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Ms. Linda Holtzapple
Executive Director
Shenandoah Area Agency on Aging
207 Mosby Ln
Front Royal, VA 22630
Via email: *l.holtzapple@shenandoahaaa.com*

Kathryn Hayfield
Commissioner, Office of Aging Services
Virginia Department for Aging and Rehabilitative Services
Via email: *Kathryn.Hayfield@dars.virginia.gov*

January 8, 2020

Dear Ms. Holtzapple and Ms. Hayfield:

We represent senior citizens impacted by your illegal actions and policies and work in conjunction with Alliance Defending Freedom and Christian Legal Society, two public interest law firms. We write regarding complaints about two senior centers operated by the Shenandoah Area Agency on Aging (SAAA) that have been ordering meal attendees not to engage in even private prayer over their meals, directing them to pray separately in another room. According to our investigation, these incidents likely resulted from directives by the Virginia Department of Aging and Rehabilitative Services (DARS). For many seniors who lack the mobility to change locations quickly, the new restrictions imposed effectively eliminates their ability to pray over their meal. These practices infringe the attendees' First Amendment rights and must end immediately.

For many years, senior citizens attended lunches hosted by the Shenandoah Agency on the Aging which traditionally began with the Pledge of Allegiance followed by a prayer lead by one of the senior citizens in attendance. This past summer the SAAA, at the behest of DARS, announced to seniors that prayer would no longer be allowed. We are aware of at least three incidents in SAAA-administered centers in which the seniors' rights have been violated. Specifically, at the Frederick Center, one senior, Mary Strosnider was told that the center *would prohibit anyone from praying aloud over his or her meal*, but instead that any prayer should be confined to another room. In another instance, a senior at the Warren County Center in Front Royal, David Sudlow, led other willing members at his table in private voluntary prayer, only to receive a letter from the center's director that such prayer is not allowed and he would be dismissed from the program if he prayed in violation of the "directive given to us by DARS." These attitudes have provoked hostility towards religious seniors; in a third incident a 98-year-old senior was shouted down by others, believed to include the center's staff, for praying aloud over a meal. These individuals shouting him down commanded him to stop saying, "We are not allowed to pray" here. No one, and certainly not the elderly, should be shamed for exercising their faith.

A review of First Amendment law makes it clear that neither the Constitution nor the receipt of government funding requires or permits a senior center to censor the religious expression of seniors. As the Supreme Court has frequently held, "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Sq. Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Even in federally funded programs, citizens maintain their individual religious rights. The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). If the seniors attending meals are allowed to discuss such secular topics as politics, recreational activities, or preferred recipes, they are also allowed to speak on religious topics. Otherwise, the organization is engaging in unconstitutional viewpoint discrimination as well as infringing on the seniors' First Amendment rights. *See, e.g., Rosenberger v. Rectors & Visitors of University of Virginia*, 515 U.S. 819, 831 (1995) ("It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.").

This is true under the Older Americans Act as well. The Administration for Community Living, the federal organization that administers OAA, plainly states that the OAA "**does not forbid older adults from praying before a meal** at a senior center or some other location that provides a meal with funding from AAA," and instead organizations should "ensure[] that each individual participant has a free choice to pray either silently or audibly."[1] The only restriction is that the prayer should not be "sponsored, led, or organized by persons administering" the meal program. *Id.* Notably, the Tenth Circuit has held that a senior center's policy that prohibited a group from showing the Jesus Film was unconstitutional, even if such policy were consistent with the Older Americans Act. *See Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1280 (10th Cir. 1996) ("The fact that the City's policy is designed to conform with federal statutory requirements, however, does not shelter it from constitutional scrutiny.").

To the extent these policies and practices are designed to prohibit a perceived endorsement of religion, courts have frequently rejected disestablishment interests as a justification for prohibitions of private religious activity, such as the kind at issue here. For example, "nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday." *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000); *see also Memorandum on Religious Expression in Public Schools*, ADMINISTRATION OF WILLIAM J. CLINTON 1227 ("[T]he government's schools [] may not discriminate against private religious expression during the school day.").[2] Similarly, government employees are allowed to participate in private religious expression. *See Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807, 815 (8th Cir. 2004) (noting that a school district's "desire to avoid the appearance of endorsing religion does not transform [a teacher's] private religious speech into a state action."). Even government bodies may have prayer in connection with official meetings. *See Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 590 (2014) ("[L]egislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate."); *see also Church on the Rock*, 84 F.3d at 1280 ("[Senior citizens] are not in need of special insulation from invitations to adopt a religious faith; nor are they, as a class, more likely than other citizens to be intimidated by such invitations.").

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[1] https://acl.gov/about-acl/authorizing-statutes/older-americans-act

[2] Available at https://www.govinfo.gov/content/pkg/WCPD-1995-07-17/pdf/WCPD-1995-07-17-Pg1227.pdf

Given the clear precedent regarding private religious expression, SAAA's and DARS's policies regarding prayer contain language that is unconstitutional or lends itself to unconstitutional application. For example, the SAAA policy on "Religious Activities at Senior Centers" indicates that "praying or sharing a faith statement with one or more individuals . . . [must] occur separately from the meal program." The SAAA policy goes on to say that "congregate members," meaning meal participants, "should not be allowed to lead a group pre-meal prayer." Similarly, DARS guidance on religious activities indicates that "**individual participants**" may pray silently or audibly. This differs from the above-cited federal guidance that says "older adults" may pray before their meal. Problematically, the DARS guidance instructs that "a meal-program participant . . . should not be allowed to lead a group pre-meal prayer or any other type of group religious activity during the meal program." These policies incorrectly (and illegally) instruct administrators to forbid groups of seniors from joining together in voluntary corporate prayer. Moreover, as noted above, due to a lack of training, these policies have been interpreted by staff to prohibit any private prayer, individual or corporate, at meals.

For these reasons, we ask that SAAA and DARS revisit their policies and clarify to seniors at meals that private prayer, even corporate and audible prayer, is allowed. Although we anticipate that SAAA and DARS will willingly correct their practices to comply with the legal rights of Virginia seniors in this instance, we would note that a senior center in Texas that had similar policies was ordered to pay nearly $80,000 in attorney's fees and costs after the matter went to litigation. (Order attached as Appendix A).

We are happy to discuss this matter further, if necessary. However, we would like confirmation that you have immediately changed your policies and will allow the senior citizens to pray at their meals or we will be forced to take other legal action.

Respectfully,

H. Robert Showers, Esq.
William R. Thetford Jr., Esq.

Cc:

Mary Strosnider

David Sudlow

Alliance Defending Freedom

Reed Smith, Esq.
Director of Litigation
Christian Legal Society

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

J. B. BARTON, et al.,	§	
Plaintiffs,	§	
	§	**Civil Action No.**
v.	§	**3:03-CV-2258-G**
	§	
CITY OF BALCH SPRINGS, et al.,	§	
Defendants.	§	

ORDER

On February 18, 2004, the District Court referred "Plaintiffs' Application For Attorney's Fees," filed January 23, 2004, to the United States Magistrate Judge for a hearing, if necessary, and for determination. After a hearing on March 9, 2004, the Court took the motion under advisement. The Court has carefully considered the arguments of the parties, the applicable authorities, the pleadings, and the exhibits and finds that Plaintiffs' Application should be granted.

Background

Plaintiffs brought a civil rights action pursuant to 42 U.S.C. § 1983, challenging the unconstitutional burdens placed upon the senior citizens at the City of Balch Springs' Senior Center ("the Center"). The Seniors were engaging in voluntary and non-disruptive religious speech at the Center. The City of Balch Springs ("the City") imposed restrictions at the Center that specifically prohibited Plaintiffs from participating in voluntary and non-disruptive speech and expression. The City banned praying, the singing of gospel music, and the giving of religiously inspired messages. On September 22, 2003, before filing suit, counsel for Plaintiffs wrote Defendants, advised them of the unconstitutionality of the City's restrictions, and demanded that the City immediately rescind the newly enacted restrictions. Neither the City nor its legal counsel responded to the demand letter.

Then Plaintiffs filed suit seeking injunctive and declaratory relief and money damages. On November 20, 2003, the parties filed a Joint Status Report in which they agreed to mediate the case in December of that year. Before the mediation, Plaintiffs' counsel prepared and submitted to Defendants' counsel a draft of Plaintiffs' Motion for Preliminary Injunction and Brief in support. The mediation, held on December 15, 2003, was not successful. After the mediation, the parties continued to negotiate. Plaintiffs filed the Motion for Preliminary Injunction and Brief on December 16, 2003. On January 8, 2004, the parties entered into a Stipulation to Agreed Judgment which resolved all of the issues except the matter of attorney fees. The District Court entered the Agreed Judgment on January 9, 2004.

The Agreed Judgment grants Plaintiffs the relief requested in the Complaint. The City was required to establish a non-discriminatory policy that allows Plaintiffs and other members of the Center to participate in voluntary religious activity and expression at the Center, including, but not limited to, praying, singing gospel music, and listening to inspirational messages that are based upon a religious viewpoint. The Judgment awards each Plaintiff the sum of $150 and court costs.

Plaintiffs now seek $73,600 in attorney fees as the prevailing parties in this litigation.[1] Additionally, Plaintiffs seek $6,250 for the necessary and reasonable attorney fees incurred in defending the attorney fee application. Defendants admit that Plaintiffs are entitled to reasonable

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[1] Plaintiffs are entitled to attorney's fees and costs pursuant to 42 U.S.C. § 1988. This statute provides, in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs ...

42 U.S.C. § 1988(b).

attorney fees, but they contend that the hours claimed are excessive. They claim reasonable attorney fees for this case would be in the range of $30,000 to $35,000. The attorney fee dispute has been fully briefed and argued by the parties and is ripe for determination.

Legal Standard

To be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. *Tex. State Teachers Ass'n. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989) (citing *Hewitt v. Helms*, 482 U.S. 755, 760-761 (1987)); *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988). Plaintiffs are the prevailing party in this case.

To determine the award amount, the court must first calculate the "lodestar" by multiplying the number of hours reasonably spent on the litigation times a reasonable hourly billing rate. *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 1939 (1983). The court should consider the factors announced in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)[2] when it analyzes the reasonableness of the hours expended and the hourly rate requested. Once the lodestar has been determined, it may be adjusted upward or downward if the *Johnson* factors, not included in the reasonable fee analysis, warrant such an adjustment. *Shipes v. Trinity Indus.*, 987 F.2d 311, 320 (5th Cir. 1993). The lodestar, however,

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[2] The factors set out in *Johnson* are: (1) the time and labor required; (2) the novelty and difficulty of the issues involved; (3) the skill required to litigate the case; (4) the ability of the attorney to accept other work; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances of the case; (8) the amount involved and results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the attorney-client relationship; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

is presumptively reasonable and should be modified only in exceptional cases. *City of Burlington v. Dague,* 505 U.S. 557, 562 (1992).

A.

The Court must first determine the reasonable number of hours expended on the case. A fee applicant is required to document the time spent and services performed. *Hensley,* 103 S.Ct. at 1941; *Cooper v. Pentecost,* 77 F.3d 829, 832 (5th Cir. 1996). The Court must review the records and exclude all time that is excessive, duplicative, or inadequately documented. *Hensley,* 103 S.Ct. at 1939; *Von Clark v. Butler,* 916 F.2d 255, 259 (5th Cir. 1990). The hours that survive this process are those reasonably expended on the litigation. *Watkins v. Fordice,* 7 F.3d 453, 457 (5th Cir. 1993).

Plaintiffs are represented by three attorneys. Jeffrey C. Mateer is a partner in the Dallas law firm of Mateer & Shaffer, L.L.P. He seeks compensation for 181.3 hours and an additional 25 hours in connection with the attorney fee application. Kelly Shackelford and Hiram S. Sasser III are with the Liberty Legal Institute of Plano, Texas. Mr. Shackelford seeks compensation for 45.1 hours and Mr. Sasser claims he reasonably expended 71.5 hours.

In determining the reasonable number of hours expended in the case, the Court has considered the applicable *Johnson* factors as well as the arguments set out in Defendants' Response to the Application for Attorney Fees and made at the hearing in this matter. Defendants claim that by the time the lawsuit had been filed, the City had lifted some of the newly enacted restrictions and informed the seniors that they could pray and play gospel

music as they had done before. Defendants argue that for this reason, the amount of fees requested grossly outweighs the result.

The Agreed Judgment reflects that Plaintiffs prevailed on each of the First Amendment claims presented in their demand letter and in their "Complaint and Application for Declaratory Relief." All of Plaintiffs' challenges to the restrictions arose out of the same operative facts. The record shows that Defendants failed to respond to Plaintiffs' demand letter and that from August 2003 through December 16, 2003, did not inform Plaintiffs' counsel that any restrictions had been lifted. The Court will not reduce Plaintiffs' attorney fees because 20-20 hindsight shows that filing the motion for preliminary injunction was not necessary. Given the lack of response to the demand letter, it was prudent for Plaintiffs' counsel to prepare thoroughly and to pursue all avenues until the settlement agreement was finally filed. Defendants now characterize this as a friendly suit where they were conciliatory in an effort to avoid incurring attorney fees; however, the record shows that an experienced mediator was unable to settle the litigation at mediation. Plaintiffs prevailed on all of their claims and the amounts of fees requested does not outweigh the result.

Defendants contend that all three attorneys should not have attended the mediation. The Court finds that it was not unreasonable for three counsel to attend the mediation given the large number of Plaintiffs, the complexity of the issues, and posture of the defense. Additionally, Defendants claim that Mr. Mateer may have been a volunteer attorney. However, the record reflects that he entered a fee agreement with Plaintiffs and did not volunteer his time and expertise. Defendants also contend that the amount of legal research performed was excessive given the experience of the attorneys and the factual similarity of

an eight-year old case decided by the Tenth Circuit Court of Appeals. Again, Defendants pursued their defenses until after the mediation. No court would expect an attorney to forego legal research based upon his experience in other cases and because of a factually similar eight-year old case from another circuit. Counsels' legal research in this case was thorough, but not excessive. Similarly, Defendants' argument that the time spent drafting the complaint was excessive is not well taken. The drafting of the complaint was careful and complete. No deductions are warranted there. Similarly, the preparation and filing of the motion for preliminary injunction was reasonable and gave impetus to the ultimate settlement of the case, even though the settlement was reached close to the time it was filed. Finally, Defendants claim the attorney fee should be comparable to what defense counsel received. Comparison of the hours spent in particular tasks by the attorney for the party seeking fees and by the attorney for the opposing party does not necessarily indicate whether the hours expended by the party seeking fees were excessive. *See Johnson v. Univ. College of the Univ. of Ala. in Birmingham,* 706 F.2d 1205, 1208 (11th Cir. 1983). A comparison to the amount defense counsel received is not helpful here. Additionally, the Court does not agree that reasonable attorney fees in this case would be in the range of $30,000 to $35,000.

The Court has reviewed the detailed billing records submitted by counsel for Plaintiffs and finds that none of the hours expended were excessive, duplicative, vague, or indefinite. Counsel divided the workload appropriately. In addition, counsel did not seek reimbursement for time expended by attorney John Parnell for legal research nor time expended by attorneys Randal Shaffer and Patrick Cryer. Additionally, Plaintiffs' counsel did not seek compensation for a paralegal, Stacy Locke, who also performed work that was

grounds, 903 F.2d 352 (5th Cir. 1990). Although the amount of money damages is not great, declaratory relief was the primary goal of the suit. The amount of fees requested is appropriate compensation for the results achieved.

The Court finds that counsel reasonably expended 297.9 hours on the litigation. The attorney fee motion was vigorously defended and 25 hours is a reasonable amount of time spent defending the motion.

B.

Counsel seeks compensation at the following hourly rates: (1) $250 for Mr. Mateer; (2) $350 for Mr. Shackelford; and (3) 175.00 for Mr. Sasser. The evidence submitted by Plaintiffs shows these rates to be at or below the customary, reasonable and necessary fees for similar legal services in litigation of this nature in the federal courts in this community. Defendants do not contest these hourly rates. Accordingly, counsel will be compensated at the stated rates.

C.

The lodestar amount is presumed to be a reasonable fee and should be modified only in exceptional cases. *City of Burlington v. Dague,* 505 U.S. 557, 562 (1992); *Watkins,* 7 F.3d at 457. Plaintiffs do not seek a fee enhancement, and the Court finds that the lodestar amount should not be adjusted.

D.

The Court finds that Plaintiffs' counsel should be compensated for 297.9 hours reasonably expended on this litigation calculated at their usual and customary rates of $175.00-$350.00 per hour for attorney time. No upward or downward adjustment of the lodestar amount is warranted. Accordingly, Plaintiffs are awarded $73,600.00 in attorney fees. Additionally, the Court awards Plaintiffs an attorney fee of $6,250.00 for attorney hours reasonably expended in defending the attorney fee award.[3] Accordingly "Plaintiffs' Application for Attorneys' Fees," filed January 23, 2004, and supplemental request for attorney fees are GRANTED.

IT IS SO ORDERED April 19, 2004.

PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

[3] This amount is based upon 25 hours expended by Mr. Mateer at his reasonable and customary hourly rate of $250.00 an hour.