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District Court Failed to Give ALJ's Decision Proper Deference and ALJ's Decision That Board Failed to Provide a FAPE Is Reinstated

Ringwood Board of Education v. K.H.J., on Behalf of K.F.J., 2007 U.S. App. LEXIS 28876 (3rd Cir. 2007) (unpublished opinion).

Prior to the start of the 2001-02 school year, K.H.J. enrolled her six-year old son, K.J., in first grade in the district. The CST determined that K.J. was eligible for special education and related services due to ADHD and a learning disability, and prepared an IEP for him. K.J. attended elementary school in the district for the 2001-02 school year. However, his mother became upset with what she perceived to be a lack of academic progress by K.J, particularly in the areas of reading and written expression. K.H.J., therefore, asked the board to pay for an out-of-district placement at the Banyan School, which specializes in educating children with language-based learning disabilities. The district rejected the request because it believed K.J. was receiving a FAPE in the LRE. K.H.J. then filed a request for mediation and a due process hearing.

The hearing before the ALJ lasted seven days and included testimony from eight witnesses. The ALJ issued a 51-page decision with 32 findings of fact, which included the following relevant findings:

16. During the 2001-2002 school year, K.J. experienced negligible progress in his reading. He would have been considered a non-reader and writer by June 2002.

17. [In an IQ test administered in May 2002, K.J.] received a Full Scale IQ of 114. . . . This represented a significant increase in his IQ from the test one year before and places K.J. in the above average IQ category. . . . Based on K.J.'s most current IQ testing, he should have the potential of

performing at least in the average grade level in reading.

. . .

27. The failure to bring K.J. up to grade level affects [his] ability to perform in all subjects. . . .

. . .

29. K.J. is presently one to two years behind his grade level in reading and writing. . . . In order for [him] to come up to grade level, he requires intensive teaching using the Orton-Gillingham and similar multi-sensory techniques throughout the day. [His current elementary school] is not providing this program . . . and [the] proposed IEP does not envision such a program.

Thus, the ALJ determined that K.J. regressed academically, and determined that the district had not provided a FAPE.

The district then filed an appeal to the U.S. District Court. The District Court, which relied solely on the administrative record, reversed the ALJ's decision. The federal judge explained that K.J. may not have been reading at grade level at the time of the OAL hearing, but he made substantial progress with reading and writing, and that the district was not required to maximize K.J.'s potential, but was only required to provide a meaningful educational benefit. The judge relied on the IEP prepared by the CST for the 2002-03 school year, to reach the conclusion that K.J. had made substantial progress in reading. K.H.J. then filed an appeal to the Third Circuit Court of Appeals.

The Third Circuit reversed the District Court's decision. Citing *Shore Reg. H.S. Bd. of Educ. v. P.S.*, 381 F.3d 194 (3d Cir. 2004), the appellate court explained that, when a District Court reviews administrative decisions involving the IDEA, the court must afford "due weight" to the ALJ's decision. Under this standard, the ALJ's factual findings are considered *prima facie* correct, and if a District

Court fails to adhere to them, it must explain why. In addition, a District Court must accept an ALJ's credibility determinations unless there is other non-testimonial evidence which would justify a contrary conclusion.

In this case which involved conflicting testimony, the ALJ found that K.J. made negligible progress during the 2001-02 school year, and at the end of the 2002-03 school year, he was behind in reading in writing. The ALJ also heard conflicting testimony regarding the improvement in K.J.'s IQ, and found that the board deserved little credit for the increase. The Third Circuit noted that the District Court rejected those factual findings without citing any evidence in the record to justify a different conclusion. Furthermore, the District Court's reliance on the IEP for the 2002-03 school year was problematic because it was prepared by the board and was the "root" of the litigation.

Based on the foregoing, the Third Circuit found that the ALJ properly concluded that the board failed to provide K.J. with a FAPE, and that the board was required to pay for K.J. to attend an out-of-district placement. Therefore, the court reversed the District Court's order and remanded the case with instructions to enter a judgment in favor of K.H.J. and for a determination of attorneys' fees and costs owed to her by the board.

Although Disabled Student Was the Victim of Bullying, Parent Failed to Prove That the Bullying Prevented the Delivery of a FAPE

L.S., on Behalf of C.S., Petitioner, v. Central Jersey Arts Community School Board of Education, Respondent, EDS No. 09573-07 (October 11, 2007) [Decided by Joann Lasala Candido, ALJ].

During the 2006-07 school year, C.S. was a sixth grade student in the Central Jersey Arts Charter School (CJACS). At the age of six, C.S. was rendered deaf in his left ear as a result of being struck by a truck. C.S. was previously classified by the Madison School District under the category "Other Health Impaired." Starting in October 2006, C.S. became a target of bullying and struggled in mathematics.

In early 2007, C.S.'s mother, L.S., apparently was not satisfied with C.S.'s program and filed a due process complaint. A mediation was conducted and, as a result of the mediation, evaluations of C.S. were to be completed, and C.S. was to be provided with 30-minute sessions of compensatory OT per week, and 30-minute sessions of speech therapy. A PT evaluation was conducted in March 2007, and it was determined that C.S. was not in need of PT. C.S. also underwent educational, psychological, social and OT evaluations.

L.S. wanted her son placed at the Newmark School. On June 12, 2007, the IEP team met and proposed that C.S. be provided with 40-minute resource room replacement classes five times per week, plus 30 minutes of speech therapy and OT per week. L.S. signed the IEP but did not read it, and did not realize that it did not contain any reference to an out-of-district placement at the Newmark School. L.S. assumed that CJACS had agreed to this placement based on the fact that she and C.S.'s case manager met at the Newmark School to determine if it was an appropriate placement.

On August 2, 2007, C.S.'s mother, L.S., filed a due process complaint alleging that C.S. did not receive a FAPE due to bullying, and requested an out-of-district placement at the Newmark School. On September 5, 2007, the IEP team met again for a re-evaluation of C.S. It was determined that C.S. would receive an aide, named Mr. T., to shadow him so as to

prevent bullying. It was also determined that he would receive one-on-one assistance in reading and language arts five times per week.

At the hearing before the ALJ regarding the out-of-district placement, evidence was presented that, starting in October 2006 and continuing throughout the 2006-07 school year, C.S. was the victim of bullying. C.S. testified that he did nothing in class during the 2006-07 school year. He could not socialize with his classmates; he was called names such as “spanky the white boy,” “white boy,” “cry-baby,” and “faggot.” He often went to the nurse after being pushed or stepped on. He was told by an administrator that, if he would stop being annoying, the kids might stop picking on him. Since Mr. T. started shadowing him, in the start of the 2007-08 school year, he has not been afraid to go to school, but he believed the Newmark School would be safer.

L.S. presented the ALJ with a test that C.S. took, in which he received a grade of 49 that was curved to an “A,” as evidence that C.S. was not receiving an appropriate education. L.S. believed that C.S. was not given a FAPE because he was exposed to a hostile educational environment. L.S. did not offer any expert testimony to prove that C.S. was not receiving a FAPE. She also did not provide any evidence that the Newmark School was the appropriate placement.

Rose Larkin, a LDTC employed by the Middlesex Regional Educational Services Commission, testified on behalf of CJACS. Larkin is C.S.’s case manager and reviewed all of his records and was present at the IEP meeting on September 5, 2007. It was her opinion that C.S.’s current placement is in the LRE.

The new principal of CJACS also testified. He was present at the September 5, 2007 IEP meeting, and testified that the school has a zero tolerance policy for bullying, and would address any further incidents that may occur.

Quoting a decision by the U.S. District Court for the District of New Hampshire, *J.W. v. Contoocook Valley Sch. Dist.*, 2001 U.S. Dist. LEXIS 13286 (D.N.H. 2001), the ALJ explained that “[a] child’s fear or hostility towards a particular placement can render the placement inadequate if it is sufficiently severe to interfere with the child’s ability to receive educational benefits.” Thus, bullying can cause the denial of a FAPE when it substantially interferes with the a student’s ability to learn.

In this case, the ALJ found it clear that C.S. was the victim of bullying. However, L.S. failed to prove that the hostile environment was preventing a FAPE. She also failed to address the fact that the school provided an aide to stop the bullying. Therefore, the ALJ found that L.S. failed to sustain her claim and ordered the petition dismissed.

ALJ Dismissed Due Process Petition After Petitioning Parent Lost Custody of Her Child

K.C., on Behalf of M.C., Petitioner, v. Verona Board of Education, Respondent, EDS No. 10705-06 (October 12, 2007) [Decided by Sandra Ann Robinson, ALJ].

K.C. is the mother of minor child M.C., who attends school in the district. On August 8, 2006, she filed a due process petition alleging that the district failed to provide M.C. a FAPE, and requested an out-of-district placement.

On September 27, 2007, prior to the start of the hearing, the Superior Court entered an order awarding M.C.’s father, P.C., sole legal and primary residential custody of M.C. and M.C.’s brother, A.C. The court order indicated that P.C. was to make decisions for his children in regard to their medical needs and education. P.C. then attended the IEP meeting for the 2007-08 school year and agreed to the IEP.

The district then filed a motion to dismiss the petition. The ALJ granted the motion since M.C.'s mother, K.C., no longer had custody of her sons and did not have the authority to question the adequacy of the program provided by the district.

Parent Lacked Standing to Challenge Adequacy of District's Program When She Lost Custody to DYFS

S.S., on Behalf of K.S., Petitioner, v. Lawnside Borough Board of Education, Respondent, EDS Nos. 6093-07 and 6094-07 (October 15, 2007) [Decided by John R. Futey, ALJ].

S.S. apparently filed two due process petitions against the board on behalf of her child, K.S. On October 5, 2007, just several weeks prior to the commencement of the hearing, the Superior Court entered an order that placed K.S. in the custody of the Division of Youth and Family Services (DYFS), and terminated S.S.'s rights to make educational decisions on his behalf. K.S. was also ordered placed with a foster family who could make parental decisions on his behalf. The order indicated that the foster parents declined to make educational decisions, the board had the responsibility of appointing a surrogate to make such decisions including decisions about the pending petitions. Based on the court order, the board filed a motion to dismiss the petitions for lack of standing.

The ALJ granted the motion finding that the court order reserved the right to make educational decisions to the foster parents, and if they declined, then the board appointed surrogate would have that right. Since S.S. had been totally divested of any right to make any educational decisions on behalf of her son, she did not have standing to challenge the board's program. Therefore, the ALJ entered an order dismissing the petitions with prejudice.

District's Decision to Place Emotionally Disturbed Student in Out-of-District Placement Due to Disciplinary Problems Was Appropriate

K.P., on Behalf of B.P., Petitioner, v. Black Horse Pike Regional Board of Education, Respondent, EDS No. 6365-07 (October 19, 2007) [Decided by Douglas H. Hurd, ALJ].

During the 2006-07 school year, B.P. was an eleventh-grade student in the district. B.P. was classified as emotionally disturbed. During his time in high school, B.P. compiled an extensive disciplinary record including incidents in which he bumped a classroom aide, ignored directives from teachers, pointed an Exacto knife at a teacher, and committed acts of violence against other students.

On January 29, 2007, B.P. entered a class and said to the teacher, "I'll smash your face in," and then made a gesture with his elbow. Because of this incident, the district sought to expel him and place him in an alternative educational setting. However, the district decided not to expel him, and he was allowed back in school with a shadow aide to monitor his behavior. The shadow aide was a substitute teacher named Bernard Moore.

Despite the shadow aide, B.P. continued to cause disciplinary problems including incidents on May 3, 2007, which led to him being suspended and placed on homebound instruction for the remainder of the school year. The CST conducted a manifestation determination and found that B.P.'s conduct was not a manifestation of his disability.

Thereafter, the CST recommended an out-of-district placement for the 2007-08 school year because of B.P.'s history of discipline problems. The CST provided B.P.'s mother,

K.P., with a list of out-of-district placements including the Burlington County Special Services School (BCSSS). K.P. did not believe any of these placements were appropriate, and on June 19, 2007 she filed a due process petition seeking an order to prevent the district from placing B.P. out of the district.

At the hearing, K.P. and B.P. testified in support of the petition. K.P. also called Dr. Henry Rowlette, Jr. and Moore as witnesses. Dr. Rowlette is a certified school social worker currently employed by BCSSS. He reviewed B.P.'s records which were sent to BCSSS and opined that BCSSS would be an appropriate placement for B.P. He testified that it offered services that would address B.P.'s individualized needs. Moore testified that B.P. tried to run away from him during gym class, and B.P. ignored instructions to stay by the door. B.P. also used profanity against Moore.

The high school principal testified on behalf of the district. His testimony indicated that B.P. needed an out-of-district placement such as BCSSS because such schools can address B.P.'s individualized needs.

The ALJ commented that the two witnesses called by K.P. did not help her son's case. The ALJ found that K.P. failed to prove that the proposed out-of-district placement would not provide a FAPE. On the contrary, the evidence demonstrated that the out-of-district placement would provide a FAPE. Therefore, the ALJ ordered the petition dismissed, and that B.P. attend an out-of-district placement for the 2007-08 school year.

Parents Entitled to Tuition Reimbursement for Unilateral Placement Due to Board's Failure to Provide FAPE

P.R. and C.R., on Behalf of K.R., Petitioners, v. Roxbury Township Board of Education, Respondent, EDS No 09874-06 (October 31, 2007) [Decided by Sandra Ann Robinson, ALJ].

P.R. and C.R. are the adoptive parents of K.R., who is now age 13. They filed a due process petition against the district alleging that it failed to provide K.R. a FAPE. Their petition requested tuition reimbursement for their unilateral out-of-district placement of K.R.

K.R. began half-day kindergarten in the district in September 1999. K.R.'s academic experience was unproductive, and she could not sound out words or the alphabet by the end of the school year.

In first grade, during the 2000-01 school year, K.R. did not do well. She had difficulty reading, and her teacher recommended that the pupil assistance committee review her program to determine if she had learning disabilities. K.R.'s teacher wanted her placed in a pull-out program. K.R. had difficulty transitioning in and out of the classroom. K.R.'s parents then had a psychological evaluation of K.R. performed by Dr. Bonnie Cimring. Dr. Cimring concluded that K.R. had ADHD and other learning disabilities. By the end of first grade, K.R. still could not read or sound out words.

In July 2001, K.R.'s parents had a neuro-developmental evaluation performed by Dr. Marilyn Ruiz, who confirmed that K.R. had ADHD. K.R. was then prescribed adderall which helped K.R. to the point where she could sit and complete a task.

K.R.'s parents presented the reports from Drs. Cimring and Ruiz to the CST. However, the principal did not initially agree to have K.R. evaluated because he thought she was too young. K.R.'s teachers disagreed with the principal's decision, and encouraged K.R.'s parents to request to have her evaluated. The principal then agreed to the evaluation, and on July 19, 2001, a neurodevelopmental evaluation was performed which revealed that K.R. had ADHD.

During the summer months, K.R.'s parents hired tutors for math and alphabet studies. Due to K.R.'s lack of progress, her parents requested an evaluation by the CST. The CST reviewed K.R.'s social assessment results and found her ineligible for special education services. K.R. could not be classified solely on the basis of ADHD, and she was not at least two years behind in grade-level performance.

In second grade, during the 2001-02 school year, K.R. remained in a regular classroom. After her first day of school, she broke into tears at home and cried for 45 minutes. She hated school and cried every day after school. She would have temper tantrums when it was time to complete assignments. After K.R.'s mother spoke to the principal and teacher, K.R. was moved to an inclusive classroom setting, and the teacher also suggested an OT evaluation.

K.R. scored in the 22nd percentile on the Terra Nova test which was a poor score, and a §504 plan was put in place. Her parents also hired a tutor to assist her with reading at school. However, by the end of the second grade, K.R. still could not read, write or sound out words.

In third grade, during the 2002-03 school year, K.R. was placed in an inclusion classroom although she was not classified. The school work became more difficult for K.R. During the fall and spring conferences with K.R.'s teacher, K.R.'s parents were encouraged to have K.R. classified.

K.R. did not improve academically, and on June 24, 2003, her parents had an educational evaluation performed at the Child Development Center at Morristown Memorial Hospital. The evaluation concluded that K.R. should be considered eligible for special education services due to Dyslexia and other problems. The report recommended private tutoring and an in-class aide.

K.R.'s parents gave the evaluation report to the principal, and requested a meeting with the CST. In August 2003, K.R. was classified as eligible for special education and an IEP was prepared. In fourth grade, K.R. was in a pull-out class for reading and language arts, and met separately with another teacher for word coding and reading. K.R. could not complete her homework without assistance because she could not read. At the end of fourth grade, K.R. still could not read, write or sound out words.

On May 20, 2004 and June 21, 2004, K.R.'s parents met with the school psychologist who advised that a new program would be offered for K.R.'s fifth-grade year, but that the IEP meeting could not be held until August 24, 2004. The school psychologist recommended that K.R. be placed in a resource room. However, K.R.'s parents did not think that would be appropriate. On July 22, 2004, the school psychologist wrote to K.R.'s parents to schedule a meeting for August 24th. They wrote back to request an earlier date because it was too close to the start of school. The school psychologist did not respond.

On August 11, 2004, K.R.'s parents wrote to the district to advise that they planned to unilaterally place K.R. at the Craig School, and that they would seek reimbursement from the district for the costs of the placement. On August 16, 2004, the district's director of special services wrote back and advised that it would not fund the cost of the out-of-district

placement, and that, although an IEP had not been prepared, K.R. could be provided with an appropriate placement. The letter also confirmed that the IEP meeting was scheduled for August 24th.

At the IEP meeting on August 24, 2004, the CST proposed that K.R. be placed in a resource room, and be assigned to a self-contained class for math and language arts. It also recommended mainstreaming with in-class support for all other subjects. The in-class support teacher was not sure whether she could handle K.R., and the principal was not sure that the in-class support would help since it had already been tried. The CST also introduced a “hybrid program” at the meeting.

In early September 2004, before K.R. was placed at the Craig School, she was given the Woodcock Johnson Reading Mastery Test (Woodcock Test). The Woodcock Test results indicated that K.R. was two grades below where she should be.

While at the Craig School, K.R. was taught using the Orton-Gillingham approach. In May 2005, near the end of her fifth grade year, her scores on the Woodcock Test showed that she had significantly improved. Her Terra Nova test results also improved, and she placed at the 62nd percentile in reading. K.R. concluded the year by performing at grade level in language arts. K.R. also attended summer classes at the Craig School, and she made additional progress in math and language arts.

In the sixth grade, during the 2005-06 school year, K.R. scored in the 50th percentile in the Terra Nova, and improved her results in reading. Her student evaluation reports showed improvement in reading, and that she was generally working at grade level.

In August 2006, K.R.’s parents filed the due process petition. Ten hearing sessions occurred between October 2006 and June 2007. Both K.R.’s parents testified on her behalf. In addition, they presented testimony from: (i) Jayne Gilbride, an expert in Dyslexia; (ii) Beth L. Haessig, an expert in school psychology; and (iii) Dr. Ruiz, an expert in neurodevelopmental pediatrics and ADHD. The following witnesses testified on behalf of the district: (i) K.R.’s fourth grade resource room teacher; (ii) the school psychologist/case manager for K.R.; (iii) the director of special services; (iv) the special education teacher who would have taught K.R. for fifth grade; (v) K.R.’s fourth grade in-class support teacher; and (vi) Kathleen M. Rotter, an expert in special education programming.

The ALJ framed the pertinent legal issues as: (a) whether the district offered an IEP which provided a FAPE for the 2004-05 school year; and (b) whether the unilateral private placement at the Craig School was reasonable and appropriate. Based on the testimony and evidence presented, the ALJ concluded that the district failed to provide K.R. with an IEP which would provide a FAPE for the 2004-05 school year. The ALJ found that K.R.’s parents gave proper notice to the district of the unilateral placement at the Craig School. Additionally, the Craig School provided K.R. with a meaningful educational benefit based on K.R.’s evaluation results and test scores. The ALJ also determined that the Craig School met K.R.’s needs in the LRE, and was, therefore, an appropriate placement. Since K.R.’s parents filed their petition in August 2006, their claims related to the 2003-04 school year were barred by the two year statute of limitations under 20 *U.S.C.A.* §1415. However, the ALJ concluded that K.R.’s parents were entitled to reimbursement for tuition and associated costs for the unilateral placement for the 2004-05, 2005-06, and 2006-07 school years.