



Special Education Bulletin

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summary

Parents not entitled to recover attorneys' fees because their child was not determined to be a "child with a disability" (page 2). Due process petition dismissed because parents failed to notify district of problems with IEP and of their intent to enroll their child in a non-public school (page 3). Board found in contempt for failing to comply with court order requiring the provision of compensatory education (page 4). Board permitted to keep student involved in fight on extended home instruction (page 5). A board does not have the right to appeal an investigative decision of the Office of Special Education Programs (page 5). Parents were not "prevailing parties" and, therefore, were not entitled to award of attorneys' fees (page 6). Parents entitled to reimbursement for the unilateral placement at the Orchard Friends School (page 7).

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Parents Not Entitled to Recover Attorneys’ Fees Because Their Child Was Not Determined to Be a “Child with a Disability”

D.S. and S.S., on Behalf of Minor, Z.S., Appellants, v. Neptune Township Board of Education, 2008 U.S. App. LEXIS 3267 (3rd Cir. 2008) (unpublished opinion).

Z.S. was enrolled as a freshman at the district’s high school. Prior to entering school in 2003, Z.S. had been found to have molested two younger siblings. Following his entry into high school, Z.S. underwent psychiatric and psychological evaluations which determined that he had various disorders. It was recommended that he be given psychotherapy, special education, and placed in a residential treatment program.

In May 2004, Z.S.’s parents requested that the CST evaluate him to determine whether he was eligible for special education and related services. After the CST’s review of the independent recommendations, it was determined that Z.S. was not eligible for special education and related services.

In December 2004, Z.S.’s parents filed a due process petition seeking emergent relief. They requested that the district place Z.S. in an out-of-district residential treatment program, and that the board perform an evaluation of him to determine his eligibility for special education. An ALJ issued a decision denying emergent relief, but ordered the CST to conduct an evaluation.

In a parallel legal proceeding in Superior Court, Family Part, the court determined that Z.S. should be placed at a private, residential treatment program in Pennsylvania called KidsPeace. The New Jersey Department of Education ultimately determined that the district was responsible for the costs of the residential placement.

After Z.S.’s placement at KidsPeace, the CST eventually conducted an evaluation and concluded that he was not eligible for special education and related services. His parents then requested an independent educational evaluation. The ALJ granted this request and allowed the parents to amend their due process petition to challenge the district’s eligibility determination. However, they withdrew the petition and filed a motion for attorneys’ fees in federal court. The federal court denied their motion on the grounds that Z.S. was never determined to be eligible for special education and related services. As such, the court did not reach the question of whether they were “prevailing parties.”

The parents then appealed to the Third Circuit Court of Appeals. They argued that the IDEA does not limit the right to recover attorneys’ fees to parents of “prevailing parties,” and that the term “child with a disability” was meant to include children suspected of having a disability.

The appellate court rejected this argument. It explained that, under the IDEA, a court had the discretion to award reasonable attorneys’ fees “to a prevailing party who is the parent of a child with a disability.” Pursuant to 20 U.S.C.A. §1401(3)(A), a “child with a disability” means a child

- (i) with mental retardation, hearing impairments . . . , speech or language impairments, visual impairments . . . , serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; *and*
- (ii) *who, by reason thereof, needs special education and related services.* (Emphasis in original).

The Third Circuit explained that this definition reflects Congress’ intent that the attorney-fee shifting provision should only apply where a child has one of the listed impairments and

needs special education and related services. The fact that parents have retained an attorney is not sufficient to justify an award of attorneys' fees; there must also be a determination that the child needs special education.

In this case, the parents withdrew their petition before that determination could be made, and the CST found that Z.S. was not eligible for special education. Therefore, the appellate court affirmed the lower court's decision.

Due Process Petition Dismissed Because Parents Failed to Notify District of Problems with IEP and of Their Intent to Enroll Their Child in a Non-public School

D.A. and A.A., on Behalf of R.A., Petitioners, v. Haworth Board of Education, Respondent, OAL Dkt. No. EDS 12450-07 (February 15, 2008) [decided by Carol I. Cohen, ALJ].

In 2001, R.A. was enrolled in kindergarten in the district. At that time she received a §504 plan that included classroom modifications and OT. In June 2002, her parents withdrew her and placed her at the Solomon Schechter Day School of Bergen County (Schechter). She repeated kindergarten at Schechter and remained there through the second grade.

In June 2005, R.A.'s parents notified the district that they intended to re-enroll her. Subsequently, R.A. was classified by the district's CST as multiply disabled. On October 12, 2005, an initial IEP was prepared and signed by R.A.'s father. The IEP called for R.A. to receive Orton Gillingham reading, mathematics, language arts, and speech therapy three times per week for 30 minutes. She was also assigned an aide.

On June 20, 2006, the CST held an annual IEP conference which was attended by R.A.'s mother. R.A.'s mother did not indicate that she was dissatisfied with the IEP, nor that she planned to withdraw her from the district. Mrs. A., however, did not sign the IEP.

On August 18, 2006, R.A.'s parents sent the district a letter stating that R.A. would be attending the Windward School in White Plains, New York. The letter also stated that, hopefully, she would attend school in the district at some point in the future, and it thanked her third grade teacher for her support and guidance.

On October 28, 2006, the board attorney received a call from R.A.'s father stating that he was prepared to file a due process petition to request reimbursement for R.A.'s placement at the Windward School. R.A.'s father also wanted to explore the possibility of a monetary settlement. The board attorney informed him that he had no knowledge of the case and had no authority to negotiate an agreement. The board attorney then sent a memo to the district explaining what transpired and asking whether R.A.'s parents had provided the district with a written ten day notice in advance of their unilateral placement.

On November 14, 2007, R.A.s' parents filed a due process petition. The district subsequently filed a motion seeking to dismiss the petition based on the fact that the parents failed to satisfy the notice requirements of *N.J.A.C. 6A:14-2.10(c)*.

The ALJ explained that, when parents decide that they are going to place their child in a nonpublic school and expect the district to pay for tuition, they must provide notice to the district of their intent to enroll the child in the nonpublic school and seek reimbursement. Furthermore, *N.J.A.C. 6A:14-2.10(c)* also indicates

that reimbursement can be denied if the parents did not inform the IEP team that they were rejecting the proposed IEP, or if they failed to give written notice of their concerns or intent to enroll their child in a nonpublic school, at least ten business days prior to removal of the child.

The ALJ found that the district established that R.A.'s parents failed to provide the notice required under the regulation; R.A.'s parents failed to present any sworn statement indicating that they put the district on notice of any concerns with the IEP, or that they intended to enroll R.A. in another school. Therefore, the ALJ entered an order dismissing the due process petition.

Board Found in Contempt for Failing to Comply with Court Order Requiring the Provision of Compensatory Education

L.J., a Minor, Individually and by His Parents, V.J. and Z.J., Plaintiffs, v. Audubon Board of Education, Defendant, 2008 U.S. Dist. LEXIS 12337 (D.N.J. 2008) (unpublished opinion) [decided by Hon. Jerome B. Simandle].

L.J. is classified as autistic and was previously enrolled in the district. His parents filed a due process petition alleging that the IEP the district prepared for the 2005-06 school year failed to provide a FAPE. The ALJ determined that the district failed to provide a FAPE and ordered, among other things, that the district provide L.J. with 15 hours per week of Applied Behavior Analysis (ABA) related services as compensatory education for a period of 40 weeks.

Subsequently, L.J.'s parents filed a complaint in federal court alleging that the district failed to comply with the ALJ's order. They also filed a motion seeking a preliminary injunction to order the district to comply with

the ALJ's order, and to hold the district in contempt. On November 5, 2007, the court granted the request for a preliminary injunction, but denied the request to hold the district in contempt.

On or about November 30, 2007, L.J.'s parents filed another motion to hold the district in contempt. L.J.'s mother supplied an affidavit stating that the district had not provided the compensatory education that was ordered, and had not contacted her in any way to discuss the provision of services. In response, the district supplied an affidavit from the director of special services stating that, between January 15, 2007 and June 11, 2007, the district provided L.J. with 15 hours of compensatory education per week. Therefore, the district conceded it had only provided 22 of the 40 weeks ordered by the ALJ.

The court explained that, in order to prove contempt, the plaintiff must demonstrate the following by clear and convincing evidence: (1) a valid court order existed; (2) the defendant had knowledge of the order; and (3) the defendant disobeyed the order. The court found, based on the record in the case, that all three prongs were satisfied. The court commented that the district did not supply any evidence of any effort to comply with the court order entered November 5, 2007. Therefore, the court found the district in contempt of that order.

As for the appropriate remedy, the court ordered the district to provide 15 hours of ABA-related services to L.J. per week beginning no later than the week of March 3, 2008. If the district fails to provide the compensatory education, it will have to pay a penalty of \$250 per day for each day of non-compliance. The court deferred the award of attorneys' fees pending the outcome of the case in chief.

Board Permitted to Keep Student Involved in Fight on Extended Home Instruction

Ocean City Board of Education, Petitioner, v. R.O. and B.H., on Behalf of J.P., Respondent, EDS No. 66-08 (April 17, 2008) [decided by W. Todd Miller, ALJ].

J.P. began the 2007-08 school year by attending Wildwood Catholic High School (WCHS). However, due to behavior problems, he left WCHS and on December 10, 2007, he enrolled in Ocean City High School (OCHS). J.P. was previously classified under the category of specific learning disability.

On December 13, 2007, J.P.'s third day at OCHS, he had an altercation with another student. On December 21, 2007, the CST conducted a manifestation determination, attended by his mother, and concluded that J.P.'s actions were not a manifestation of his disability. The CST, however, recommended that J.P. undergo further evaluations before being permitted to return to school; his mother agreed but objected to home instruction.

Thereafter, on January 4, 2008, in accordance with 20 *U.S.C.A.* §1415(k)(4), the board filed a petition for emergent relief seeking approval to keep J.P. on extended home instruction beyond ten days. On January 7, 2008, J.P. underwent a psychological evaluation and presented with suicidal ideation. He was then immediately hospitalized and remained there until January 15, 2008.

On January 18, 2008, the parties appeared before the ALJ and agreed to a "plan of action" that included, in part, fifteen hours of home instruction per week, and an agreement that there would be cooperation to obtain psychiatric evaluations. The case was then continued for further proceedings.

On March 5, 2008, the ALJ was advised that, in a matter in the Superior Court, Family Part, the court had ordered that J.P. undergo a psychological evaluation by Cape Counseling, and there was the possibility that the court could order a residential placement. Subsequently, on April 11, 2008, the ALJ was advised that J.P. had been arrested and incarcerated in the State of Delaware. The board received a request from the New Castle County Detention Center for J.P.'s records.

The ALJ explained that, under the circumstances of this case, J.P. was appropriately placed on home instruction in December 2007. The ALJ believed that, since J.P. was currently incarcerated and has not been fully evaluated, "home instruction remains the appropriate placement determination if and when he returns to the jurisdiction of the [OCHS]." If J.P. returns, the district must convene an IEP meeting, and his "stay put" placement will be home instruction.

A Board Does Not Have the Right to Appeal an Investigative Decision of the Office of Special Education Programs

Board of Education of the Lenape Regional High School District v. New Jersey State Department of Education, 399 *N.J. Super.* 595 (App. Div. 2008).

Parents of two students filed complaints with the Office of Special Education Programs (OSEP), alleging that the board violated the IDEA. OSEP investigated and ruled in favor of the students. The board then sought to appeal OSEP's decision to the Commissioner. The Commissioner then transmitted the case to the Office of Administrative Law.

The ALJ concluded that, under state regulations, OSEP was authorized to render a final decision on an IDEA complaint investigation, and that an administrative appeal to the Commissioner was not available. The Commissioner adopted the ALJ's initial decision, and on April 4, 2007, the State Board affirmed the Commissioner's decision. The board then filed an appeal to the Superior Court, Appellate Division.

The legal issue presented for the appellate court's determination was whether a school district can appeal to the Commissioner from an investigative decision of OSEP. The court explained that the IDEA gives parents two alternative means for redressing alleged violations of the statute: (1) they can request a due process hearing; or (2) they can file an administrative complaint with a designated state agency, which must investigate and issue a decision within 60 days. Citing *N.J.A.C. 6A:14-9.2*, the court explained that state regulations designate OSEP as the agency to receive and investigate complaints under the IDEA.

The court further explained that the Commissioner, in general, has broad authority to hear and decide disputes under the school laws. However, *N.J.A.C. 6A:14-9.2* does not provide for a right of administrative appeal beyond OSEP, but it does afford a party the right to file a request for reconsideration with OSEP.

In further support of the conclusion that there is no right of appeal to the Commissioner, the court indicated that in 2005, there were proposed amendments to *N.J.A.C. 6A:14-9.2(c)* which would have provided for the right of appeal to the Commissioner. However, the proposed amendment to the regulation was not adopted; rather, the right to request reconsideration was added instead in 2006. The court inferred from this that the State Board did not intend to confer a right to appeal. Based on the foregoing, the court affirmed the decision of the State Board.

Parents Were Not “Prevailing Parties” and, Therefore, Were Not Entitled to Award of Attorneys’ Fees

Deptford Township School District, Appellant, v. H.B., by Her Parents and Legal Guardians, E.B. and P.B., et al., 2008 U.S. App. LEXIS 10861 (3rd Cir. 2008) (unpublished opinion).

H.B. is classified as autistic and attends school in the district. Shortly after he began attending school in the district, her parents objected to the proposed IEP and filed a due process petition. On December 6, 2000, the ALJ found that the district failed to provide H.B. with a “meaningful education,” and ordered it to create “a full day in-district program in a regular education class” for H.B. The ALJ also ordered the district to compensate H.B.’s parents for their costs of educating H.B. in the interim.

The district filed an appeal of the ALJ’s decision in federal court. On February 15, 2002, the court reversed the ALJ’s determination that the district failed to provide H.B. a FAPE. However, the court ruled that the district failed to educate H.B. in the LRE, but since no harm resulted, it did not award any relief. The court required H.B.’s parents to return the portion of the interim payment which had not been spent, and permitted them to retain funds spent in good faith reliance on the ALJ’s erroneous decision.

On March 31, 2006, the court entered an order finding that H.B.’s parents were “prevailing parties” under 20 *U.S.C.A.* §1415(i)(3)(B)(i)(I) because they were allowed to obtain and retain compensation for interim services. As a result, they were awarded \$98,550 in attorneys’ fees. The district then filed an appeal to the Third Circuit Court of Appeals.

The Third Circuit explained that it will only overturn a lower court's decision to award attorneys' fees if the decision was made upon a clearly erroneous finding of fact, an error of law, or an improper application of law to fact. In this case, it was clear that H.B.'s parents were successful in the administrative proceedings before the ALJ. Nevertheless, the district court reversed the ALJ's decision and found that they did not achieve any relief with respect to the portion of the ALJ's ruling that was affirmed, since there was no harm in the district's failure to provide an education in the LRE. Despite the fact that H.B.'s parents were allowed to retain a portion of the interim payment they received, the appellate court found that the lower court erred in concluding that they were "prevailing parties" under the IDEA.

The Third Circuit explained that, in order to be a "prevailing party," a party must have prevailed on the merits of at least some of his claims, and that a purely technical or *de minimis* success is not sufficient. In this case, H.B.'s parents only achieved temporary relief and were required to return a portion of the ALJ's interim award. Since they did not achieve a victory on the merits, they cannot be considered prevailing parties. Therefore, the appellate court reversed the lower court's award of attorneys' fees and remanded the case for the entry of a judgment in the district's favor.

Parents Entitled to Reimbursement for the Unilateral Placement at the Orchard Friends School

J.D. and C.D., on Behalf of C.D., Petitioners, v. Cherry Hill Township Board of Education, Respondent, EDS No. 8122-06 (March 24, 2008) [Decided by John Schuster, III, ALJ].

C.D. was born on September 17, 1995, and before the age of three had problems verbalizing and had stopped eating.

Between ages three and five, he attended the district's preschool disabilities class. In September 2000, he transitioned into the district's self-contained kindergarten class. He ended up repeating kindergarten in the 2001-02 school year and was placed in a full-day, self-contained program.

In March 2002, a neurodevelopmental evaluation was performed which found that C.D. had a learning disorder, ADHD, emotional, speech, fine motor, coordination, and anxiety issues. C.D.'s parents enrolled him in St. Peter Celestine School (SPC) for first grade. He was placed in its self-contained special education program, which included mainstreaming for specials and homeroom. Initially, C.D. did well but, by the third grade, his academic, social and emotional problems re-emerged.

In October 2005, C.D. was independently evaluated by Dr. Ellen Fenster-Kuehl. Dr. Fenster-Kuehl found that C.D. had an impaired cognitive ability, and difficulty with transitioning, remembering directions, and speaking fluently. She found that he had high levels of stress and anxiety, and difficulty maintaining peer relationships. She recommended the following: (1) a small school setting to aid in transitioning and reduce his anxiety; (2) teachers who are trained in multi-sensory methods and will reinforce his lessons throughout the day; (3) sensory integration and social skills training incorporated into daily activities; and (4) remedial physical education.

C.D. remained at SPC for the fourth grade, but his condition worsened. His parents then contacted the district to have him re-enrolled. On May 30, 2006, an IEP conference was held and a draft IEP was prepared. The IEP proposed the following: (1) 90 minutes per day of language arts instruction in a resource room; (2) 60 minutes per day of math instruction in a

resource room; (3) mainstreaming in science, social studies, lunch, recess and specials; (4) a one-on-one aide; (5) speech/language therapy; (6) OT; and (7) 30 minutes of counseling per month.

C.D.'s parents refused to sign the IEP, and marked the "draft" on every page. They did agree to place C.D. in the extended-school-year program, but requested Dr. Fenster-Kuehl to observe the proposed program while school was in session. Based on Dr. Fenster-Kuehl's observations, she concluded that the proposed IEP would be inappropriate. She found that the mainstream classes could have up to 24 students and were too busy, noisy and fast moving for C.D. She found the lunchroom to be disorganized and extremely noisy. The outdoor recess had no organized activities to give C.D. an opportunity for social training. She found that the resource room teacher had a negative disposition and the room was noisy. She believed that, even with an aide, the multiple distractions would prevent C.D. from receiving any academic benefit in the resource room. Dr. Fenster-Keuhl prepared a report which was submitted to the district with the intent on having the district modify the IEP.

On June 30, 2006 and August 2, 2006, C.D.'s parents' attorney wrote to the district's attorney to advise that they did not find the current program to be appropriate, and that the district consider a placement at the Orchard Friends School (OFS). The district did not respond to either letter. Consequently, in September 2006, C.D.'s parents unilaterally enrolled him at OFS. They then filed a due process petition requesting reimbursement of tuition for their unilateral placement and a determination that OFS was an appropriate placement.

The ALJ hearing the case explained that the IDEA requires a district to provide a disabled

child with a personalized educational program and sufficient support services to confer a meaningful educational benefit on the child. In determining whether a district has offered such a program, a tribunal must consider the IEP actually offered by the district, and not one which it could have offered. Parents have the right to be reimbursed for a unilateral placement in an out-of-district program if it is determined that the program proposed by the district was inappropriate, and that the placement was appropriate and made in good faith.

Based on the evidence presented and the testimony of two witnesses from the school district, the ALJ found that the program offered by the district lacked the components necessary for C.D. to receive a meaningful educational benefit. The ALJ found that, in order for C.D. to receive a meaningful educational benefit, the district must provide a small school environment with teachers trained in multi-sensory teaching strategies. The ALJ found that speech and language remediation should be incorporated in C.D.'s lessons through the day, that his physical education should be tailored to his abilities, and that he should have specific social skills training.

The ALJ found that C.D.'s parents were correct in their decision to place him at OFS. The evidence presented indicated that he was doing well academically and socially at OFS. C.D.'s parents notified the district, through their attorney, that they were dissatisfied with the proposed IEP. However, the district did nothing in response to those letters and had sufficient opportunity over the summer of 2006 to modify C.D.'s program. Therefore, the ALJ ordered the district to reimburse the parents for actual costs and expenses for the placement at OFS, to prepare an IEP designating OFS as C.D.'s placement, and to incorporate details of his current program into the IEP.