Tulsa Law Review

Volume 34
Number 1 *Conference on the Rehnquist Court* Volume 34 | Number 1

Fall 1998

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TULSA LAW JOURNAL

Volume 34 Fall 1998 Number 1

ARTICLES

GENDER EQUITY IN INTERSCHOLASTIC SPORTS: THE FINAL SAGA: THE FIGHT FOR ATTORNEYS' FEES

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I. INTRODUCTION

This article is the third installment in a series of articles that examine gender equity in sports at the interscholastic level. The initial article[1] detailed the progress of a case filed as a class action against Owasso Public Schools on behalf of female students. The second article[2] focused on the Consent Decree which culminated the case and set out the changes that Owasso Public Schools agreed to make. This article details the procedures involved in settling the dispute over the costs and attorneys' fees related to the case.

The final provision of the Consent Decree stated that the Owasso School District would pay Ray Yasser and Sam Schiller the reasonable costs and attorneys fees' incurred in connection with the lawsuit.[3] The amount of the payment, based on the reasonableness of the costs and fees, is determined either by the court or by

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1. *See* Ray Yasser & Samuel J. Schiller, *Gender Equity in Athletics: The New Battleground of Interscholastic Sports*, 15 CARDOZO ARTS & ENT. L.J. 371 (1997).

2. *See* Ray Yasser & Samuel J. Schiller, *Gender Equity in Interscholastic Sports: A Case Study*, 33 TULSA L.J. 273 (1997).

3. *See* Consent Decree at 18, Randolph v. Owasso Indep. Sch. Dist. (N.D. Okla. 1996) (No. 96-CV-0105-K).

agreement of the parties.[4] Since the parties were unable to agree on the costs and attorneys' fees, the court order finalized the issue.[5] This article focuses on the dispute over the calculation of the fees and the reasonableness of the costs incurred.

While it may seem a bit "pedestrian" to devote an entire article to what we have dubbed a "fee fight," as a practical matter the fee struggle looms large. Indeed, if the practicing attorney is to take these cases, she must have some reasonable assurance of payment. We believe that simply relying on the pro bono efforts of public-spirited lawyers will not get the job done. This belief provides the impetus for this installment. Lawyers who are confident they can take these cases, win them, and get fairly compensated are essential to the ultimate success in this battle. A few brief observations about the general rules in connection to these fee disputes are in order. In its discretion, the court is permitted to award costs and attorneys' fees to the prevailing party in a Title IX[6] action.[7] Plaintiffs' counsel has the burden of establishing the reasonableness of fees. The U.S. Supreme Court has stated that this involves submitting evidence "supporting the hours worked and rates claimed."[8] Counsel must show the reasonableness of both the number of hours expended and the hourly rate sought to be recovered.[9] The burden then shifts to the party opposing the fee to demonstrate that the fee is not reasonable.[10]

The following discussion covers the entire dispute over the costs and attorneys' fees, beginning with our initial arguments. A discussion of defendants' opposing arguments follows, countered by our response to defendants' arguments. The article concludes with a summary of the Court Order, with comments on the final calculation of the costs and fees.

II. OUR INITIAL ARGUMENTS

The first step in determining the appropriate fee in a civil rights case such as this Title IX action is to multiply the number of hours reasonably expended by the customary hourly rate.[11] This calculation is known as the lodestar and is the basic standard for assessment of attorneys' fees.[12] The minimum award using the lodestar standard should not be less than the number of hours claimed times the attorneys' regular hourly rate.[13] "Once counsel has carried its burden of proof on the 'basic standard' a strong presumption arises that the product represents a reasonable fee."[14]

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4. *See generally*, Consent Decree, *Randolf* (No. CV-0105-K).
5. *See* Consent Decree, *supra* note 3.
6. 20 U.S.C. §§ 1681-1688 (1998).
7. *See* 42 U.S.C. § 1988(b) (1998).
8. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).
9. *See* Beard v. Teska, 31 F.3d 942, 955 (10th Cir. 1994).
10. *See* Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990).
11. *See* Ramos v. Lamm, 713 F.2d 546, 552 (10th Cir. 1983).
12. *See* Jane L. v. Bangerter, 61 F.3d 1505, 1509 (10th Cir. 1995); Mares v. Credit Bureau, 801 F.2d 1197, 1201 (10th Cir. 1986).
13. *See* Zoll v. Eastern Allamakee Community Sch. Dist., 588 F.2d 246, 252 (8th Cir. 1978).
14. *Mares*, 801 F.2d at 1201.

The "basic standard" for calculating reasonable fees consists of reasonable hours and reasonable rates.[15]

The lodestar figures calculated for the plaintiffs' attorneys were submitted to the district court in affidavits as follows:

Attorney	Hours	Rate	Total Lodestar
Ray Yasser	132.00	$175.00	$23,100.00[16]
Samuel Schiller	160.25	$125.00	$20,031.25[17]
Judith Appelbaum	3.00	$175.00	$525.00[18]
Deborah Brake	4.00	$125.00	$500.00[19]
Total			$44,156.25

The affidavits were accompanied by "Billing Records" that detailed the nature of the professional services rendered as well as the time spent on those services.[20] The hours involved were reasonably expended based on the tasks necessary to bring the Owasso School District into compliance with Title IX requirements. We argued that our hourly rates were reasonable based on all relevant circumstances, including the attorneys' credentials, to which we referred in support of our Motion for Class Action Certification.[21]

The lodestar calculation is the first step in determining attorneys' fees.[22] Once the initial calculation is made, the lodestar may be adjusted upward if factors not included in the reasonable fee analysis warrant such an adjustment.[23] This is commonly referred to as an enhancement.[24] Thus, the court undertakes a two-step analysis. First, the court objectively determines the reasonable value of the lodestar.[25] The strong presumption exists that this amount represents a reasonable fee.[26] In the second step, the court decides whether to adjust the lodestar amount to take certain special factors into account.[27] In the Owasso case, we argued that the special factors involved warranted a discretionary upward adjustment of the lodestar figure. While

15. *Id.*

16. *See* Ray Yasser Affidavit at 1, Randolph v. Owasso Indep. Sch. Dist. (N.D. Okla. 1996) (No. 96-CV-0105-K); *see also* Ray Yasser Billing Records at 15, Randolph v. Owasso Indep. Sch. Dist. (N.D. Okla. 1996) (No. 96-CV-0105-K).

17. *See* Samuel Schiller Affidavit at 1, Randolph v. Owasso Indep. Sch. Dist. (N.D. Okla. 1996) (No. 96-CV-0105-K); *see also* Samuel Schiller Billing Records at 18, Randolph v. Owasso Indep. Sch. Dist. (N.D. Okla. 1996) (No. 96-CV-0105-K).

18. *See* Judith Appelbaum Affidavit at 1-3, Randolph v. Owasso Indep. Sch. Dist. (N.D. Okla. 1996) (No. 96-CV-0105-K).

19. *See* Deborah Brake Affidavit at 1-3, Randolph v. Owasso Indep. Sch. Dist. (N.D. Okla. 1996) (No. 96-CV-0105-K).

20. *See* Yasser Billing Records, *supra* note 16, at 1-15; Schiller Billing Records, *supra* note 17, at 1-18; Appelbaum Affidavit, *supra* note 18, at 1-3; Brake Affidavit, *supra* note 19, at 1-3.

21. *See* Brief in Support of Motion for Class Action Certification, Randolf v. Owasso Indep. Sch. Dist. (N.D. Okla 1996) (No. 96-CV-0105-K).

22. *See generally* Hensley v. Eckerhart, 461 U.S. 424 (1983).

23. *See* Ramos v. Lamm, 713 F.2d 546, 557 (10th Cir. 1983).

24. *See, e.g., Ramos* at 557.

25. *See* Mares v. Credit Bureau, 801 F.2d 1197, 1201 (10th Cir. 1986).

26. *Id.*

27. *See Ramos*, 713 F.2d at 557.

we anticipated that we might not receive an enhancement, we believed it was reasonable to argue for such an adjustment. The courts have set out the following factors as appropriate in considering an enhancement:

> (1) the time and labor required; (2) novelty and difficulty of question presented; (3) the skill required to perform the legal services; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) the amount involved and results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the cases; (11) the nature and length of professional relationship with the client; (12) awards in similar cases.[28]

We contended that the novel, groundbreaking issues addressed in the Owasso case, together with the way in which they were handled, provided a persuasive argument in favor of an enhancement. The case was the first Title IX cause of action brought at the interscholastic level in Oklahoma, and one of few filed nationwide. Viewed objectively, the skills and efforts involved and the results obtained met many of the factors outlined above as appropriate for an upward adjustment.

The case was unpopular when we first agreed to handle it. After the case was filed, the local Owasso newspaper chastised the plaintiffs in its lead editorial for doing a disservice to the community. Individual plaintiffs had legitimate fears of retribution. These facts attested to the undesirability of the case.

To provide appropriate legal services, we had to both fully understand the law and spend considerable time researching all aspects of Owasso's programs. This involved obtaining information not only from the named plaintiffs, but also from other class members and in many instances, others who had an interest in the administration of Owasso's sports programs. In addition, the commitments required precluded other employment. Payment was entirely contingent on prevailing. We did not charge the class members any fees, and did not collect any attorneys' fees from any other source.

Title IX, and the accompanying Regulations and Policy Interpretations,[29] presented a difficult and complex mosaic of issues as they applied to interscholastic and other school sponsored sports. Many of the issues were of first impression, again attesting to the novelty of the case. We successfully brought the application of Title IX into the intramural context of both intermediate and high schools, setting a precedent not only for Owasso, but also for the rest of the state and the entire nation.

The matter was prosecuted efficiently as well as effectively. The case was filed

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28. Palmigiano v. Garrahy, 616 F.2d 598, 601 n.3 (1st Cir. 1980), *cert. denied* 449 U.S. 839 (1980) (citing Johnson v. Georgia Highway Express, 488 F.2d 714, 717 (5th Cir. 1974)); *see also* King v. Greenblatt, 560 F.2d 1024, 1026-27 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); Uzzell v. Friday, 618 F. Supp. 1222, 1224-25 (D.C. N.C. 1985); Coleman v. Block, 589 F. Supp. 1411, 1415 (D.C. N.D. 1984); Stacy v. Stroud, 845 F. Supp. 1135, 1138 (S.D. W. Va. 1993).

29. 34 C.F.R. pt. 106 (1996).

on February 15, 1996, and the Consent Decree was signed on October 2, 1996.[30] This was an example of the system working well, with justice dispensed both fairly and swiftly. In the interests of conserving the resources of both the court and of the defendants regarding their ultimate liability for attorneys' fees, we agreed early in the process to approach the case in the spirit of cooperation. This approach drastically reduced the potential amount of plaintiffs' attorneys' fees, resulting in a lodestar figure surprisingly low considering the far-reaching accomplishments realized in the case.

Finally, the Consent Decree clearly demonstrated that the lawsuit accomplished exactly what the originally named plaintiffs intended—to bring Owasso into full compliance with Title IX, the Regulations, and the Policy Interpretations.[31] The excellent results obtained, along with the other factors to consider in adjusting the lodestar, made a compelling argument for a discretionary enhancement of the lodestar calculation.

The Owasso case was the first to extend the Title IX mandate into the middle school level. In addition, the Consent Decree has already served as a model Title IX compliance plan. Widely reported in the newspapers, the Consent Decree proved effective outside the Owasso School District. Other school districts voluntarily began moving into compliance as a direct result of the litigation. In fact, defendant Dale Johnson, Owasso Schools Superintendent, reported that twenty-five to thirty other superintendents had contacted him for tips on how to get their districts into compliance with Title IX.

In addition to the lodestar and its potential enhancement, out-of-pocket expenses incurred during litigation should be included in fee allowances in civil rights cases if they are reasonable in amount and are normally itemized and billed in addition to the hourly rate.[32] The out-of-pocket expenses included in billing records for Samuel Schiller were normally itemized and billed to the client in addition to the hourly attorney rate.[33] This was verified in an affidavit submitted by the managing partner of Mr. Schiller's law firm.[34] The only expense included with Mr. Yasser's billing records was for mileage, which was reasonable in amount and clearly incurred as a part of the litigation.[35]

The Consent Decree contemplated that the court and the attorneys would continue their involvement with the full implementation of the Decree.[36] The plaintiffs believed that it was reasonably foreseeable that the attorneys for the Class would continue to play a role in the process of compliance and therefore we requested that the court exercise its broad discretion to fashion the award in such a way as to

30. Consent Decree, *supra* note 3.
31. 34 C.F.R. pt. 106 (1996).
32. *See* Mares v. Credit Bureau, 801 F.2d 1197, 1208 (10th Cir. 1986); *Ramos*, 713 F.2d at 559.
33. *See* Schiller Billing Records, *supra* note 17, at 1-18.
34. *See* David Nichols Affidavit at 1-2, Randolph v. Owasso Indep. Sch. Dist. (N.D. Okla. 1996) (No. 96-CV-0105-K).
35. *See* Yasser Billing Records, *supra* note 16, at 1-15.
36. *See* Consent Decree, *supra* note 3, at 17-18.

permit the attorneys to seek and secure compensation for such monitoring services in a timely and efficient manner.

Any award of fees is a matter left to the sound discretion of the court, and the award should take into account all relevant factors presented by the particular case.[37] While the parties had general discussions on the subject of fees, the discussions resulted only in an agreement on the part of the Owasso School District to pay reasonable fees. Defendants had not yet articulated any specific objection to plaintiffs' attorneys' fees.

III. DEFENDANTS' OPPOSING ARGUMENTS

Counsel for the defendants opposed virtually all components of the attorneys' fees requested by the plaintiffs. The defendants stressed that they did not dispute the plaintiffs were entitled to reasonable attorneys' fees; however, the defendants emphatically disputed the fees requested. The three main areas of contention were the calculation of the lodestar,[38] the request for a fee enhancement[39] and future costs related to monitoring the implementation of the Consent Decree.[40] The defendants alleged that the lodestar calculation incorrectly included (1) extensive duplication of time by multiple attorneys,[41] (2) recovery for time spent on public relations activities,[42] and (3) an excessive rate for Mr. Yasser and Ms. Appelbaum.[43]

The defendants argued, "'the 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.'[44] This calculation provides an objective basis on which to make an *initial estimate* of the value of a lawyer's services."[45] The defendants stated that after the initial estimate was made, the court should determine whether the fees should be adjusted either upward or downward.[46] Thus, the defendants agreed on the basic methodology used to calculate the lodestar. Their objections centered around the components of the calculation.

The defendants pointed to "massive" duplication of time by the two lead attorneys as the most significant problem in the lodestar calculation.[47] They began by emphasizing that the "plaintiffs bear the burden of establishing the reasonableness of 'each dollar, each hour, above zero.'"[48] The defendants stressed for the exclusion

37. *See* Keyes v. School Dist. No. 1, 439 F. Supp. 393, 402 (D.C. Colo. 1977).

38. *See* Brief of the Owasso School District in Opposition to Plaintiffs' Motion for Awarding of Attorneys' Fees at 3-11, Randolph v. Owasso Indep. Sch. Dist. (N.D. Okla. 1996) (96-CV-0105-K) [hereinafter Defendants' Brief].

39. *See id.* at 11-15.

40. *See id.* at 15-16.

41. *See id.* at 5-10.

42. *See id.* at 4-5.

43. *See id.* at 10-11.

44. Defendants' Brief, *supra* note 38, at 3 (citing Ramos v. Lamm, 713 F.2d 546, 552 (10th Cir. 1983), quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)).

45. *Id.* (quoting *Hensley*, 461 U.S. at 433 (1983)).

46. *See id.* at 3 (referencing *Hensley*, 461 U.S. at 434).

47. *See id.* at 5.

48. *Id.* at 6 (quoting Mares v. Credit Bureau, 801 F.2d 1197, 1210 (10th Cir. 1986)).

of hours from the initial fee calculation that were not "reasonably expended."[49] Hours potentially questioned may relate to overstaffing or may be "'excessive, redundant, or otherwise unnecessary.'"[50] The defendants indicated that the court has the authority to reduce the plaintiffs' award in those instances where the necessity of the hours is not adequately supported.[51]

The defendants argued that in the Tenth Circuit, duplication is a factor when determining reasonableness of attorneys' fees.[52] The defendants noted that the court in *Ramos v. Lamm*[53] stated that just because time was actually spent on a case does not mean that the time was actually reasonable:

> Another factor the court should examine in determining the reasonableness of hours expended is the potential duplication of services. For example, [if] three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time... [s]imilarly, if the same task is performed by more than one lawyer, multiple compensation should be denied. The more lawyers representing a side of the litigation, the greater the likelihood will be for duplication of services.[54]

The defendants finished their litany on reasonableness by giving two examples in which the court reduced attorneys' fees due to duplication.[55] In the first, a district court disallowed 100% of the time worked by a second attorney brought into the case before the trial.[56] The Tenth Circuit affirmed.[57] The Circuit explained that "[t]here is a difference between assistance of co-counsel which is merely comforting or helpful and that which is essential to proper representation."[58] In the second example, the district court's action, dividing in half the time requested by each of plaintiffs' two attorneys for consultations with one another and with other attorneys uninvolved in the case, was affirmed.[59] The Tenth Circuit noted that cutting the fees in half due to duplication of services was reasonable.[60]

The defendants then began to list areas in which they felt time and efforts of the plaintiffs' attorneys were duplicative.[61] In total, the defendants indicated that 79.5 hours billed by Samuel Schiller and 75.75 hours billed by Ray Yasser mirrored each other and were thus duplicative.[62]

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49. *Id.* (quoting *Hensley*, 461 U.S. at 434).
50. Defendants' Brief, *supra* note 38, at 6 (quoting *Hensley*, 461 U.S. at 434).
51. *See id.* (citing *Hensley*, 461 U.S. at 433).
52. *See id.* (citing Ramos v. Lamm, 713 F.2d 546, 554 (10th Cir. 1983)).
53. 713 F.2d 546 (10th Cir. 1983).
54. Defendants' Brief, *supra* note 38, at 6 (quoting *Ramos*, 713 F.2d at 554).
55. *See id.* at 6-7.
56. *See id.* at 6 (referencing Mares v. Credit Bureau of Raton, 801 F.2d 1197 (10th Cir. 1986)).
57. *See id.* at 6 (referencing *Mares*, 801 F.2d 1197).
58. *Id.* (quoting *Mares*, 801 F.2d at 1206).
59. *See id.* at 7 (referencing Mann v. Reynolds, 46 F.3d 1055, 1063 (10th Cir. 1995)).
60. *See* Defendants' Brief, *supra* note 38, at 7 (referencing *Mann*, 46 F.3d at 1063).
61. *See id.*
62. *See id.*; *see also* Yasser Billing Records, *supra* note 16, at 1-15; Schiller Billing Records, *supra* note 17, at 1-18.

First, defendants stated that Mr. Schiller sought compensation for "32.25 hours for 'personal conferences' with Mr. Yasser, the plaintiffs, and opposing counsel."[63] Defendants indicated that Mr. Yasser sought compensation for 28.75 hours for "attending identical conferences."[64] Defendants indicated that both Mr. Schiller and Mr. Yasser sought compensation for "1 hour for attending the case management conference on June 12, [1996,] 1.5 hours for attending the status conference on August 13, [1996,] and 5.25 hours for attending the settlement conference on September 3, [1996]."[65] The defendants also noted that Mr. Schiller and Mr. Yasser each sought compensation for "18.75 hours of telephone conferences in which the other participated."[66]

In addition to labeling these efforts as duplicative, the defendants questioned the overall necessity of various conferences based on the descriptions in the billing statements. The defendants argued that in the "vast majority" of the personal and telephone conferences,[67] "litigation strategy and legal analysis"[68] were the terms used to describe the work performed by Messrs. Schiller and Yasser.[69] The defendants questioned this description, citing a need for the "specific issue or issues discussed" and an explanation of the "need for . . . extensive and continual consultation."[70] The defendants also indicated that they wanted an explanation for why it was "necessary for both Mr. Schiller and Mr. Yasser to attend the case management conference, the status conference, and the settlement conference."[71]

The second issue regarding duplication dealt with the drafting and reviewing of the Complaint filed in the action against the Owasso School District.[72] The defendants stated, "Mr. Schiller spent 12.25 hours drafting and reviewing the complaint,"[73] while "Mr. Yasser spent 12 hours drafting the same complaint."[74] The defendants were disturbed by the lack of explanation as to why both spent nearly the same amount of time drafting the complaint.[75] The defendants questioned the attorneys' efficiency, stating that it might have worked better if one drafted the complaint and the other reviewed and revised the complaint.[76]

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63. Defendants' Brief, *supra* note 38, at 7; *see also* Yasser Billing Records, *supra* note 16, at 1-15; Schiller Billing Records, *supra* note 17, at 1-18.

64. Defendants' Brief, *supra* note 38, at 7; *see also* Yasser Billing Records, *supra* note 16, at 1-15; Schiller Billing Records, *supra* note 17, at 1-18.

65. Defendants' Brief, *supra* note 38, at 7; *see also* Yasser Billing Records, *supra* note 16, at 10-11, 13; Schiller Billing Records, *supra* note 17, at 9, 13, 15.

66. Defendants' Brief, *supra* note 38, at 7; *see also* Yasser Billing Records, *supra* note 16, at 1-15; Schiller Billing Records, *supra* note 17, at 1-18.

67. Defendants' Brief, *supra* note 38, at 7.

68. *Id.*

69. *See id.*

70. *Id.*

71. *Id.*

72. *See id.*

73. Defendants' Brief, *supra* note 38, at 7; *see also* Schiller Billing Records, *supra* note 17, at 1-3.

74. Defendants' Brief, *supra* note 38, at 7; *see also* Yasser Billing Records, *supra* note 16, at 1, 3.

75. *See* Defendants' Brief, *supra* note 38, at 7.

76. *See id.* at 8.

The third issue of potential duplication related to legal research.[77] Mr. Schiller and Mr. Yasser spent 4.5 and 2.25 hours on legal research respectively.[78] The defendants again questioned the plaintiffs' billing descriptions, which they described as inadequate to determine whether the research hours were duplicative.[79] The defendants questioned the inclusion of these hours in the lodestar calculation without reference to a specific motion or issue.[80]

The defendants questioned the inclusion of Ms. Appelbaum's and Ms. Brake's hours based not only on duplication but also on necessity.[81] The defendants claimed these hours should be excluded because Ms. Appelbaum and Ms. Brake "never entered an appearance"[82] in the case and were "not the plaintiffs' attorneys of record."[83] The defendants also believed their hours should be excluded based on the minimal number of hours worked (seven total),[84] which the defendants believed were either "duplicative of work performed by Mr. Schiller and Mr. Yasser or related to non-compensable matters such as preparation and review of press releases."[85] The defendants pointed to the minimal number of hours as evidence that "their involvement was not reasonably necessary."[86] The defendants likened the time spent by Ms. Appelbaum and Ms. Brake to the second attorney in *Mares v. Credit Bureau of Raton*,[87] stating that although their involvement was helpful, it was not essential.[88]

The defendants' final argument questioning the reasonableness of the hours billed was based on the fact that all work was performed by Mr. Schiller and/or Mr. Yasser themselves.[89] The defendants stressed that no work was performed by either a legal assistant or an associate attorney during the course of the suit.[90] The defendants stated that the following tasks were performed by Mr. Schiller, Mr. Yasser, or both: (1) the writing of every pleading, discovery request and brief; (2) the drafting of all correspondence; (3) all legal research, all witness interviews and all trips made to observe the Owasso School District athletic facilities.[91] The defendants questioned the fact that Mr. Schiller and Mr. Yasser filed the pleadings themselves and indicated such practices are unreasonable in the Northern District of Oklahoma.[92] The defendants claimed they were being penalized by the possibility of

77. *See id.*
78. See id; *see also* Yasser Billing Records, *supra* note 16, at 4, 12, 13; Schiller Billing Records, *supra* note 17, at 2, 5.
79. *See* Defendants' Brief, *supra* note 38, at 8.
80. *See id.* (referencing Brown v. Eichler, 680 F. Supp. 138, 142-143 (D. Del. 1988)); *see also* Lock v. Jenkins, 634 F. Supp. 615, 623 (N.D. Ind. 1986).
81. *See id.*
82. *Id.*
83. *Id.*
84. *See* Appelbaum Affidavit, *supra* note 18, at 1-3; Brake Affidavit, *supra* note 19, at 1-3.
85. Defendants' Brief, *supra* note 38, at 8.
86. *Id.*
87. 801 F.2d 1197 (10th Cir. 1986).
88. *See* Defendants' Brief, *supra* note 38, at 8.
89. *See id.* at 8-9.
90. *See id.* at 8.
91. *See id.* at 8-9.
92. *See id.* at 9.

increased attorney's fees in this case because neither a legal assistant nor a lower-billing associate attorney was used.[93]

The second component of the lodestar calculation questioned by the defendants was the inclusion of activities deemed by the defendants as "public relations activities."[94] The defendants felt that time spent conferring with representatives of the media, drafting and reviewing press releases, and appearing on radio shows was not time reasonably expended on litigation and should be excluded from the lodestar calculation.[95] The defendants noted nine hours expended on these activities during the course of the lawsuit.[96]

The defendants gave some examples in which hours related to public relations activities were excluded from the final award granted to attorneys. In one decision following a remand by the Tenth Circuit, "the district court pointed out that 'time spent attending speeches and press conferences must be deducted since it is not necessary to the litigation of the case.'"[97] The court "disallowed 28 hours sought by the plaintiffs for time spent attending press conferences, speeches, and meetings."[98] In another case, the district court's decision to disallow attorneys' time spent in public relations was upheld by the Tenth Circuit.[99] The defendants also noted two instances outside the Tenth Circuit in which attorneys' time on public relations work was disallowed.[100]

Based on the generic term "public relations," the defendants sought to disallow Mr. Schiller's and Mr. Yasser's time spent conferring with media representatives, drafting and reviewing press releases and appearing on radio and television news shows.[101] The defendants indicated that such time did not help resolve the litigation and should be excluded from the lodestar calculation.[102]

The third component of the lodestar contested by the defendants was the hourly rate charged for Mr. Yasser's and Ms. Appelbaum's services. The defendants claimed the prevailing market rate for such services in the Northern District of Oklahoma was $125 per hour instead of the $175 per hour as billed by Mr. Yasser and Ms. Appelbaum, and therefore the charges for their services should be reduced by $50 per hour.[103]

The defendants relied on a Tenth Circuit decision in which the court stated, "[t]he relevant market value is not the price that the particular lawyer chosen may be paid by willing purchasers of his or her services, but rather the price that is

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93. *See id.*
94. Defendants' Brief, *supra* note 38, at 4.
95. *See id.*
96. *See id.*; *see also* Yasser Billing Records, *supra* note 16, at 1-15; Schiller Billing Records, *supra* note 17, at 1-18.
97. Defendants' Brief, *supra* note 38, at 4 (quoting Ramos v. Lamm, 632 F. Supp. 376, 381 (D. Col. 1986)).
98. *Id.* (quoting *Ramos*, 632 F. Supp. at 384).
99. *See id.* at 4-5 (referencing Jane L. v. Bangerter, 61 F.3d 1505, 1510 (10th Cir. 1995)).
100. *See id.* at 5 (referencing Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169 (4th Cir. 1994) and Gray v. Romeo, 709 F. Supp. 325 (D. R.I. 1989)).
101. *See id.*
102. *See id.*
103. Defendants' Brief, *supra* note 38, at 10-11.

customarily paid in the community for services like those involved in the case at hand."[104] In *Beard v. Teska*,[105] the "Tenth Circuit was required to determine the reasonable market rate for legal services in the Northern District of Oklahoma in a civil rights class action against school districts and the Oklahoma State Department of Education."[106] The district court awarded the attorneys' fees based on the hourly fees those attorneys regularly received.[107] The Tenth Circuit reversed, and established the award at the prevailing market rate in the Northern District at that time, which was $125.[108]

The defendants' contented that, based on *Beard*, Mr. Yasser and Ms. Appelbaum were only entitled to a $125 hourly fee.[109] The defendants claimed $125 was still the prevailing rate in Oklahoma at the time of the Owasso litigation, although there was no information included to support that statement.[110]

The second major area the defendants contested was the requested fee enhancement.[111] The defendants referred to some of the factors mentioned in the plaintiffs' brief and attempted to demonstrate that these factors were inapplicable in this case.[112]

The defendants began their response by agreeing the Tenth Circuit has authorized fee enhancements within the circuit.[113] However, they also argued that the Circuit's opinion is that enhancements should be granted rarely, and that the lodestar calculation forms "'the presumptively reasonable fee.'"[114] The defendants also pointed to the Supreme Court case *Blum v. Stenson*,[115] in which several factors that have otherwise been considered to support a fee enhancement were considered to be part of the lodestar.[116] These factors include "'novelty and complexity of the issues,' 'special skill and experience of counsel,' 'quality of representation,' and 'results obtained.'"[117] The defendants thus implied that these factors, outlined by the plaintiffs as reason to justify an enhancement, should be disregarded completely.[118]

Three other factors addressed in the defendants' response were "'undesirability of the case[119]. . . preclusion of other employment,'"[120] and contingency of the

104. *Id.* at 10 (quoting Beard v. Teska, 31 F.3d 942, 956 (10th Cir. 1994)).
105. 31 F.3d 942 (10th Cir. 1994).
106. Defendants' Brief, *supra* note 38, at 10 (referencing *Beard*, 31 F.3d at 946).
107. *See id.* at 10 (referencing *Beard*, 31 F.3d at 946).
108. *See id.* (referencing *Beard*, 31 F.3d at 958).
109. *See id.* at 11.
110. *See id.*
111. *See id.*
112. Defendants' Brief, *supra* note 38, at 11-15.
113. *See id.* at 11 (referencing Homeward Bound, Inc. v. Hissom Mem'l Ctr., 963 F.2d 1352, 1356 (10th Cir. 1992) and Ramos v. Lamm, 713 F.2d 546, 557 (10th Cir. 1983)).
114. *Id.* at 11-12 (quoting *Homeward Bound*, 963 F.2d at 1355, citing Pennsylvania v. Delaware Valley Citizens' Counsel, 478 U.S. 546 (1986)).
115. 465 U.S. 886 (1984).
116. *See* Defendants' Brief, *supra* note 38, at 12.
117. *Id.* (quoting *Homeward Bound*, 963 F.2d at 1355, referencing Blum v. Stenson, 465 U.S. 886 (1984)).
118. *See id.*
119. *Id.*
120. *Id.* at 12

attorneys' fee.[121] The defendants took the position that the undesirability of a case does not justify a fee enhancement because undesirability is no longer associated with civil rights cases such as the Owasso suit.[122] The defendants stated that "'a bonus for the social stigma assumed by a lawyer participating in civil rights litigation should rarely be given.'"[123] Defendants did not explain exactly in what kind of rare case a stigma and/or undesirability would justify an enhancement.[124] Defendants' counsel argued that preclusion of employment should not be considered as an enhancement factor because the attorneys are being compensated at a reasonable rate.[125]

The defendants addressed contingency by agreeing it can be considered as a factor to justify fee enhancement, but again, only rarely.[126] They claimed the Tenth Circuit has taken the position that contingency is appropriate only in "'exceptional cases.'"[127] An exceptional case is one in which the prevailing parties were not expected to succeed "either because the law was unsettled or because the outcome of the litigation was dependent upon resolution of material facts."[128]

The defendants claimed the plaintiffs did not run a real risk of not prevailing.[129] They argued that Title IX law could not be considered "'unsettled'"[130] because the statute and regulations establish the validity of causes of action under Title IX as well as the right to a remedy.[131] The defendants also stated the "outcome of this case did not hinge upon the determination of any fact dispute."[132] They argued Owasso knew it had problems with Title IX compliance and was working to increase the athletic opportunities available to female students at the time the suit was filed.[133] The defendants argued it was fairly certain the plaintiffs would prevail to some extent, therefore "no contingency enhancement should be awarded."[134]

The defendants also argued against using the "'efficiency'"[135] and "'excellent results obtained'"[136] factors to support an enhancement. Owasso claimed the efficient resolution was not obtained solely through the plaintiffs' efforts, but rather was attained through the cooperative spirit of Owasso and the plaintiffs in attempting to resolve the action.[137] Owasso argued the defendants themselves were instrumental in achieving the efficiency mentioned by the plaintiffs, choosing to resolve the concerns in a way that would satisfy both sides instead of engaging in a potentially divisive

121. *See id.*
122. *See* Defendants' Brief, *supra* note 38, at 12.
123. *Id.* (quoting Ramos v. Lamm, 713 F.2d 546, 557-558 (10th Cir. 1983)).
124. *See id.*
125. *See id.* (referencing *Ramos*, 713 F.2d at 558, n. 10).
126. *See id.* at 12.
127. *Id.* at 12-13 (quoting *Homeward Bound*, 963 F.2d at 1360).
128. Defendants' Brief, *supra* note 38, at 12-13 (referencing *Homeward Bound*, 963 F.2d at 1360).
129. *See id.* at 13.
130. *Id.*
131. *See id.*
132. *Id.* at 13.
133. *See id.*
134. Defendants' Brief, *supra* note 38, at 13.
135. *Id.*
136. *Id.*
137. *See id.*

legal battle.[138] The defendants called the plaintiffs unreasonable, stating that a request for a fee enhancement was actually a method of punishment by the plaintiffs, in spite of the cooperation and compromises offered by the Owasso School District.[139]

The defendants then listed the accomplishments which had been or would have been made without the plaintiffs' intervention. They stated the results of the case were not extraordinary as claimed by the plaintiffs.[140] For example, Owasso stated that it has "sponsored varsity and junior varsity female softball for many years,"[141] so inclusion of these two levels of softball was not anything new for the school district.[142] Owasso also claimed the establishment of volleyball at the varsity and junior varsity levels was not a result of the Title IX litigation, as the school published its "intention to establish . . . a volleyball program prior to . . . the litigation."[143] Next, Owasso stated that it maintained "specific records regarding the expenditures of its revenues on athletic programs"[144] for several years, even though this became a specific provision of the Consent Decree.[145] Owasso argued it always provided female athletes with equipment and supplies comparable to those of male athletes as expressly required by Title IX.[146] Additionally, Owasso claimed that it always followed the practice of treating "male and female athletes the same with regard to travel expenses and support,"[147] another Title IX requirement and provision of the Consent Decree.[148] Finally, Owasso stated that prior to the filing of the Title IX litigation, it began providing "male and female athletes with equal access to weight training and conditioning facilities and equipment,"[149] another Consent Decree requirement.[150]

The defendants admitted the plaintiffs did prevail on some of their concerns and the school district had made concessions;[151] however, they closed their argument against a fee enhancement by stating the results obtained were "neither as extensive nor as dramatic as they have suggested in their application for attorney's fees."[152] They argued the lodestar calculation was sufficient to cover the attorneys' fees.[153]

The defendants also contested the plaintiffs' request that the court consider, in the Owasso case, there would be additional involvement between the plaintiffs and the defendants during the implementation of the Consent Decree which would require

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138. *See id.* at 13.
139. *See id.* at 13-14.
140. *See* Defendants' Brief, *supra* note 38, at 14.
141. *Id.*
142. *See id.*
143. *Id.*
144. *Id.* at 14.
145. *See id.*; *see also* Consent Decree, *supra* note 3, at 10-11.
146. *See* Defendants' Brief, *supra* note 38, at 14.
147. *Id.*
148. *See id.*; *see also* Consent Decree, *supra* note 3, at 11.
149. Defendants' Brief, *supra* note 38, at 14.
150. *See id.* at 14; *see also* Consent Decree *supra* note 3, at 14.
151. *See* Defendants' Brief, *supra* note 38, at 14-15.
152. *Id.* at 15.
153. *See id.*

additional work by the plaintiffs' attorneys.[154] The defendants construed this request as an "open-ended . . . obligation"[155] to pay future attorneys' fees for monitoring services and classified the request as a way to establish a "perpetual money machine."[156]

The defendants claimed the Consent Decree did not contemplate continued involvement by the plaintiffs' attorneys.[157] They referenced the position of "'Compliance Officer'"[158] and argued the Officer would be responsible for monitoring the implementation of the Decree.[159] The defendants also referenced the grievance procedure contained in the Consent Decree and claimed, if there is a question of default under the Decree, the grievance procedure must be followed before the court becomes involved.[160]

The defendants took the position that the process contained in the Consent Decree and the request made by the plaintiffs' attorneys were completely "at odds"[161] with one another.[162] They indicated the Decree did "not call for close monitoring by the plaintiffs' attorneys under the supervision of the [c]ourt,"[163] but rather provided for self-monitoring by the parties themselves with court involvement only if the parties could not resolve an issue.[164] The defendants indicated the plaintiffs' request was, in effect, an "attempt to rewrite the terms of the parties' agreement"[165] and approving such a request would place an unreasonable obligation on the defendants.[166]

The defendants' final request included a number of exclusions, reductions, and denials. First, the defendants requested that Ms. Appelbaum's and Ms. Brake's hours be excluded from the lodestar calculation.[167] They also asked to exclude Mr. Schiller's and Mr. Yasser's hours expended on public relations activities.[168] The defendants asked for a reduction in Mr. Schiller's and Mr. Yasser's remaining hours by 40% due to "extensive and unreasonable duplication of efforts . . . , lack of specificity in . . . time records, and . . . unreasonable failure to make use of less expense alternatives for routine matters."[169] The defendants asked that the hourly fee for all attorneys be set at $125.[170] Finally, the defendants asked that the request for enhancement and request for attorneys' fees for future monitoring be denied.[171]

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154. *See id.*
155. *Id.*
156. *Id.* at 3.
157. *See* Defendants' Brief, *supra* note 38, at 15.
158. *Id.*; *see also*, Consent Decree, *supra* note 3, at 15.
159. *See* Defendants' Brief, *supra* note 38, at 15.
160. *See id.* at 15; *see also* Consent Decree, *supra* note 3, at 17-18.
161. Defendants' Brief, *supra* note 38, at 15.
162. *See id.* at 15.
163. *Id.*
164. *See id.* at 15-16.
165. *Id.* at 16.
166. *See id.*
167. *See* Defendants' Brief, *supra* note 38, at 17.
168. *See id.*
169. *Id.*
170. *See id.*
171. *See id.*

IV. OUR RESPONSE TO DEFENDANTS' ARGUMENTS

In response to the defendants' arguments, we submitted a reply that rebutted those arguments and supported the plaintiffs' original request. We pointed out that the total fees and costs requested were modest given the efficiency with which the case was prosecuted. Additional detail on the tasks performed was supplied. We explained why certain hours were included in the lodestar calculation.

We first addressed the issue of unnecessary duplication charged by Owasso, pointing out that Owasso listed as unnecessary duplication every hour billed by Mr. Yasser and Mr. Schiller when the two worked on the same task during the same day.[172] The hours fell into five categories: (1) conferences with plaintiffs; (2) telephone and personal conferences between Mr. Yasser and Mr. Schiller; (3) legal research; (4) document writing and (5) conferences with Owasso's counsel. We addressed these categories *seriatim.*

In the first category, conferences with plaintiffs, Owasso listed the three meetings between plaintiffs and their counsel, in which essential facts were gathered, as examples of unnecessary duplication.[173] These meetings took place December 10, 1995; January 15, 1996 and January 27, 1996. A total of 16.75 attorney hours was spent in the meetings in order to gather the factual evidence to bring the class action litigation. We explained that during meetings, Mr. Yasser and Mr. Schiller individually met with different plaintiffs for "sequestered" conferences on the factual issues. Using this method allowed us to verify the accuracy of the accounts by subsequently comparing notes from the meetings.

We also pointed out that for all three of the meetings, Mr. Yasser and Mr. Schiller had varied hours.[174] This was a result of the attorney who finished his tasks first "going off the clock" in order to avoid unnecessary fees. We contend that our decision to hold meetings to verify facts was actually more efficient and far less duplicative than requiring formal discovery. We noted that by the time the lawsuit was filed, facts were verified and Owasso's violations of Title IX were manifest without the need for costly, time-consuming formal discovery.

Owasso also questioned the time spent in the second category, telephone and personal conferences between Mr. Yasser and Mr. Schiller.[175] We noted that the 25.25 hours Owasso questioned took place over a period of ten and a half months, an average of less than 35 minutes per week. These strategic, tactical, and analytical conferences were necessary in order to confer and disseminate information obtained in meetings with the plaintiffs as well as discuss ongoing litigation matters. We pointed out the descriptions submitted on the billing statements purposely did not contain specific details as we were engaged in other Title IX litigation with the same

172. *See id.* at 7; *see also* Yasser Billing Records, *supra* note 16, at 1-15; Schiller Billing Records, *supra* note 17, at 1-18.

173. *See* Defendants' Brief, *supra* note 38, at 7.

174. *See* Yasser Billing Records, *supra* note 16, at 1-2; Schiller Billing Records, *supra* note 17, at 1-2.

175. *See* Defendants' Brief, *supra* note 38, at 7.

defense counsel. Thus, details of the subject matter were not submitted in order to preserve the interests of the other clients. We offered to present more specific details to the court at its pleasure and reiterated that, far from being duplicative, the hours spent in personal and telephone conferences saved time and promoted efficiency by regularly reviewing all aspects of the case through brief discussions.

In the third category, Owasso questioned the 6.75 hours spent on legal research.[176] We were amazed that Owasso challenged such a low figure, since the hours were minimal at best, a direct result of our expertise in the Title IX area of law. We explained those hours were spent researching the requirements of Title IX and class action and were necessary for purposes of drafting the Complaint, Consent Decree, and Class Action documents. Again, we offered to supply more detailed information regarding our research to the court upon request.

In the fourth category, potentially duplicative billing, Owasso questioned the hours spent on document drafting and offered its own opinion on how the drafting could have taken place.[177] Our response explained the methodology behind the drafting of the documents in which responsibilities were divided. For example, one of us drafted the paragraphs dealing with the factual allegations of the Complaint while the other drafted the legal allegations. One drafted the Motion for Class Certification and opening twelve pages of the accompanying Brief while the other drafted the final twelve pages of the Brief. All other documents and pleadings were similarly assigned. We believed that this division of assignments accomplished the required tasks in an expeditious manner and demonstrated that Owasso's suggestion for increased efficiency was without merit or support.

We also pointed out an area in which Owasso was grossly inefficient, not only with regard to the plaintiffs' fees, but also in relation to Owasso's payment of its own counsel's fees. On several occasions, in order to increase efficiency and reduce time and expense, we urged defense counsel to agree to class certification. Each time they refused. Therefore, we were forced to file a Motion with accompanying Brief for Class Certification. Defense counsel then filed an extensive Response in Opposition which we were compelled to review and analyze. Plaintiffs also had to prepare for a hearing on the matter. Only at the hearing were we made aware of the defense's agreement to class certification. We pointed out the obvious inefficiency and noted that Owasso could not point to an instance of such unnecessary work and expense on our part. We requested that the court review the entire billing record to confirm the Complaint and the Class Action Certification documents were researched and drafted into final form for filing with all due attention to efficiency.

In the final category, regarding duplicative billing, Owasso questioned the appearance of both plaintiffs' counsel at the June 12th Case Management Conference, the August 13th Status Conference and the September 3rd Settlement Conference.[178] A total of fourteen and a half hours was spent in these three

176. *See id.* at 8.
177. *See id.* at 7-8.
178. *See id.* at 7.

conferences as well as other conferences with defense counsel. We explained that, due to the method of representation which included segregation of duties, we both needed to be present. Representation of a class in a complex, fact-intensive case is a solemn responsibility we took very seriously. In order to effectively represent the plaintiffs, both of us needed to attend these crucial conferences. Because we were both present, the conferences were more efficient.

We also countered defense counsel's argument that Mr. Schiller's trip to view the athletic facilities at the Owasso School District was not reasonable. When the tour was proposed, *all* counsel immediately agreed on the appropriateness of the visit. We were completely mystified by the defense's complaint, since the defense attorney represented Owasso on the tour. Any other alleged duplication in Owasso's expense analysis actually involved separate conferences with the same individual(s) on the same day, with the exception of the conference held on August 21, 1996 to review the Consent Decree.

We agree with Owasso's position that as the number of attorneys involved increases, the more likely duplications in billing will occur. However, the majority of the work was performed by the two lead attorneys with only minimal assistance from Ms. Appelbaum and Ms. Brake. The defendants claimed the number of hours alone demonstrated the assistance provided by Ms. Appelbaum and Ms. Brake was unnecessary.[179] This attack on the hours expended by Ms. Appelbaum and Ms. Brake was illogical and counter-intuitive, considering we managed to minimize their involvement by our efforts to keep costs as low as possible.

Owasso's second argument, concerning the calculation of the lodestar, dealt with hours billed for "public relations" activities.[180] We noted that although the activities may have been public in nature, the services were necessary as a part of the litigation and were therefore appropriately included in the lodestar calculation.

Due to the nature of the lawsuit, the plaintiffs had legitimate fears of retribution from filing the lawsuit. On the day the case was filed, a television reporter telephoned Mr. Schiller to advise him that a named defendant called her and told her of his plans to place the girls' names prominently on the school marquee with a statement to the effect that "these are the girls who sued us." This conversation not only supplied us with valuable information, but also revealed the hostile attitude and general recalcitrance faced by the plaintiffs. In spite of the importance of this incident, Owasso claimed the time spent was not "reasonably expended on the litigation."[181]

Both the Eighth and Ninth Circuits found public relations work compensable.[182] The Ninth Circuit held that since private attorneys bill their clients for press conferences and other public relations work, "[p]revailing civil rights plaintiffs may do the same."[183] We endeavored to educate the defendants, class members and

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179. *See id.* at 8.
180. *Id.* at 4-5.
181. Defendants' Brief, *supra* note 38, at 5.
182. *See* Jenkins v. Missouri, 862 F.2d 677, 678 (8th Cir. 1988), *aff'd* 491 U.S. 74 (1989); Davis v. City of San Francisco, 976 F.2d 1536, 1545 (9th Cir. 1992).
183. *Davis*, 976 F.2d at 1545.

community in the belief that education would dispel the hostility faced by the girls. Since the broadcast and print media actually assisted in this task, our fees for time spent talking to the press under the circumstances were not only reasonable but also virtually unavoidable in effectively representing the class.

Finally, the media served as an efficient vehicle to communicate with our class. As a result of media coverage, we received communication from class members who relayed factual information to us. This use of the media has been deemed appropriate.[184] The plaintiffs primarily sought injunctive relief. Unlike many class actions, such as those in the securities area, the nature of injunctive relief is not obvious absent contact with many members of the class.[185] In such cases, the news media can provide "a valuable conduit of information between counsel and the class."[186]

Owasso's final contention regarding the calculation of the lodestar was the hourly fee billed by Mr. Yasser and Ms. Appelbaum.[187] Owasso cited *Beard* in arguing that $125 per hour was still the prevailing market rate in the Northern District of Oklahoma.[188] In *Beard*, the court relied heavily upon the defendant's expert, who testified that the $125 hourly rate was based upon a survey of 70 cases covering the period of 1980 to 1991.[189] The cases surveyed were "IDEA-type" cases (i.e., Individuals with Disabilities Education Act cases).[190] We argued that the *Beard* rate was out-dated and should not be applied to a ground-breaking case of first impression. The $125 hourly rate awarded in *Beard* was for services performed between 1987 and 1990.[191] The prevailing rate in the Northern District at the time of the Owasso Title IX litigation was much higher.

In plaintiffs' application for fees, Mr. Yasser submitted an affidavit from Mr. Martin A. Frey, Senior Adjunct Settlement Judge in the Northern District, in support of the reasonableness of his $175 per hour rate.[192] This rate was that "prevailing in the community for similar services by lawyers of reasonably compared skill, experience and reputation."[193] Mr. Yasser is the lead co-author of the nation's most widely used Sports Law Casebook.[194] He was recently named an "Outstanding Professor," the University of Tulsa's most prestigious teaching award. In a long career at the University of Tulsa, he continually participates in the active practice of law. He was one of the original lawyers in perhaps the most noteworthy civil rights cases in the Northern District, the so-called "Hissom" litigation. He performed the initial crucial analysis in and supplied his considerable expertise throughout, this

184. *See* Keyes v. School Dist. No. 1, 439 F. Supp. 393 (D.C. Colo. 1977).
185. *See id.* at 408.
186. *See id.*
187. *See* Defendants' Brief, *supra* note 38, at 10-11.
188. *See id.* at 10 (citing Beard v. Teska, 31 F.3d 942 (10th Cir. 1994)).
189. *See Beard*, 31 F.3d at 949.
190. *See id.*
191. *See id.*
192. *See* Martin A. Frey Affidavit at 1-2, Randolph v. Owasso Indep. Sch. Dist. (N.D. Okla. 1996) (No. 96-CV-0105K).
193. *Beard*, 351 F.3d at 955.
194. RAY YASSER ET AL., SPORTS LAW (3d ed. 1997).

case. Considering Mr. Yasser's skill, experience, and reputation, the $175 per hour rate requested appeared reasonable in this type of litigation. Similarly, Ms. Appelbaum's credentials also supported a $175 per hour fee.

Owasso also challenged the proposed fee enhancement.[195] Owasso stated the fee enhancement was not necessary because the case "did not hinge upon the determination of any fact dispute"[196] and "[i]n truth and fact, the Owasso School District was aware of the need to continue to increase athletic opportunities available to female students"[197] when the action was filed. There was a discrepancy between these statements from Owasso's Brief compared to the blanket denials in Owasso's Answer. Either the statements in the Brief fundamentally misrepresented the truth or the Answer denied factual allegations which Owasso knew were true. This was a revisionist approach to the history of the lawsuit, and our response challenged this discrepancy in Owasso's position. We noted the Consent Decree contained wording that was actually proposed by the defense counsel to demonstrate the far-reaching results of the litigation.[198]

We rebutted Owasso's argument that it made substantial progress toward Title IX compliance prior to the filing of the suit. Both the Consent Decree and the facts patently contradict this position and we provided several examples to support this assertion. For example, Owasso claimed that prior to the filing of the suit, it initiated a practice which provided male and female athletes with equal access to both weight training and conditioning facilities and equipment. Yet, even at the time we submitted our response, equal access to weight training facilities was not accomplished. Furthermore, the Consent Decree itself required Owasso to come up with a plan to achieve sports specific weight training and conditioning facilities and equipment by a certain time frame.[199] The paragraph regarding the plan, providing benefits to girls comparable to those offered to boys, was placed in the Consent Decree at Owasso's request because Owasso insisted it could not implement a plan earlier than the specified time frame. This confirmed that significant progress with Title IX was lacking at the time the suit was filed.

The final issue in our response addressed our request for a provision for monitoring fees. Owasso's attempt to paint the request as a way to turn the case into a "perpetual money machine"[200] was distasteful and offensive. We requested a mechanism of compensation for post-Consent Decree fees without having to go through the attorney fee process again. We suggested that a legal reserve of $5,000 be set aside for compensable legal work required to insure compliance with the Consent Decree. The court need only become involved should the requested fees be disputed or in excess of the reserve. Having a reserve would be efficient and cost-saving for both the court and Owasso, who could avoid defense counsel involvement.

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195. *See* Defendants' Brief, *supra* note 38, at 11-15.
196. *Id.* at 13.
197. *Id.*
198. *See* Consent Decree, *supra* note 3, at 3.
199. *See id.*
200. Defendants' Brief, *supra* note 38, at 3.

V. COURT ORDER

Judge Kern began the Court Order by summarizing the progression of the case from the commencement of the suit to the issuance of the Consent Decree.[201] First, the Court Order addressed our request for an enhancement.[202] The court stated that in the Tenth Circuit, enhanced fees are not granted as a matter of course.[203] The court stated:

> [w]e believe that bonuses or multipliers of the normal fee because of the extraordinary skill of counsel should rarely be awarded, and should be confined to cases in which the bulk of the work was done by a single attorney who exhibits extraordinary skill or to cases in which the work was done well in a relatively short time given the complexity of the task.[204]

The court closed its opening statement regarding the issue of enhanced fees by declaring this case was not exceptional enough to justify enhancement.[205]

The court focused its explanation for its refusal to grant a fee enhancement on several factors listed as potential reasons to award an enhancement: unpopularity of the suit, the contingency fee arrangement, preclusion of employment, novelty and complexity of issues and results obtained.[206] First, the court stated there is no longer any real stigma associated with civil rights cases, and therefore unpopularity does not justify a fee enhancement.[207] The court continued by stating that in spite of the contingency fee arrangement, an enhancement "is appropriate only in [an] 'exceptional case[],' one in which prior to the litigation, the attorney for the prevailing party was confronted with a 'real risk of not prevailing.'"[208] The court went on to say the plaintiffs did not demonstrate a real risk because Title IX principles are recognized.[209]

The court stated that the third factor, the preclusion of employment, is not looked upon favorably by the Tenth Circuit.[210] The court also noted that "'novelty and complexity of issues' and 'results obtained'"[211] are generally compensated as a part of the lodestar calculation.[212] The court stated the plaintiffs received "excellent representation,"[213] but determined even so, that representation did not justify an

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201. *See* Court Order at 1-2, Randolph v. Owasso Indep. Sch. Dist. (N.D. Okla. 1996) (No. 96-C-105-K).
202. *See id.* at 2.
203. *See id.*
204. *Id.* (quoting Ramos v. Lamm, 713 F.2d 546, 557 (10th Cir. 1983)).
205. *See id.*
206. *See id.* at 2-3.
207. *See* Court Order, *supra* note 201, at 2 (citing *Ramos*, 713 F.2d at 557-58).
208. *Id.* at 3 (quoting Homeward Bound, Inc. v. Hissom Mem'l Ctr., 963 F.2d 1352, 1360 (10th Cir. 1992)).
209. *See id.*
210. *See id.* (referencing *Ramos*, 713 F.2d at 558 n.10).
211. *Id.* (quoting *Homeward Bound*, 963 F.2d at 1355).
212. *Id.* (citing *Homeward Bound*, 963 F.2d at 1355).
213. Court Order, *supra* note 201, at 3.

enhancement.[214] The court concluded its explanation of why it did not grant an enhancement by stating we may have come out ahead by participating in this engagement, because we became involved in other similar cases in this and other jurisdictions.[215]

The court next examined the calculation of the lodestar amount.[216] It began its examination with a general overview of the calculation process and the parties' responsibilities.[217] The court recognized its discretion in determining the amount of the fee award.[218] "The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates."[219] "The benchmark for the award is that the attorney's fee must be reasonable."[220] "The lodestar figure—reasonable hours times reasonable rate—is the mainstay of the calculation of a reasonable fee."[221]

It is the plaintiffs' responsibility to prove the reasonableness of its fee calculation, and the court's responsibility to adjust that calculation should it prove to be unreasonable.[222] Thus, it is the plaintiff's burden to "prove and establish the reasonableness of each dollar, each hour, above zero."[223] "The prevailing party must make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary."[224] Once the calculation is made by the plaintiff, it is the court's obligation to exclude hours from the calculation if the court believes they were not reasonable.[225] The court has the authority to reduce the hours to a reasonable figure.[226] The court also noted that in calculating the lodestar, a reasonable rate is required to establish an appropriate fee.[227] "[T]he prevailing market rate in the relevant community"[228] is considered a reasonable rate.[229]

The court began its review of the plaintiffs' lodestar calculation by stating the number of hours expended by Mr. Yasser and the rate requested for his time.[230] It also mentioned the submitted mileage costs.[231] The court noted that Owasso did not object to the mileage figure, and that "reasonable out-of-pocket expenses normally charged to clients are recoverable as attorney fees under civil rights and other fee-

214. *See id.*
215. *See id.*
216. *See id.* at 3-8.
217. *See id.* at 3.
218. *See id.* (citing Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)).
219. Court Order, *supra* note 201, at 3-4 (using in part the language of *Hensley*, 461 U.S. at 437).
220. *Id.* at 4 (using in part the language of Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 562 (1986)).
221. *Id.* (using in part the language of Anderson v. Secretary of Health and Human Serv., 80 F.3d 1500, 1504 (10th Cir. 1996)).
222. *See id.*
223. *Id.* (quoting Jane L. v. Bangerter, 61 F.3d 1505, 1510 (10th Cir. 1995)).
224. *Id.* (using in part the language of *Jane L.*, 61 F.3d at 1510).
225. *See* Court Order, *supra* note 201, at 4 (citing Malloy v. Monahan, 73 F.3d 1012, 1018 (10th Cir. 1996)).
226. *See id.* (citing Carter v. Sedgwick County, 36 F.3d 952, 956 (10th Cir. 1994)).
227. *See id.*
228. *Id.* (citing *Malloy*, 73 F.3d at 1018).
229. *See id.* (citing *Malloy*, 73 F.3d at 1018).
230. *See id.*
231. *See* Court Order, *supra* note 201, at 4.

shifting statutes."[232] The court thus approved the mileage costs as a part of the lodestar calculation.

The court spent a significant portion of the Order establishing the hourly rate for Mr. Yasser. It began its explanation by noting that one of the defendants' main objections was to Mr. Yasser's proposed hourly rate of $175.[233] The court explained that the defendants' reliance on the civil rights' hourly fee of $125 established in *Beard* was somewhat misplaced, because "specific factors were at work in the court's decision [regarding the fee calculation]."[234] These factors included the plaintiff's counsel's lack of background in the area being litigated as well as uncontradicted evidence before the court as to the hourly rate in that type of litigation.[235] Thus, the court indicated that its decision in the Owasso fee calculation would not be mandated based on *Beard*.[236]

Instead, the court stated a "reasonable hourly rate comports with 'those prevailing in the community for similar services by lawyers of reasonably competent skill, experience, and reputation.'"[237] The court should establish the rate that would be paid for comparable attorneys in private firms using the information provided and its own judgment.[238] A judge may also use personal knowledge in ascertaining the reasonable market rate.[239] The court stated that based on these criteria, it had "taken into account the increases in billing rates in the past few years and the [c]ourt's own knowledge of billing rates in this [particular] community."[240]

The court commented positively on Mr. Yasser's credentials, although it questioned the extent of his active participation in Title IX cases.[241] The court noted a recent case in which an hourly fee of $175 was granted to prevailing plaintiff's counsel.[242] It stated that in Saladin v. Turner,[243] the attorneys were both specialists in their field as well as experienced litigators.[244] The court declared that although Mr. Yasser's's expertise was unquestionable, his litigation experience (or possible lack thereof) did not justify a rate of $175 per hour.[245] Therefore, the court decided that although $125 per hour was an outdated figure, $175 per hour was too high, and granted Mr. Yasser an hourly rate of $150 per hour.[246] (The determination of this particular amount was not explained. It appears to simply split the difference.) The

232. *Id.* at 4-5. (citing Pinkham v. Camex, 84 F.3d 292, 294-95 (8th Cir. 1996)).
233. *See id.* at 5.
234. *Id.*
235. *See id.* (citing Beard v. Teska, 31 F.3d 942 (10th Cir. 1994)).
236. *See id.*
237. Court Order, *supra* note 201, at 5 (quoting Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984)).
238. *See id.* (citing Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983)).
239. *See id.* at 5-6 (citing Metz v. Merrill Lynch, 39 F.3d 1482, 1493 (10th Cir. 1994)).
240. *Id.* at 5.
241. *See id.* at 6.
242. *See id.* at 6 (citing Saladin v. Turner, 936 F. Supp. 1571, 1585 (N.D. Okla. 1996)).
243. 936 F. Supp. 1571 (N.D. Okla. 1996).
244. *See* Court Order, *supra* 201, at 6.
245. *See id.*
246. *See id.*

court awarded Samuel Schiller his requested fee of $125 per hour without any discussion.[247]

Next, the court addressed Owasso's objection to the hours spent on public relations activities.[248] The court determined the hours spent on press interviews and news releases were not excessive.[249] The court noted, "[e]nforcement of Title IX involves vast changes in the structure of a school's athletic programs and is a matter of public interest within the area."[250]

The court gave more merit to Owasso's objections regarding duplication of fees.[251] The court specifically noted two areas: (1) the 79.5 hours spent by Mr. Schiller and 75.75 hours spent by Mr. Yasser that mirrored one another; and (2) the 12.25 hours spent by Mr. Schiller on drafting and reviewing the Complaint to initiate the action and the 12 hours spent by Mr. Yasser on the same document.[252] The court indicated that although this may have been the "first action of its type in Oklahoma, it [was] surely not the first of its type in the United States,"[253] and therefore it was possible that excessive time was spent on the Complaint.[254] The court also denounced entries on billing records with descriptions such as "'legal research' and 'conferences,'"[255] stating they were generally not fully compensable.[256] The court closed its comments on the number of hours by stating some of the work performed by Mr. Yasser and Mr. Schiller was work clerks or paralegals could perform.[257]

The court subsequently found that we were required to spend extra (unnecessary) time because the defendants initially opposed class action certification.[258] The court also stated that despite defendants' objections, the visit to Owasso's facilities was necessary.[259] The court then abruptly determined that although the defendants had requested a reduction in the lodestar hours of 40%, a better figure would be 20%.[260] Unfortunately, the court did not explain why 20% would be more appropriate, or even why a reduction was justified at all.

Next, the court addressed the issue of Ms. Appelbaum's and Ms. Brake's fees, although it failed to respond to Owasso's argument in contention of those fees.[261] The court implied the hours were acceptable, but cut Ms. Appelbaum's hourly fee to $150 per hour.[262]

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247. *See id.*
248. *See id.* at 6-7.
249. *See id.* at 7.
250. Court Order, *supra* note 201, at 7.
251. *See id.* at 7-8.
252. *See id.* at 7.
253. *Id.*
254. *See id.*
255. *Id.*
256. *See* Court Order, *supra* note 201, at 7 (citing H.J. Inc. v. Flygt Corp., 925 F.2d 257, 260 (8th Cir. 1991)).
257. *See id.* at 8.
258. *See id.*
259. *See id.*
260. *See id.*
261. *See id.*
262. *See* Court Order, *supra* note 201, at 8.

The final issue addressed in the Court Order was the monitoring fees.[263] The Tenth Circuit has approved post-judgment monitoring fees;[264] however, the court determined that in this case, the Consent Decree provided a "procedure for assuring compliance."[265] The court stated that because the parties have the right to resort to the court if a grievance is not resolved by the established procedure, a special monitoring fund is unnecessary.[266]

VI. CONCLUSION

As of this writing, we have been involved in eight Title IX suits.[267] And in each case, our "fee fight" experience has been similar to what we have reported here.[268] Attorneys who represent plaintiffs in these types of cases should be prepared to "hunker down" for a long, and sometimes nasty, struggle. It is as though the defendant school districts simply cannot accept the stark reality that, under the law, it is obligatory to pay the attorneys' fees and costs to the prevailing party. We have noted an almost complete unwillingness on the part of the school district to make an even arguably reasonable offer on the issue of the fees.[269] But "hunkering down" and patiently fighting for fees is worthwhile. Indeed it is rare for lawyers to have the opportunity to work for the public good and receive reasonable compensation for their efforts. We are grateful for the opportunity and are willing to help others who are interested in joining the battle to achieve gender equity in interscholastic sports.

263. *See id.*

264. *See id.* (referencing Joseph A. v. Department of Human Serv., 28 F.3d 1056, 1059 (10th Cir. 1994)).

265. *Id.*

266. *See id.* at 8-9.

267. We have been lead counsel in Title IX suits brought against the following school districts in Oklahoma: Owasso, Tulsa, Norman, Noble, Guymon, Inola and Sperry. We recently filed a case against the Harrison, Arkansas School District.

268. The Owasso result is perhaps our least successful. In the other cases decided thus far, we have been awarded significantly higher percentages of our requested fees. Maybe we have learned by doing. For example, in the Tulsa case, we received 100% of the billable hours requested.

269. In our Noble case, we actually settled the fees at the settlement conference for 83% of the amount we requested. In no other case have we received an offer to settle fees in excess of 30% of the amount we requested.