UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RICHARD MESSIER, et al. Plaintiffs,	:	
v.	:	No. 3:94-CV-1706(EBB)
SOUTHBURY TRAINING SCHOOL, et al. Defendants.	:	

RULING ON THAT PART OF PLAINTIFFS' MOTION FOR ATTORNEYS' FEES, COSTS AND EXPENSES CONCERNING THEIR "DEGREE OF SUCCESS" IN THE LITIGATION

The plaintiffs -- residents of Southbury Training School ("STS"), an institution for the mentally disabled in the State of Connecticut, and three advocacy groups -- filed the instant motion [doc. #s 1067, 1083, 1100 & 1101] for attorneys' fees, costs and expenses in an amount exceeding $6.8 million. This class action litigation was brought in 1994 seeking injunctive relief for alleged constitutional and statutory violations relating to the conditions, services and programs at STS, as well as the continued placement of residents there. The plaintiffs ultimately prevailed on their claims relating to community placement.

Following a 123-day bench trial in 1999, the Court ruled that the defendants -- who are STS, the Director of STS and the Commissioner of the Connecticut Department of Mental Retardation -- had deprived class members of their procedural due process and statutory rights to professional judgment regarding the appropriateness of individual placements in a more integrated setting ("community placement"), as well as their statutory right to be free of

discrimination with respect to having such placements made. Messier v. Southbury Training Sch., 562 F. Supp. 2d 294, 338-39, 343-44 (D. Conn. 2008). The plaintiffs did not prevail on any of their other claims, principally because those claims were moot by reason of the then-ongoing litigation in United States v. Connecticut, No. 3:86-cv-252 (D. Conn. 1986) ("Connecticut litigation"). Messier, 562 F. Supp. 2d at 303-04. Based on the Court's finding of liability on the plaintiffs' community placement claims, the parties reached a settlement on the issue of remedies, which required "the defendants to fully address the violations of rights of class members that the Court identified in its decision on the merits." Order Re: Approval & Implemen't of Settl't Agreem't [doc. # 1054] at 13. The instant motion for attorneys' fees, costs and expenses followed. By agreement of the parties, this ruling is limited to addressing a specific subset of the attorneys' fees component of that motion: the "degree of success" the plaintiffs achieved in the litigation. The Court will address the other part of the attorneys' fees component -- i.e., calculation of the lodestar -- as well as the costs and expenses components in a subsequent ruling.

As discussed, infra, the plaintiffs maintain that their "degree of success" was excellent, i.e., that they obtained "excellent results" and so are entitled to a full award of attorneys' fees. The defendants, on the other hand, contend that the plaintiffs' award should be significantly reduced because they succeeded on only a fraction of their claims. For the reasons that follow, the Court finds that the plaintiffs achieved "excellent results" with respect to the claims on which they prevailed (i.e., the community placement claims), but, because those claims are both factually and legally distinct from the plaintiffs' unsuccessful claims (i.e., medical care, protection and habilitation), the lodestar calculation must be limited to the time the plaintiffs'

counsel expended on the successful claims. That is, the plaintiffs are not entitled to an award of fees, costs and expenses incurred in connection with their unsuccessful claims.

DISCUSSION

I. The Plaintiffs' Prevailing Party Status

A plaintiff in a civil rights case may recover attorneys' fees pursuant to, inter alia, 42 U.S.C. § 1988[1] if he or she is a "prevailing party . . . [that is,] one who achieves a material alteration of the legal relationship of the parties . . . [through] a judicially sanctioned change." Grievson v. Rochester Psychiatric Cent., 746 F. Supp. 2d 454, 460 (W.D.N.Y. 2010) (quoting Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 604 (2001)). In this case the Court ruled that "the defendants . . . had failed . . . [both] to provide for the evaluation of all class members for community placement and had failed to place in the community class members for whom such placement was found to be appropriate . . . ." Messier, 562 F. Supp. 2d at 345. Even though the plaintiffs did not prevail on their claims alleging constitutional and statutory violations relating to medical care, protection and habilitation, the plaintiffs nevertheless meet § 1988's threshold requirement by virtue of the Court's finding of liability on the issue of community placement and the Settlement Agreement's provision requiring the defendants to take remedial action in that regard. See Farrar v. Hobby,

[1] The plaintiffs base their motion for attorneys' fees, costs and expenses on two additional fee-shifting statutes: 42 U.S.C.A. § 12205 and 29 U.S.C. § 794a(b). These statutes pertain specifically to their ADA and Rehabilitation Act claims, respectively. See Pls.' Mem. in Supp. [doc. # 1067] at 15-16. Because fee-shifting statutes generally contain similar key language, the case law pertaining to what constitutes a reasonable fee applies uniformly to them all. See Perdue v. Kenny A., 130 S.Ct. 1662, 1671 n.3 (2010); Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603, n.4 (2001) (citing Hensley v. Eckerhart, 461 U.S. 424, 433, n.7 (1983)). Thus, for purposes of this ruling, the Court cites only to § 1988.

506 U.S. 103, 111-12 (1992) (stating that a civil rights plaintiff "prevails" when, inter alia, the relief obtained in the litigation requires the defendant to modify its behavior in a way that directly benefits the plaintiff).

II. Calculating the Amount of the Attorneys' Fees Award

Having found that the plaintiffs meet the threshold statutory requirement for an award of attorneys' fees, the Court must determine what fee is "reasonable." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); see also LeBlanc-Sternberg v. Fletcher, 143 F.3d 748, 757 (2d Cir. 1998) ("The question of whether a plaintiff is a 'prevailing party' . . . is separate from the question of the degree to which the plaintiff prevailed."). Hensley instructs that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley, 461 U.S. at 433. This calculation is otherwise known as the lodestar figure. See Perdue v. Kenny A., 130 S.Ct. 1662, 1672 (2010) (reaffirming use of the "lodestar method" post-Arbor Hill Concerned Citizens Neighborhood Assn. v. County of Albany, 522 F.3d 182, 190 (2d Cir. 2008), which proposed use of a modified method it termed the "presumptively reasonable fee" in place of lodestar).[2] But where, as here, "a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims," the Court may make downward adjustments to the lodestar figure -- principally by considering the "results obtained" in the litigation -- in order to arrive at a reasonable fee.

[2] The plaintiffs at times make reference to use of the "Johnson factors" in place of, or in addition to, the lodestar approach as a method for determining the fee award. See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974). But as the Supreme Court recently reaffirmed in Perdue, the lodestar calculation displaced Johnson in the federal courts some time ago. Perdue, 130 S.Ct. at 1671-72. This Court's prior rulings in this case reflect the same. See Order Re: Pending Mots. [doc. # 1099]; Ruling Re: The Legal Standard for Calculating Attorneys' Fees [doc. # 1124].

Hensley, 461 U.S. at 434. As previously stated, the Court will make the lodestar calculation in a subsequent ruling. But first it must address the downward adjustment question by determining what "degree of success" is reflected in the "results obtained" by the plaintiffs. In other words, the Court must first decide whether the plaintiffs achieved "excellent results."

A. The "Results Obtained"

In order to make the "results obtained" determination, Hensley instructs the Court to address "two questions." Hensley, 461 U.S. at 434. "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded?" Id. "Second, did the plaintiff achieve a level of success that makes the hours reasonably expended [on the litigation as whole] a satisfactory basis for making a fee award?" Id. As discussed below, the Court answers both questions "yes."

1. Relatedness of the Unsuccessful Claims to the Successful Ones

Answering the first Hensley question requires the Court to determine if any of the plaintiffs' unsuccessful claims were related to the successful ones. Because § 1988 only authorizes attorneys' fees to prevailing parties, no fee may be awarded for unsuccessful claims that are not related to the successful ones. Instead, any unrelated claims must be "treated as if they had been raised in separate lawsuits" and so must be disregarded for the purpose of the fee calculation. Hensley, 461 U.S. at 435; Quaratino v. Tiffany & Co., 166 F.3d 422, 425 (2d Cir. 1999) (stating that courts should subtract any hours dedicated to severable unsuccessful claims).

Here, the plaintiffs' three-count complaint alleged that the defendants: (1) violated the class members' Fourteenth Amendment Due Process rights by failing to provide them with adequate medical care, protection from harm, habilitation and community placement ("Count

I");[3] (2) discriminated against the class members in violation of Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12132 (1997), and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794 (1997) ("Count II"); and (3) failed to provide the class members with "active treatment" as required by Title XIX of the Social Security Act ("SSA"), 42 U.S.C. § 1396a et seq. ("Count III").[4] As the Court previously determined, these three counts fall into four subject areas: (1) medical care; (2) failure to protect; (3) habilitation/active treatment;[5] and (4) community placement. Messier, 562 F. Supp. 2d at 303. As noted, the Court found the defendants liable only on the community placement claims. Id. at 304, 313, 319, 345 (finding that the other three claims were either moot as resolved by the actions taken in the Connecticut litigation or without merit).

The question now is whether the three unsuccessful claims (pertaining to medical care, protection and habilitation) are related to the plaintiffs' successful community placement claims,

---

[3] Count I of the complaint only cites the Fourteenth Amendment as the source of the plaintiffs' due process claims. It does not reference, as is common with respect to such claims, 42 U.S.C. § 1983, which is one of the enumerated actions for which attorneys' fees may be awarded under § 1988. See 42 U.S.C. § 1988 (2000). Nevertheless, since such Fourteenth Amendment claims are virtually synonymous with § 1983, and because excluding the successful claims in Count I on this basis would not change the result (as those claims are nevertheless related to the claims in Count II, see infra pp. 15-17), nor have the defendants raised an objection on this ground, the Court construes Count I as implicitly invoking § 1983 and thus coming within the explicit ambit of § 1988.

[4] The last section of the plaintiffs' complaint, entitled "Relief," is merely another iteration of the claims for relief the plaintiffs make in Counts I-III; thus, for purposes of this ruling, the Court does not give them additional, separate consideration. The one exception to this is the plaintiffs' demand for class certification. See infra n.9.

[5] Generally speaking, habilitation refers to teaching and training a person with significant disabilities to function as fully and as independently as possible. Pls.' Prop. Findings of Fact [doc. # 497] at ¶ 262. Active treatment refers to a specific, customized habilitation regimen. Id. at ¶ 264. For purposes of this ruling, the Court uses the term habilitation to refer to both.

"such that [counsel's] time spent on the failed claims [substantively overlaps with time spent on the winning claims and thus] should be compensated." Tatum v. City of New York, No. 06CV4290, 2010 WL 334975, at *10 (S.D.N.Y. Jan. 28, 2010) (internal quotations and citations omitted).

Under Hensely, claims for relief, even when brought against the same defendant, are not related if they are based on different facts and different legal theories. Hensley, 461 U.S. at 434-35; see also Green v. Torres, 361 F.3d 96, 98 (2d Cir. 2004). As discussed below, based on the facts and legal theories in this case, the plaintiffs' unsuccessful claims cannot be deemed related to the successful community placement claims because they were based on different factual proof and legal theories. Accordingly, for purposes of calculating the lodestar amount, the hours expended by the plaintiffs' counsel on the unsuccessful medical care, protection and habilitation claims are severable and thus will be disregarded. See Hensley, 461 U.S. at 434-35; see also Green, 361 F.3d at 98.

a. The unsuccessful claims do not share a common core of facts with the successful claims

A claim is related to another claim if it is based on a common core of facts. Hensley, 461 U.S. at 434-35. Here, the four subject areas, which, broadly speaking, challenged and sought remedies for alleged deficiencies at STS, were each based on different facts and required different proof.

For instance, the plaintiffs' claims that STS provided inadequate medical care was supported by various factual allegations including that STS personnel had used DNR orders that had been written for class members for whom death was not imminent. For example, the evidence showed that the file of one patient contained a DNR order written six years before her

death, and the file of another patient contained a DNR order written two years prior to her death. Messier, 562 F. Supp. 2d at 308-09. The plaintiffs also adduced evidence showing that the defendants improperly used DNR orders to withhold nutrition, fluids and treatment, such as a bronchoscopy, allegedly causing the deaths of at least two STS residents. Id. at 308-12.[6]

In contrast, the plaintiffs' allegations that the defendants failed to protect class members from physical harm and unnecessarily restrained them were drawn from an altogether different set of facts. For example, in support of this claim they cited to an incident where an STS staff member left residents unattended on a bus, which allegedly led one STS resident to punch and fracture the nose of another resident, and to another incident where a STS resident was weaned off "one-to-one staffing" by being secluded in a "separation room" on more than 100 occasions in three months without proper authorization.

Still another set of facts supported their habilitation claims. In this regard, the plaintiffs alleged that "[STS residents] receiv[ed] little attention from staff, and rarely interact[ed] with anyone other than a paid staff member," that "[m]ost of the[ ] [residents'] time is 'dead time,'" and that the habilitation at STS was "meaningless" and failed "to support [residents] toward independence." These assertions were buttressed by various factual examples, including that, in one instance, "music activity . . . consisted [merely] of seven residents watching a music videotape" and, in another instance, that "the staff donned gloves, went from resident to resident and brushed their teeth right out in the open."

---

[6] In addition to their allegations regarding DNR orders, the plaintiffs also asserted that medical care at STS was inadequate due to, inter alia, lack of planning and poor administration of medication, infection control and nursing services. See Pls.' Post-Trial Br. [doc. # 832] at 69-188.

In connection with the community placement claims, the plaintiffs drew from still a different set of facts, which demonstrated that STS lacked a "formal mechanism for considering community placement for class members." Messier, 562 F. Supp. 2d at 328. In particular, the evidence supporting the community placement claims included various statements and statistical information gleaned from STS reports and testimony of STS officials, which demonstrated that STS had failed to exercise professional judgment regarding community placement. See id. at 325-42. Other factual evidence the plaintiffs proffered with respect to the community placement claims included STS's defective "opportune placement process" and its use of a flawed 1996 questionnaire mailed to the parents and guardians of STS residents, as well as factual evidence showing that the defendants had instructed the Interdisciplinary Teams ("IDTs") not to discuss community placement during team meetings and to cease making references to community placement in the Overall Plan of Service ("OPS"). Id. at 329, 331-34, 338-39.

Not only did the four subject areas fail to share a common core of underlying facts, the evidence pertaining to the three unsuccessful claims was of a different character than the evidence required for the successful claims. While the plaintiffs offered evidence consisting of individual patient information and conditions at STS, in support of their claims of inadequate medical care, failure to protect and lack of habilitation, they used mostly statistical data and institutional and departmental records to show the nature of the STS residents' confinement in order to prove the community placement claims. Thus, even if conditions at STS were as the plaintiffs claimed, community placement (as opposed to, say, remediation of the conditions or transfer of residents to another institution) would not have been mandated because such community placement must be medically appropriate for and personally desired by each

individual.[7] The converse is also true. Had the plaintiffs relied solely on the facts supporting the community placement claims, the Court would not have been persuaded to find the defendants liable on the medical care, protection and habilitation claims since even an outright refusal by the defendants to consider community placement of medically eligible and willing STS residents, absent other evidence, would have proved little, if anything, about the institutional conditions at STS.[8] Accordingly, because the unsuccessful claims were largely predicated on factual evidence that was different in kind and character from the evidence on which the successful claims were predicated, the unsuccessful claims are severable from the community placement claims. Cf. Serrichio v. Wachovia Sec., LLC, 706 F. Supp. 2d 237, 260-61 (D. Conn. 2010) (finding

---

[7] This point is further illustrated by the ADA's integration mandate, which expresses a preference for community placement even when other institutional conditions (i.e., medical care, protection and habilitation) are as they should be. See Messier, 562 F. Supp. 2d at 326. As the Court noted in its liability ruling, "STS is not an integrated setting." Id. Thus, even if proper medical care were being provided by an institution like STS, and its residents were properly protected and habilitated, the integration mandate would still require community placement (or the closest thing to it) whenever medically appropriate and consented to by the resident. See id. In other words, the statute on which the plaintiffs based some of their community placement claims presupposes that community placement is independent of other institutional conditions. Accord Soc'y for Good Will to Retarded Children, Inc. v. Cuomo, 902 F.2d 1085, 1087, 1090-91 (2d Cir. 1990) (reaffirming that "community placement . . . cannot be justified as a remedy to correct [ ] unconstitutional conditions found at [state-operated school for the mentally retarded]") (emphasis added).

[8] Given these distinctions, and as further explained, infra p. 14, the Court rejects the plaintiffs' implication that the "conditions" claims constitute an alternative legal ground for the community placement claims. For a claim to be an alternative legal ground of another claim, some factual or legal relatedness between the claims is presupposed. See Hensley, 461 U.S. at 435. But for the reasons given, supra pp. 7-10 and infra pp. 11-17, the "conditions" claims are neither factually nor legally related to the community placement claims. Thus, the Court's decision to disregard the time that counsel for the plaintiffs spent on the "conditions" claims does not contravene Hensley's proviso that the plaintiffs may "in good faith [ ] raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." Hensley, 461 U.S. at 435.

plaintiff's unsuccessful state law claims were not severable as they were "largely predicated on" some of the same facts underlying his successful claims).

Further underscoring the severability of the unsuccessful claims from the community placement claims is the Court's finding early in this litigation that almost all of the plaintiffs' claims pertaining to medical care, protection and habilitation were moot as a result of the Connecticut litigation. The Court's mootness finding was premised on the conclusion that the unsuccessful claims shared a common core of facts with the issues in that other litigation, which involved the conditions at STS. See Messier, 562 F. Supp. 2d at 303. The community placement claims, however, as they arose from different facts, were not mooted. Were the community placement claims based on the same core of facts as the plaintiffs' unsuccessful claims -- as the plaintiffs now contend -- the Court likely would have found that they too were mooted by the Connecticut litigation, with the result that the plaintiffs would have prevailed on none of the claims in this litigation, and, under Hensley, would not be entitled to any fees, costs or expenses.

The one thread of factual commonality among the plaintiffs' claims is that each subject area alleged a different way in which the defendants failed to act. Commonality at such a broad level, however, is too tenuous a connection to justify awarding attorneys' fees on the unsuccessful claims. As noted, under Hensley, fees are awarded for time spent by counsel on unsuccessful claims only when such claims are inextricably intertwined with a prevailing claim so that counsel's time is presumed to have overlapped between the two -- making it, as courts have noted, an exercise in futility to try to separate out the legal services rendered as to each claim. E.g., Hensley, 461 U.S. at 435; Munson v. Milwaukee Bd. of Sch. Dirs., 969 F.2d 266,

272 (7th Cir. 1992). But factual claims pertaining to the different ways in which a defendant failed to act -- which is what the plaintiffs alleged -- does not, without more, marry otherwise separate facts, at least not for Hensley purposes. For example, if an employee were to bring a single suit against her employer for both a slip and fall in the office lobby and a hostile work environment arising from her supervisor's continued sexual advances, the employer's implicit failure to act in each instance would not mean the two claims arose from a common core of facts, even though all of the claims involve, in some sense, the employer's failure to act.

For similar reasons, the fact that the Court certified the plaintiffs as a class pursuant to Federal Rules of Civil Procedure 23(a) and (b)(2) does not mean that the plaintiffs' unsuccessful claims are factually related to the community placement claims. Among its prerequisites, Rule 23 requires "questions of law or fact common to the class" and a showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(a) & (b)(2) (emphasis added). But whether questions of law or fact are common or apply generally to a class says nothing of the commonality of law or fact underlying each substantive claim. Thus, drawing on the previous example, a group of employees alleging multiple instances of slip and falls and sexual harassment might obtain class certification and yet, absent additional, specific evidence, their underlying claims would not, per se, be factually related for Hensley purposes, i.e., the slip and falls still would arise from different factual and legal allegations than the sexual harassment claims. See, e.g., Freid v. Nat'l Action Fin. Servs., Inc., No. 10-2870 (ES)(CLW), 2011 WL 6934845, at *4 (D.N.J. Dec. 29, 2011) (finding that the lodestar amount could be reduced where the underlying substantive claim, on which the individual plaintiff succeeded, was not sufficiently intertwined with his unsuccessful effort to

achieve class action certification since certification of a class under Rule 23 is a separate question from the substantive merits of a case; that is, "a putative class must first be certified before the merits of the class action claims can be reached").[9]

Based on the foregoing, it is clear that the plaintiffs relied on wholly different facts -- different in both type and character -- to challenge the conditions and services at STS as opposed to the defendants' practices with regard to community placement. The plaintiffs' assertion that proof of the alleged deficient conditions at STS was necessary to demonstrate that "community placement is an appropriate option for STS residents," is not correct, and, in any event, does not alone provide the requisite factual relatedness for purposes of awarding attorneys' fees. As noted, the plaintiffs' success on the community placement claims -- despite the Court's refusal to adjudicate virtually any of the claims relating to medical care, protection and habilitation -- demonstrates that the unsuccessful claims were not factual predicates of the community

---

[9] The defendants make a separate but related assertion: that "certification of a class is not substantive relief . . . and so should not be considered an area in which the [p]laintiffs prevailed for purposes of awarding attorneys' fees." This argument is unavailing. While the defendants are correct that class certification is not a substantive claim, it is nevertheless clear that the plaintiffs used class certification as a method of pursuing relief on all of their claims. See O'Neal v. City of Seattle, 66 F.3d 1064, 1069 (9th Cir. 1995) ("motion [for class certification]. . . not a separate claim, but rather a method for pursuing [the] ultimately successful claims"). That class certification might have tangentially benefitted the unsuccessful claims as well, see Messier v. Southbury Training Sch., 183 F.R.D. 350 (D. Conn. 1998) (ruling on motion to opt out), does not necessarily mean that counsel's time must be reduced for its work in this area; after all, such time was expended on a successful claim. Moreover, since the plaintiffs qualify as "prevailing parties," the catalyst theory rejected by the Supreme Court is not implicated here either. See Buckhannon, 532 U.S. at 602-10. Thus, it is only if the defendants are able to identify specific blocks of time pertaining solely to class certification and one or more of the unsuccessful claims that the Court will deduct time, on the rationale that such time "cannot [then] be deemed to have been 'expended in pursuit of the ultimate result achieved.'" Hensley, 461 U.S. at 435. The defendants may identify and raise objections to any such blocks of time in the subsequent lodestar calculation phase. See infra pp. 22-23. The plaintiffs may respond if the defendants identify any such time; otherwise, the plaintiffs should not address this issue.

placement claims. See supra p. 11 & n.7. And, although parts of the defendants' deposition and trial testimonies state, in effect, that consideration of community placement had been discontinued at STS because the defendants believed that the same level of care was not available in the community (thereby, according to the plaintiffs, putting the conditions at STS in dispute), this does not by itself mean that there was any significant overlap of the plaintiffs' counsel's time and effort between the winning and losing claims. A review of the complaint and the overall record clearly shows that counsel for the plaintiffs intended and pursued medical care, protection and habilitation as claims in their own right. Thus, for the reasons stated, and because the plaintiffs have not demonstrated otherwise,[10] the Court finds that the plaintiffs' unsuccessful claims concerning medical care, protection and habilitation are not factually related to the community placement claims. The Court must now determine whether any of the unsuccessful claims were based on a legal theory that was related to the legal theory on which the community placement claims were based. See Hensley, 461 U.S. at 435; Green v. Torres,

[10] That is, the plaintiffs have not shown -- especially given the factual differences the Court has highlighted between the winning and losing claims in this case -- that courts have generally and necessarily found in this context that claims for medical care, protection and habilitation arise from the same core of facts as the community placement claims. Cf. Parrish v. Sollecito, 280 F. Supp. 2d 145, 172 (S.D.N.Y. 2003) (citing cases and awarding attorneys' fees based on district courts having regularly found that unsuccessful sexual harassment discrimination claims are sufficiently related to retaliation claims to warrant inclusion of time spent on both for attorneys' fees purposes); Garrity v. Sununu, 752 F.2d 727, 734-35 (1st Cir. 1984) (holding, based on specific claims made by plaintiffs in the underlying case, Garrity v. Gallen, 522 F.Supp. 171, (D.N.H. 1981), in which plaintiffs lost on community placement claims but succeeded on some claims relating to institutional conditions, and which involved more expansive -- but not necessarily warranted -- reading of plaintiffs' § 504 claims (compare 752 F.2d at 734-35, with 522 F.Supp. at 209-10, 213-15), that district court "could reasonably find" unsuccessful community placement claims were related to successful conditions claims for fee award purposes) (emphasis added).

361 F.3d at 98.

b. The unsuccessful claims were not based on a related legal theory

Claims can also be related if they are based on a similar legal theory. See Hensley, 461 U.S. at 435; Green v. Torres, 361 F.3d at 98. A legal theory is the principle on which a litigant bases or proceeds with its claims. Black's Law Dictionary 907 (7th ed. 1999). Here, the plaintiffs' complaint avers: (1) denial of Fourteenth Amendment Due Process (Count I); (2) unlawful discrimination pertaining to community placement in violation of the ADA and Section 504 (Count II); and (3) failure to habilitate as required by the SSA (Count III). Each count references separate constitutional or statutory provisions and relates to one or more of the aforementioned subject areas: medical care, protection, habilitation and community placement. As noted, the plaintiffs prevailed on the community placement claims alleged in both Counts I and II. But because Count I also contains due process claims relating to the unsuccessful subject areas, the Court must determine whether this means that the community placement claims in Count I are based on a similar due process legal theory as the unsuccessful claims in that count.[11]

i.) The due process claims in Count I

In Count I, the plaintiffs allege that the defendants deprived class members of their Fourteenth Amendment Due Process rights with respect to medical care, protection, habilitation

[11] Counts II and III do not possess this hybrid nature. That is, the claims asserted in Count II deal only with community placement and violations of the ADA and § 504, and the claims asserted in Count III deal only with habilitation and violations of the SSA. The Court notes that while the word "programs" in Count II and subparts (e) and (f) of Count III could be viewed, in the most general sense, as implicating habilitation and community placement, respectively, the substance of the plaintiffs' arguments and assertions during the pendency of this case did not reflect that in any meaningful way. The plaintiffs did not advance a legal theory connecting community placement with the other subject areas, and the Court did not interpret Counts II and III in this manner, either. See, e.g., Messier, 562 F. Supp. 2d at 298-99.

and community placement. While Count I only asserted a general denial of due process, the Court construed it as advancing claims for violations of both substantive and procedural due process. See Messier, 562 F. Supp. 2d at 298. The Court found that while residents of a state-operated institution for the mentally disabled have a substantive due process right to medical care, protection and habilitation, they do not have a substantive due process right to community placement. Id. at 300, 319. Rather, community placement is subject to due process scrutiny only to the extent that "the decision to keep a resident in an institution [rather than] placing the resident in a community setting must be 'a rational decision based on professional judgment.'" Id. at 319. In other words, a decision to keep a mentally disabled individual in an institution may be attacked on procedural due process grounds, but not substantive ones. Because procedural and substantive due process are very different[12] it cannot be said that the community placement claims in Count I are based on a similar legal theory as the unsuccessful claims, which assert substantive due process violations. Due process does not constitute a single legal theory so much as a platform from which a litigant may trigger liability by asserting and proving certain

[12] The Due Process Clause of the Fourteenth Amendment has both a procedural and a substantive component. See, e.g., Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). Procedural due process ensures that the government utilizes "fair procedure[s] in connection with any deprivation of life, liberty, or property by a State." Id. Substantive due process, on the other hand, "forbids the government to infringe certain 'fundamental' liberty interests . . . no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 302 (1993) (citing Collins, 503 U.S. at 125). Moreover, "the fundamental interests that [ ] have been viewed as implicitly protected by the Constitution," and which implicate substantive due process, are not generally viewed to be the same ones that implicate procedural due process. See Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229-30 (1985) (Powell, J.,concurring); Smith v. Twp. of East Greenwich, 519 F. Supp. 2d 493, 502 (D.N.J. 2007) (recognizing that "while property rights for procedural due process purposes are created by state law, substantive due process rights are created by the Constitution") (citing cases).

other factual and legal claims. See County of Sacramento v. Lewis, 523 U.S. 833, 850-51 (1998). Indeed, absent some additional and independent commonality, different claims alleging denial of due process, even of the same type, are not correctly characterized as being based on a similar legal theory because the inherent fluidity of due process renders "[t]hat which may, in one setting, constitute a denial [of due process], . . . in other circumstances, and in light of other considerations, [cause it to] fall short of such denial." Id. at 850.

For these reasons, it cannot be said that the plaintiffs' unsuccessful claims in Count I are based on a similar legal theory as the successful community placement claims. Due process is too fluid a concept to provide the requisite relatedness for Hensley purposes.

2. The Degree of Success Achieved on the Successful Claims

The next step is to analyze the degree of success the plaintiffs obtained with regard to their successful community placement claims. Hensley, 461 U.S. at 435, 440. Ascertaining the "degree of success" requires the Court to compare the "results obtained" by the plaintiffs with the scope of "the litigation as a whole." Id. Effectively, the Court must construct a fraction: if comparison of the "results obtained" with "the litigation as a whole" yields "excellent results," (i.e., a fraction equaling a percent near 100), then the plaintiffs "should recover a fully compensatory fee." Id. at 435. But if the comparison shows that the results obtained were limited, the amount of the fee should be reduced. Id. The plaintiffs' failure to prevail on "every contention" or "alternative legal ground[ ]," however, is not a sufficient reason for reducing the fee. The results are what matter.[13]

[13] The Court notes that utilizing a fraction for purposes of determining whether an adjustment to the lodestar is required, as opposed to the amount of the adjustment, does not violate the rule against strict proportionality. See Lunday v. City of Albany, 42 F.3d 131, 134-

a. Comparison of the "results obtained" with "the litigation as a whole"

The results obtained in this litigation are the finding that the defendants failed to provide for the evaluation of all class members for community placement and they failed to place in the community class members for whom such placement was appropriate.[14] Messier, 562 F. Supp. 2d at 345. While this is not the exact result the plaintiffs sought to achieve -- community placements for all class members -- it is sufficient relief to qualify them as a prevailing party. The question now is whether the results obtained are almost the same as the results the plaintiffs sought in "the litigation as a whole." Hensley, 461 U.S. at 435, 440. In other words, the Court must determine if there is an appreciable difference between what the plaintiffs sought and what they achieved so that a fully compensatory fee for all time expended in "the litigation as a whole" is not excessive, i.e., whether the degree of success is close to 100% and as such may be found to constitute "excellent results."

After discarding the severable claims pursuant to the first Hensley question, the community placement claims constitute "the litigation as a whole." This serves as the denominator in the "degree of success" fraction. The "results obtained" on the community placement claims serves as the numerator. Id. If the resulting fraction is close to 100, the results are considered "excellent." See supra n.13.

---

35 (2d Cir. 1994) (rejecting contention that lodestar amount should have been reduced by a specific percentage to reflect plaintiff's limited success at trial on rationale that the Second Circuit has consistently resisted strict proportionality of this kind in civil rights cases, but reaffirming that "determination of whether such a lodestar adjustment need be made is left largely to the discretion of the trial court") (emphasis added).

[14] Based on the Court's liability ruling, the parties reached a settlement agreement that requires the defendants to take specific, remedial actions. But see infra n.18.

i.) The "results obtained" in Count I

The parts of Count I pertaining to community placement consist of subparagraphs (e), (f), and (g). In subparagraph (e) the plaintiffs asked "to have community placements that are integrated in society." (Emphasis added.) In subparagraph (g) the plaintiffs asked "to have community placements provided when . . . transfer to the community is necessary to protect classmembers' [sic] rights . . . ." (Emphasis added.) With regard to these two subparagraphs, the Court ruled only that the defendants must evaluate all class members for community placement and, thus, strictly speaking, the results "actually obtained" are not identical to the results sought. On the other hand, with regard to subparagraph (f), the result sought -- that all community placement decisions be made on an individual basis and implemented in accordance with the recommendations of placement teams -- corresponds closely with the results obtained. In sum, the Court concludes that as to the community placement claims in Count I, the results obtained, while not identical, closely correlate with the results sought.

ii.) The "results obtained" in Count II

The plaintiffs also sought community placement as relief for the unlawful discrimination alleged in Count II (alleging that the defendants have violated class members' rights "[b]y failing to provide residents of [STS] the opportunity to receive state support in the community . . . and by failing to provide the most severely handicapped residents of [STS] with the same opportunity to benefit from programs and community living . . . ."). In connection with this count the Court found that the defendants had engaged in discrimination because they "failed to place in the community class members for whom such placement was found to be appropriate

. . . ." Id. at 345. Thus, the plaintiffs achieved the precise results they sought in Count II.[15]

b. Does the comparison yield "excellent results"?

After concluding that the "results obtained" by the plaintiffs differ only in a minor degree from the results they sought "in the litigation as a whole," the Court must now determine whether that difference is nevertheless appreciable enough to preclude a finding of "excellent results," considering both the quantity and the quality of the results. See Barfield v. N.Y. City Health and Hosps. Corp., 537 F.3d 132, 151-52 (2d Cir. 2008). As an initial matter, however, the Court must affix a meaning to the term "excellent." Neither the case law nor either party provides a specialized definition. As such, the Court must use its common meaning. Stenberg v. Carhart, 530 U.S. 914, 993 n.9 (2000) (recognizing that undefined terms are construed in accordance with their ordinary and plain meaning). Webster's Dictionary defines "excellent" as "near the standard or model," which is to say almost but not exactly perfect.[16] Webster's New International Dictionary 888 (William A. Nielsen et al. eds., 2d ed. 1960). In other words, "excellent results" are achieved when the "fraction" is close to, but not precisely, 100.

From a purely quantitative standpoint one might say that the results obtained by the plaintiffs fall short of excellent since they did not wholly succeed on the community placement claims. But qualitatively the results obtained are a near-proxy for community placement. As the Court noted in its liability ruling, the exercise of professional judgment is but one of three factors

---

[15] Proof of discrimination in this context does not require a showing of unequal treatment of similarly situated individuals, but only a showing that class members who were referred for community placement were not in fact so placed. Messier, 562 F. Supp. 2d at 321, 343.

[16] Webster's defines "perfect" as "conforming completely to . . . [a] standard . . . flawless . . . [i.e., 100%.]" Id. at 1817.

that must be considered in deciding the appropriateness of community placement; the other two being medical appropriateness and consent of the STS resident, both of which were beyond the scope of relief that could be ordered by the Court.[17] See Messier, 562 F. Supp. 2d at 319, 323, 326. Nevertheless, because of the results obtained in the litigation, STS residents are now ensured that they will receive community placements when, in the exercise of professional judgment, such placement is deemed to be both medically appropriate and desired. This result is far different from the situation that existed prior to the litigation. Id. at 327 (finding that "[m]ost OPS documents produced after 1996 do not indicate that IDTs ever made individualized community placement decisions or recommendations").

Thus, not only is the exercise of professional judgment a necessary component of and antecedent to community placement, the assurance that such judgment will be exercised on behalf of all class members is all that the plaintiffs could have achieved in the litigation since the two other requirements for community placement are outside the scope of relief available from the Court. Accordingly, although the results are not per se the precise relief the plaintiffs sought "in the litigation as whole," the results are the maximal relief the plaintiffs could have been awarded under the circumstances. Hence, the results obtained constitute "excellent results." [18]

---

[17] For these purposes, the Court treats professional judgment as an additional factor since medical appropriateness and consent, though required, may not necessarily be sufficient for community placement in all circumstances.

[18] To this end, the plaintiffs urge the Court to consider the Settlement Agreement and related interim progress reports submitted by the Remedial Expert as independent, additional evidence of the "excellent results" they obtained. But the Settlement Agreement and progress reports simply implement the Court's liability ruling; they do not, and cannot, provide additional bases of relief. See Order Re: Approval & Implemen't of Settl't Agreem't [doc. # 1054] at 13 (stating that "the settlement agreement requires the defendants to fully address the violations of the rights of class members that the Court identified in its decision of the merits"). Thus, while

See Barfield, 537 F.3d at 152 (reaffirming that "'the most critical factor' in a district court's determination of what constitutes reasonable attorney's fees . . . 'is the degree of success obtained' by the plaintiff" and that "[a] district court's assessment of the 'degree of success' achieved . . . is not limited to inquiring whether a plaintiff prevailed on individual claims . . . [rather] [b]oth 'the quantity and quality of relief obtained[ ]' . . . are key factors in . . . 'assessment of what is a reasonable fee under the circumstances of the case'") (internal citations omitted).

For these reasons, the Court finds the defendants have not sustained their burden of proving that the results obtained by the plaintiffs cannot be deemed excellent because they obtained only a fraction of the relief they sought in the complaint. Indeed, that assertion is not only factually incorrect, but is contrary to the logic and teaching of the Supreme Court in Hensley. Consistent with Hensley, the Court has disregarded the plaintiffs' severable claims and has deemed the scope of the "litigation as a whole" to be comprised only of the community placement claims. And, pursuant to Hensley's second prong, the Court has compared the "results obtained" (i.e., the requirement that the defendants employ professional judgment to evaluate the appropriateness of community placement for all class members and to place in the community the class members for whom such placement is appropriate) with the results sought in "the litigation as a whole" (i.e., community placement for all class members). Based on that comparison, the Court has concluded that the plaintiffs obtained all the relief that could appropriately be awarded and thus achieved "excellent results." See U.S. Football League v. Nat'l Football League, 887 F.2d 408, 413 (2d Cir. 1989) (noting that the party advocating a

---

the Court **GRANTS** the plaintiffs' Motion to Supplement Reply [doc. # 1127], doing so does not change the result. Accordingly, the defendants' related Motion in Limine to Exclude [doc. # 1130] and the plaintiffs' Motion to Strike [doc. # 1144] are both **DENIED**.

reduction in the calculation of attorneys' fees bears the burden of proof).

CONCLUSION

For the foregoing reasons, the Court finds that the plaintiffs obtained "excellent results" with respect to the claims on which they prevailed (i.e., the community placement claims). Because those claims are both factually and legally distinct from the plaintiffs' unsuccessful claims (i.e., medical care, protection and habilitation), calculation of the lodestar shall be limited to the time expended by the plaintiffs' counsel on the successful claims (i.e., community placement), with no fees awarded for the time the plaintiffs' counsel expended on the severable claims.

A scheduling order shall be issued setting forth the final steps in this litigation.

SO ORDERED.

/s/
ELLEN BREE BURNS
SENIOR UNITED STATES DISTRICT JUDGE

Dated this 22nd day of January, 2013 at New Haven, Connecticut.