEGAL GROUP, LLC

_____
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CERTIFICATE OF SERVICE

I, Thomas B. York, hereby certify that on this 22nd day of July 2011, I served a true and correct copy of the Defendants' Motion for an Award of Attorneys' Fees and Costs via the Court's electronic filing system, upon the following:

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