

IDEA and CHAPTER 162 HEARING PANEL

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION

IN RE ____ , by parents, ____

Petitioners,

vs.

THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY,

Respondent.

DECISION AND ORDER

A. PARTIES

Petitioners

_____, student

_____, parents

By Counsel:

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Respondent

The Special School District of St. Louis County

By Counsel:

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B. PANEL MEMBERS

Karen Aslin

Trudy Fulmer

Dan Pingelton, Chairman

C. REQUEST HEARING AND EXTENSION DATES

Hearing Request Received: July 16, 1997

Original Decision Deadline: September 2, 1997

Extended Hearing Dates: April 28-30; May 12-13, 1998

Extended Decision Deadline: August 23, 1998

D. PROCEDURAL HISTORY

Petitioners, _____, on behalf of their son, filed a request for review of the student's special education services, received by the Missouri Department of Elementary and Secondary Education on July 16, 1998. The original 45day statutory deadline for an administrative hearing and decision to be rendered was September 2, 1997. Following request by both parties, the hearing and decision dates were extended, with the hearing scheduled to commence on October 28, 1997. Both parties were allowed 20 days following the conclusion of the hearing to submit proposed findings of fact and conclusions of law, and written argument. A decision was to be mailed within 45 days of the conclusion of the hearing.

Petitioners thereafter filed a request to continue the hearing, due to the unavailability of one of their expert witnesses. With Respondent's consent, a continuance was granted, with the hearing

scheduled to commence on December 8, 1997, concluded with an equivalent post-hearing schedule as previously set forth.

On Friday, December 5, 1997, Petitioner's attorney became notably ill, and requested a continuance due to significant health reasons. The request was not opposed by Respondent. The matter was continued, with the hearing rescheduled to commence on February 2, 1998, along with the previously set post-hearing schedule.

Petitioners again requested a continuance due to the unavailability of two witnesses, Mia Elfrink and Lisa Haden, teachers at Churchill School - a private facility where the student had been placed by the student's parents, following the placement dispute in this case. Respondent did not object to the continuance, and following a telephone conference between counsel and the panel chairman, the matter was continued. The hearing was rescheduled to commence on April 28, 1998 at the Respondent's board room in Clayton, Missouri. The decision was scheduled to be mailed 30 days after the conclusion of the hearing.

The hearing commenced on April 28, 1998, and proceeded through April 29 and 30. By agreement of the parties, as the hearing had not been concluded, the matter was continued, and resumed on May 12 and 13, 1998. At the conclusion of the hearing, the parties agreed that within ten days of the transcript being delivered by the court reporter, each would be allowed to file proposed findings, conclusions and argument. Within 30 days thereafter, the panel would render a decision. Following the delivery of the transcript, the parties requested a small filing extension. Thereafter, the final deadline for the decision to be mailed was extended by agreement for August 23, 1998.

E. ISSUES

Petitioners' hearing request identified the following issue: "an appropriate educational program in the least restrictive environment." Their response to a "Due Process Hearing Request Notice Form" supplied by the Department of Elementary and Secondary Education stated: "Parents and student seeks [sic] appropriate education in an educational facility outside the public school system."

No further issues were identified until the hearing commenced on April 28, 1998. During the hearing, Petitioners also claimed they were denied extended school year services for the student over the 1996 and 1997 summer recesses.

The submitted issues can be summarized as follows: Petitioners claim Respondent failed to provide the student with a free and appropriate public education ("FAPE"). They claim the student's placement at Westchester Elementary School for the 1996 Spring semester was inappropriate and that he did not receive sufficient special education services there. They seek reimbursement for private school placement after they removed the student from Westchester, compensation or reimbursement for lack of extended school year services, attorney fees and costs.

F. SUMMARY OF EVIDENCE

The following evidence was introduced and considered by the hearing panel:

Petitioners' Witnesses: Scott Trail; _____; Jeffrie Silverberg; Mia Elfrink; Lisa Haden; Eric Lowder; and _____ Ruth Snitzer was examined as an adverse witness.

Petitioner's Exhibits: P-1 through P 50.

Respondent's Witnesses: Dianne Arbeiter; Pam Stanfield; Judy Pohl; Denise Bowenschulte; Mary Bauer; Janet Mueller; Patti Rosenkranz; Abbie Sterling; Barbara O'Leary; and Kay Kiernan.

Respondent's Exhibits: R- 1 through R-42.

G. FINDINGS OF FACT

1. The student is a __ year-old (born __) residing with parents in the Kirkwood School District in St. Louis County, Missouri.
2. The student has an educational diagnosis of learning disabled in math. The student has a mild speech impairment and language disorder. The student also has a mild hearing impairment.
3. The student has a medical diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). Scott Trail, a physician who specializes in pediatrics and child psychiatry, testified that the student also suffers from obsessive-compulsive disorder (OCD) and pervasive development delay (PPD). Trail explained that PPD is related to autism- a milder form. The student is not retarded, and has no cognitive difficulties. The student's problem, Trail explained, is with communication. The student's problems are exacerbated by change, which causes anxiety.
4. Psychologist Jeffrie Silverberg has been treating the student since January, 1997. The student's primary diagnosis was ADHD, with some autistic traits, as well as a learning disability

- in math. Silverberg testified that the student is unique in suffering from a variety of conditions - something the student has not seen in another child through 25 years of practice.
5. The parties stipulated that the hearing panel not consider any public education during the student's kindergarten or first grade years.
 6. The student attended second grade, 1993-94, at Miriam School, a private facility. The student attended third grade, 1994-95, at St. Paul Lutheran, also a private school.
 7. In the fall semester, 1995, the student began fourth grade at Captain School, a public facility with a special education hearing impaired component.
 8. For the spring semester, 1996, Respondent transferred the student from Captain to Westchester Elementary School.
 9. After the Spring semester ended, the student attended a summer evaluation program at The Churchill School, a private facility.
 10. Because Churchill had no openings for the fall semester, 1996, the student enrolled at private Miriam School for the entire fifth grade.
 11. The student attended no summer school program following fifth grade.
 12. The student enrolled at The Churchill School beginning the fall semester, 1997. The student completed the 1997-98 sixth grade year there.
 13. When the student returned to the public school system for fourth grade in the fall of 1995, Petitioners agreed to the Captain School placement. They believe the student received an educational benefit at Captain, and were satisfied with the student's progress.
 14. There was disagreement between the parties regarding the nature of the student's placement at Captain. The student's mother testified she believed the student was in a self-contained classroom for the hearing impaired. However Diane Arbeiter, Respondent's administrator in charge of the deaf and hard-of-hearing program, stated that the student was not in a self contained setting, although the student received some resource room services. She stated the student was in a regular classroom, taught by a general education teacher, for more than 1000 minutes per week.

15. Diane Arbeiter testified that the only reason Respondent placed the student at Captain was to remove the hearing component from the student's "educational equation." She testified that Mother lobbied hard to get the Captain placement for her child.

16. Diane Arbeiter also testified that the student assignment to Captain was only a "diagnostic placement," and that the parents understood this. Petitioners, however, dispute that they were ever informed that Captain was a diagnostic placement.

17. Nowhere in the "Captain IEP [Individualized Education Program]," August 24, 1995, is a "diagnostic placement" mentioned.

18. Pursuant to the "Westchester IEP," December 18, 1995, Respondent transferred the student to Westchester Elementary for the second semester of the student's fourth grade year.

19. The "Captain IEP" provided for 1025 weekly minutes of general education services; 30 minutes of "consultative/collaborative/class-within-a-class services"; 900 minutes of special education resource services; and 100 minutes of speech and language therapy. Testimony from Respondent's educators indicated that the special education services included 300 weekly minutes for LD resource.

20. The "Westchester IEP" provided for 1105 weekly minutes of general education services; 15 minutes of "consultative/collaborative/class-within-a-class services"; 20 minutes of special education itinerant service for hearing; 540 minutes for "special education resource services"; and 60 minutes of speech and language therapy. The 540 special education resource services included 60 minutes each day (300 weekly minutes) of something labeled "Transdisciplinary Instructional Model." The remaining 240 weekly minutes were to be spent with Wanda Bullard, the student's special education teacher.

21. Petitioners initially agreed to the Captain-to-Westchester transfer, following the urging of Respondent's educators, who said the student was "doing great," and should be mainstreamed at Westchester, closer to the student's home and neighborhood friends.

22. The student testified that one educator informed the student that Respondent needed to make room at Captain for more severely hearing-impaired children.

23. Within two or three weeks of the student's transfer to Westchester, the student began exhibiting increased problems at home: the student no longer desired to attend school; the student developed headaches; the student's behavior problems worsened.

24. The student testified that in late January or early February, Petitioners requested to reconvene the IEP team. They also requested the student be re-evaluated.

25. Respondent did not re-evaluate until June, and reconvened the IEP team on June 3, 1996. That IEP increased the student's general education weekly minutes to 1485; 15 minutes for itinerant services; and 300 minutes in a special education resource room. This IEP envisioned placement to remain at Westchester.

26. During that summer, 1996, the student attended the evaluation program at The Churchill School.

27. On August 14, 1996, the student wrote Respondent, summarizing problems at Westchester, and again requesting the IEP team be reconvened. The student also requested information from the Churchill evaluation be incorporated into the current evaluation.

28. Hearing nothing further from Respondent, and bound by the June 3, 1996 IEP, Petitioners on August 23, 1996, enrolled the student at Miriam School, without advising Respondent or anyone with the Kirkwood School District. Respondent learned of this enrollment through a September 6, 1996 letter from Eric Lowder, a parent advocate, requesting payment for Miriam.

29. On September 10, 1996, an IEP review was held to consider the Churchill summer evaluation information. Respondent concluded that the current IEP (from June 3, 1996) was appropriate. The Westchester placement designation was unchanged.

H. CONCLUSIONS OF LAW DECISION AND RATIONALE

1. The student is a child with a disability, as that term is defined by the Individuals with Disabilities Act, 20 U.S.C. § 1400 *et seq* and the regulations thereto. 34 C.F.R. §300.7.

2. As such, the student is entitled to a free and appropriate public education (FAPE). Respondent's duty is to provide an educational program reasonably calculated to enable a child to receive educational benefits. *Board of Education of Henrick Hudson Central School District v. Rowley*, 102 S.Ct. 3034, 3049 (1982).

3. Respondent correctly notes that IDEA's goal is "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Rowley, Id.*, at 3043. Yet, Respondent is required to provide more than a "trivial or

de minimis educational benefit." *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180-85 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1030.

4. Respondent bears the burden of proving that the child received, or could have received, FAPE. See *Oberti v. Board of Education*, 995 F.2d 1204, 1218-19 (3rd Cir. 1993).

Westchester and Implementation of the IEP

5. Respondent has failed to prove that FAPE was provided to the student at Westchester Elementary.

Specifically, Respondent failed to meet its burden of proof that the "Westchester IEP" was actually implemented as written, or was implemented to provide more than a *de minimis* educational benefit, given the student's educational diagnoses.

There is no inherent error in Respondent's transferring the student from Captain to Westchester. Neither fatal is the fact that Respondent initially failed to communicate to Petitioners the ramifications of what was later termed a "diagnostic placement" at Captain. Indeed, the student's hearing impairment is apparently a minor concern, as Petitioners themselves described the student is doing well at Churchill with no hearing impaired services. Yet while the transfer may have initially been warranted, the subsequent placement must still be appropriate. Respondent has failed to demonstrate that it was.

There is insufficient evidence before the panel to demonstrate the appropriateness of the special education weekly minutes described in the December 18, 1995 "Westchester IEP." The 15 weekly minutes of "consultative/collaborative/class-within-a-class services" was time allocated for discussion among the student's educators. The 20 weekly minutes of special itinerant hearing services was to ensure the student's hearing aid was working properly, and to remind the student to use it. The student was to, and did, receive 60 weekly minutes for speech and language therapy. Of the remaining 540 weekly minutes of special education resource services, the student was to receive 60 daily minutes (300 weekly minutes) of "transdisciplinary instructional model." The remaining 240 weekly minutes were to be spent with Wanda Bullard, the student's special education teacher.

General education teacher, Denise Bowenschulte, testified at length regarding what was purportedly implementation of the Westchester IEP. Yet despite her extensive testimony, there remains no clear explanation of the actual implementation of the 540 minutes of special education. Respondent has failed to establish that the student received *any* significant time of the special education specifically set forth in the IEP.

Despite repeated questioning by the panel regarding the special education services, Denise Bowenschulte was able to give only vague generalizations. As Bowenschulte described, "transdisciplinary instruction" indicates utilization of a theme across various educational disciplines: "Like in science, we talked about Missouri rocks and Missouri caves, and in art, they were working on landmarks in Missouri and in reading, we were reading books about famous Missourians, and in that, we would try to meet the needs of the student so the student could be successful in that unit." [Tr. 840] Although listed as special education services, Bowenschulte admitted that in effect, these minutes could comprise general education instruction. That fact is not necessarily fatal to Respondent's burden of proof, as mainstreaming envisions special and general education occurring side-by-side. Respondent's problem here is that it proved only one side - the general education component of an IEP program that mandated special education.

Even less specific than the 300 minutes of transdisciplinary instruction" was the evidence supporting the claim that the student received 240 minutes of "drop-in-time" by the student's special education teacher, Wanda Bullard. Inexplicably, Wanda Bullard did not testify. Of all educators, Wanda Bullard would appear to be the most crucial witness to describe specifically *how* the IEP was implemented. She was listed on Respondent's witness list, yet no explanation was ever offered to explain her absence. What Respondent offered was a non-specific description of Bullard's efforts through the general education teacher, Denise Bowenschulte.

A careful review of the evidence in this case demonstrates that Westchester was not appropriately ready to implement the IEP in mid-stream, when the student transferred from Captain. Worse, the implementation problem occurred in math- obviously most crucial because this is the student's specific learning disability.

Denise Bowenschulte testified that the student received math instruction twice a day, yet it remains unclear how that occurred. From 1 to 1:40 p.m., the student allegedly received math instruction from Bowenschulte in her in general education classroom, where "the student did basic skills, and all of our math activities during that time." There was absolutely no evidence presented that the student's 40 minutes here comprised any special education for the student's math learning disability. According to Respondent's own assessment in May, 1996 (at the end of fourth grade), the student was functioning at the third month of third grade. The student's combined score was in the sixth percentile. Yet Respondent was giving the student fourth grade instruction.

Unlike some subjects, such as reading, exposure to an inappropriately advanced level of instruction in math holds little chance of conferring any educational benefit. For as the evidence

demonstrated, the experience was frustrating, and compounded the student's learning disability. As further evidence that none of this instruction was individualized for the student, Denise Bowenschulte testified that she never used "touch math" for the student. Yet Respondent's own working IEP specifically noted the child had utilized this technique. Worse, Bowenschulte defended her efforts by claiming incorrectly that the procedure was not in the IEP.

Anything beyond Denise Bowenschulte's 40 minutes of inappropriate math remains a mystery to the panel. Clearly, there were scheduling problems.

Q: (by Petitioner's counsel): What was the teaching that was done with regard to the student's math in the general education classroom?

A: The reason that happened was, like I had stated, when the student came to us in January, our schedule was already established. All of the fourth graders did mathematics, right after our lunch period, from 12:45 to 1:30 or 1:35, and also, Ms. Bullard's schedule was already established at that time. She had other students at that time.

Bowenschulte then explained that for the first several weeks after the student transferred to Westchester, Wanda Bullard taught the student in the general classroom for 35 minutes, "and put her other children on hold." After the teachers "got a feel for the student a little bit more on where the student was," Bullard reduced her time to 15 minutes a day in the general education classroom. Bowenschulte claimed Bullard also had the student in her special education resource room from 11 to 11:45 a.m. each day.

Respondent questioned Denise Bowenschulte at length regarding interventions, adaptations and modifications used for the student in her classroom. Several of Respondent's exhibits are lists of various techniques, many of which were highlighted by Bowenschulte to indicate which ones she had employed. While helpful, in this case these documents are not particularly persuasive to the panel. All of these documents were prepared after the student had already left Westchester. Believing that Petitioners may file a formal complaint, Respondent requested Bowenschulte review the documents and highlight the techniques she used with the student.

For example, some of the techniques highlighted by Denise Bowenschulte for "Math Recommendations" included the following: "Develop logical reasoning skills through word problems with familiar contexts"; "Review basic time concepts, including days of the week, months of the year, time spans and time-telling stories"; "Provide opportunities for overlearning basic skills through drill and practice"; "Consider use of calculator with older students to practice math processes"; "Allow child to use concrete or visual aids as necessary." Yet all of these

devices were doubtlessly part of Bowenschulte's ordinary teaching methods for all of her students. They do not amount to FAPE if done in an inappropriate setting. For instance, one recommendation highlighted by Bowenschulte was: "Be sure teaching is at the student's instructional level." Clearly, it was not. Knowing this, after highlighting it, Bowenschulte added a note in the margin: "(at first, I tried to teach & expose the student to more 4th grade concepts, but realized the student was not up to 4th grade skills. We jumped down to grade level 2 (approx) - teaching number concepts & basic facts from April through June." Three or four months were therefore lost with the student despite the fact that Respondent's own IEPs delineated the math disability.

It may have been difficult for Respondent to implement an appropriate schedule for the student upon the student's transfer. But Respondent initiated the transfer. Respondent's duty to provide FAPE continued, regardless of the increased burdens Respondent's own transfer created.

To be sure, Respondent is not a guarantor of a child's educational progress. Respondent could have demonstrated it provided FAPE perhaps by calling Wanda Bullard as a witness. Or perhaps by demonstrating that appropriate, individualized instruction was attempted with the student. Yet based on the evidence before the panel, much of the 540 minutes of "special" education is in doubt. Respondent could have proven FAPE by showing educational benefit. It did not. The student's report cards are unpersuasive, as they are easily subject to manipulation. Rather, Respondent's own math assessment done toward the conclusion of the student's bad experience at Westchester is highly persuasive that the student received no educational benefit for the student's learning disability: "The student would benefit from any extra help and individual attention especially from the Resource Room." This math assessment was performed by Carol Sipes. She did not testify, either.

Appropriateness of Miriam and Churchill Placements

6. If a school district fails to provide FAPE, a parent may seek reimbursement for a private placement if that private placement is likewise found to be appropriate. *Florence County School District Four v. Carter*, 114 S.Ct. 361, 366 (1993) [quoting *School Comm. Of Burlington v. Department of Educ. Of Mass.*, 105 S.Ct. 1996, 200405 (1985)]

Although Petitioners, in their brief, claim reimbursement for the Miriam tuition, the evidence clearly establishes that this was not an appropriate placement. Jeffrie Silverberg, Petitioner's own expert witness, testified that it was not. Petitioners themselves acknowledged that the placement was in lieu of obtaining a space at Churchill.

Churchill, however, was an appropriate placement for the student. Respondent's only bona fide argument against Churchill was that there, the student was not mainstreamed. However, mainstreaming cannot be used as a sword to deny an educational benefit if a school district itself has failed to provide FAPE. Perhaps Respondent could have provided FAPE at Westchester. But it did not. It was then incumbent upon the parents to seek out their own appropriate education for their child. Respondent does not attempt to refute the fairly ample amount of evidence that the student has progressed significantly at Churchill, and is receiving substantial educational benefit in all areas, including the student's learning disability in math. At Churchill, the student learned addition and subtraction re-grouping, memorization of some number facts, multiplication, fractions, long division, and two-step word problems.

Respondent claims further that even if Churchill was appropriate, Petitioners are not entitled to reimbursement because they failed to inform the school district they wanted to initiate a change in placement. Respondent cites *Evans v. District No. 17 of Douglas County, Nebraska*, 841 F.2d 824 (8th Cir. 1988) in support of this claim. However, in *Evans*, the court noted that the school district had no opportunity to change services for the child before the parents unilaterally removed her. *Id.* at 831 [11]. In the case before the panel, however, Respondent envisioned no change in placement. The June 3, 1996 IEP and September 10, 1996 IEP review (which occurred after Respondent knew the child was enrolled at Churchill) clearly established that Respondent's placement decision was firm and not dependent upon earlier formal notice from Petitioners. Indeed, as noted by the *Evans* court itself: "Only if it is likely that no change would be made which would benefit [the student] (if the school district had made it clear that no change in the placement would occur), would there be a denial of a free appropriate education." *Id.* at 832.

Extended School Year Services

7. In evaluating whether a student should receive extended school year (ESY) services, school officials must consider the individual needs unique to each child. *Yaris v.*

Special School District of St. Louis County, 558F.Supp. 545, 551 (D.Mo. 1983).

8. "[T]he case law indicates a need for the policy to allow for an extended school year based on the prediction of regression/recoupment problems and must always keep in mind that the decision whether to provide ESY for each student eligible for special education is a decision which should be made based on the unique characteristics of the individual student. Prediction of regression/recoupment problems is a decision the IEP team might make based on evaluation

information, evaluator opinion, and/or looking to the numerous factors, referenced above, from various court cases."

Recommendation for Extended School Year Policies, Department of Elementary and Secondary Education, September, 1993.

Contrary to Petitioners' claim, *Yaris* requires no specific regression/recoupment tests be administered to every special education student. The tests are an option available for evaluation by the IEP team, if further evaluation is warranted. The decision, like all others, must be made in good faith through a bona fide consideration of unique, individual factors.

While there was not a great deal of evidence presented by Respondent demonstrating the ESY considerations, the IEPs do confirm the issue was at least reviewed by the teams. Additionally, Petitioner's own witness, Churchill teacher Lisa Haden, testified that the private school provides no summer program other than the evaluation.

Respondent adequately demonstrated that extended school year services were properly considered, and rejected. Petitioners' claim is, at best, a "tack on" complaint, without merit.

I. ORDERS

1. Petitioners are entitled to reimbursement for their placement of the student at The Churchill School for the 1997 fall semester and 1998 spring semester.

However, the panel cannot order a specific amount of reimbursement to which Petitioners are entitled. Petitioners failed to introduce any evidence regarding their costs incurred at Churchill. Petitioner's counsel stated that tuition is \$28,000 per year. But unless stipulated by the parties, an attorney's statement is not evidence. Petitioners also indicated they would provide the panel with copies of tuition statements. None were submitted. Subsequently, in their brief, Petitioners claimed an "approximate aggregate amount of \$33,000" for all tuition and related expenses at Miriam and Churchill. As previously ruled, the Miriam placement was inappropriate and hence not reimbursable. There remains no evidence before the panel as to the amount of "damages" to which Petitioners are entitled.

Respondent was entitled to cross-examine and challenge any evidence of compensation and reimbursement claimed by Petitioners. Because no such evidence was presented, Respondent could not do so. This panel has no authority to order any specific amount of reimbursement without any evidence to support such an award. Whether Petitioners may proceed to present

evidence of a proper amount of reimbursement in a court of competent jurisdiction is an issue the panel does not address.

2. Petitioners are entitled to a reasonable attorney fee.

Again, the panel received no evidence in support of Petitioners' claim for attorney fees. No fee bill was submitted with Petitioners' written argument. Petitioners did claim the sum of \$15,000 at the conclusion of their brief. Clearly, the better practice is to submit a detailed fee statement. While \$15,000 appears to be in the range of reasonableness for this case, the panel declines to award a specific amount absent review of a statement. If necessary, the matter may be addressed in court. *See Bernardsville Board of Education v. J.H.*, 42 F.3d 149 (3rd Cir. 1994).

3. Petitioners' claims for reimbursement for tuition and related expenses for Miriam and any extended school year services are denied.

This is a unanimous decision of the hearing panel, entered this 20th day of August, 1998, and mailed to counsel for each party by certified mail, return receipt requested, this same day.

Dan Pingelton, Chairman

Karen Aslin, Panel Member

Trudy Fulmer, Panel Member

Notice of Right to Appeal

The law provides that any party aggrieved by this decision may appeal to a court of proper jurisdiction. An aggrieved party may file an appeal in state court by utilizing a "Petition for Judicial Review," pursuant to Chapter 536 of the Revised Statutes of Missouri. That petition must be filed in a court of proper venue (the county wherein the aggrieved party resides, or Cole County) within 30 days after mailing or delivery of the decision. An aggrieved party may also file an appeal in federal court by filing a complaint in a district court of the United States, without regard to the amount in controversy.

8 The panel does not address whether this would be appropriate, without agreement between the parties, after the evidence was concluded.

9 As noted in *Bernardsville*, Petitioners may not be entitled to their entire fee, as they did not prevail on every issue. *Id.*, 42 F.3d at 160-61[4,5].