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summary

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Parent Fails to Prove That Board Did Not Provide a FAPE in the LRE by Proposing an Out-of-District, Self-Contained Class for Her Autistic Child

S.K. on Behalf of N.K., Petitioner, v. Parsippany-Troy Hills Township Board of Education, Respondent, EDS No. 9651-06 (August 31, 2007) [Decided by Leslie Z. Celentano, ALJ].

N.K. is a ten-year-old, third-grade student, and is classified as autistic. During the 2002-03 school year, N.K. was in pre-school and attended an out-of-district Comprehensive Application of Behavioral Analysis to School (CABAS) program. N.K.'s mother, S.K., was unhappy with the CABAS program and, for the 2003-04 school year, requested and was granted an in-district kindergarten placement supplemented by a CABAS home-based program.

For first grade, the district recommended a self-contained program with Applied Behavioral Analysis (ABA) instruction. N.K. filed a due process petition and the case was settled through mediation. The district provided full-day regular instruction and a home-based ABA program. This program was continued through N.K.'s second grade year.

In March 2006, an independent evaluation was performed on N.K. by Margaret Kay, Ed.D., a certified school psychologist. Dr. Kay also conducted an observation of N.K. on June 7, 2006. Dr. Kay concluded that N.K. should be classified as multiply disabled and placed in a self-contained class. She found that N.K. was not making reasonable educational progress in his current program.

On June 16, 2006, an IEP meeting was held. Based on Dr. Kay's findings, the district proposed an IEP in which N.K. would be placed in an out-of-district, self-contained language and learning disabilities class but would be mainstreamed for extracurricular activities and non-academic subjects. S.K. made it clear that she would not consider anything other than the continuation of mainstreaming with the home-based ABA program, and filed a due process petition on July 26, 2006. S.K. requested that N.K. be placed in a mainstream third grade classroom with a one-on-one aide, support from a board certified behavior analyst (BCBA), and ABA home-based therapy. S.K. also asserted that there were procedural violations of the IDEA.

At the hearing, Dr. Carol Fiorile testified on behalf of N.K. Dr. Fiorile, a BCBA, testified that N.K. should be mainstreamed with an aide. She believed that the current program with a modified curriculum should be continued for another year, with more emphasis on "pre-teaching." She testified that the district did not perform a functional behavioral assessment (FBA), and as a result, the IEP may lead to academic regression since N.K. may model the behavior of other disabled children, rather than non-disabled children.

Michelle Goodwin, a learning consultant, testified on behalf of the district. She believed that N.K. should be classified as multiply disabled since he has a learning disability in addition to autism. It was her opinion that N.K. should be placed in a self-contained class since he has only made minimal progress with mainstreaming and the home-based ABA program.

Dr. Kay also testified on behalf of the district. She explained that N.K. was not making reasonable educational progress in his current program. He also disrupts the class,

ignores cues from his aide, and is years behind his peers. She believed that the self-contained class would give him the skills needed to be mainstreamed later in his education. In her opinion, the proposed IEP is correct and appropriate.

The ALJ explained that the IDEA requires disabled children to be educated in the LRE and be mainstreamed to the greatest extent possible. The LRE is the environment that provides education to disabled children with their non-disabled peers in the same school setting. In accordance with 20 *U.S.C.A.* §1412(a)(1)(A), a disabled child should not be removed from the regular educational environment unless the education in that environment cannot be achieved satisfactorily.

Citing *Oberti v. Board of Educ. of Clementon*, 995 *F.2d* 1204, 1215-17 (3d Cir. 1993), the ALJ explained that the following test is used to determine whether the LRE can be provided:

1. Can an education be achieved in a regular classroom (with supplementary aids)?
 - a. Consider the steps the school district has taken to accommodate the child in a regular classroom;
 - b. Consider the child's ability to receive an educational benefit from the regular education;
 - c. Consider the possible negative effects the disabled child may have on the education of other children in the regular classroom.
2. A court must determine whether, despite the need for a more restrictive educational environment, a disabled child is being mainstreamed to the maximum extent possible.

In this case, the ALJ found that N.K. cannot achieve academically in a regular classroom, despite steps to accommodate him. N.K. was not attentive in class and was disruptive to other students. Based on Dr. Kay's expert testimony, the ALJ found that N.K. is unable to receive an educational benefit in a regular classroom. The ALJ concluded that the proposed IEP was appropriate and satisfied the LRE requirements.

With respect to the allegations of procedural violations, S.K. contended that the district predetermined the IEP without a transition plan, and that the IEP was developed with an inappropriate behavioral intervention plan since a FBA was not performed. In addition, prior IEPs failed to measure progress of the goals and objectives.

Citing *Deal v. Hamilton Cty.*, 392 *F.3d* 840 (6th Cir. 2004), the ALJ explained that a court should strictly review an IEP for procedural compliance. However, technical deviations will not render an IEP invalid, and a finding of a procedural violation does not entitle a complainant to relief unless there is substantive harm.

The ALJ found no evidence that the district predetermined N.K.'s IEP. Quoting *E.W. v. Rocklin Unified Sch. Dist.*, 2006 *U.S. Dist. LEXIS* 71151 (D.Cal. 2006), the ALJ stated that "[s]chool officials are permitted to form such opinions and compile reports prior to the IEP meetings, as long as a meaningful IEP meeting is subsequently conducted where various options are discussed and considered." In this case, no options could be discussed because S.K. would not consider any alternatives. The ALJ found that the district fulfilled its duty by conducting a meaningful IEP meeting with recommendations and consideration of alternatives.

The ALJ likewise rejected S.K.'s other claims of procedural violations. There was no evidence that the IEP failed to include a statement of N.K.'s current level of performance and how his disability affected his performance; the goals are stated in the IEP and have been communicated to S.K. With regard to the lack of a behavioral assessment and transition plan, the ALJ found that these procedural violations did not cause substantive harm. The district provided sufficient evidence to demonstrate that the proposed IEP will provide an appropriate educational benefit.

Based on the foregoing, the ALJ determined that S.K. failed to meet her burden to prove that the proposed IEP did not provide a LRE for N.K. Therefore, the ALJ ordered the petition dismissed.

ALJ Grants “Stay Put” Request to Maintain Student in Unapproved, Out-of-District Placement

M.L., on Behalf of R.H., Petitioners, v. Beverly City Board of Education, Respondent, EDS No. 6657-07 (September 7, 2007) [Decided by Joseph F. Martone, ALJ].

R.H. is ten years old and classified as specific learning disabled. In February 2007, after considering other placements, including the in-district resource center program, the district's IEP team agreed that R.H. should be placed at the Orchard Friends School (OFS) which is a private, unapproved school for students with learning disabilities. On March 6, 2007, pursuant to the “Naples Act,” *N.J.S.A.* 18A:46-14, the superintendent submitted an application to the Department of Education certifying that: (a) a suitable program cannot be provided to R.H. in another setting; (b) OFS

was the most appropriate placement; (c) OFS can implement the IEP; and (d) OFS complies with all laws pertaining to the placement of special education students. The Commissioner approved the application for the remainder of the 2006-07 school year; the approval did not extend into the 2007-08 school year.

On May 17, 2007, an IEP team meeting was held to determine the placement for the 2007-08 school year. An IEP was presented to R.H.'s mother, M.L., proposing a placement in an in-district resource room program. The parental agreement/notice section of the IEP stated that M.L. had 15 calendar days to consider the proposal and after that time, unless she disagreed in writing, the IEP would be implemented starting June 1, 2007. At the meeting, M.L. disagreed with the proposal but did not follow-up with a written objection.

Between May 25, 2007 and July 3, 2007, M.L.'s attorney and the district's former attorney, who was replaced, were in contact regarding R.H.'s placement. On July 10, 2007, M.L. wrote to the case manager regarding the status of the placement. She received a letter from the case manager dated July 30, 2007, stating that the in-district program would be successful. Thereafter, on August 1, 2007, M.L. filed a due process petition.

After the due process petition was filed, M.L. made a request for emergent relief to have R.H.'s placement maintained at OFS pursuant to the “stay put” provision of 20 *U.S.C.A.* §1415(j). M.L. asserted that she did not have to satisfy the four-part standard under *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) to be entitled to emergent relief, and that she did not receive written notice or a final IEP to trigger the 15-day provision in accordance with *N.J.A.C.* 6A:14-2.3(f). The district, on the other hand, maintained that M.L. waived the “stay put” for R.H. by failing to seek due

process or mediation within 15 days of the May 17, 2007 IEP. It also argued that the *Crowe* standards were applicable to enforce the “stay put” provision.

With respect to the issue of 15-day trigger under *N.J.A.C.* 6A:14-2.3(f), the ALJ found that M.L. made it clear at the IEP team meeting that she disagreed with the proposed in-district placement. She was also led to believe that the district was making attempts to continue R.H.’s placement at OFS. It was not until the case manager’s letter dated July 30, 2007, that M.L. was aware that OFS was no longer an option. Since no written notice was provided and no final IEP was in place, the 15-day trigger did not apply, and the filing of a due process petition on August 1, 2007 was timely.

The ALJ explained that 20 *U.S.C.A.* §1415(j) generally provides that “during the pendency of any proceedings . . . unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement” In accordance with *N.J.A.C.* 6A:14-2.7(u), no change can be made to a child’s placement, classification or program unless emergency relief is granted.

With regard to the application of the *Crowe* standards, the ALJ rejected the district’s argument and found that those standards were not applicable for emergent relief in a “stay put” case. Citing *Pardini v. Allegheny Intermediate Unit*, 420 *F.3d* 181 (3d Cir. 2005) and *Drinker v. Colonial Sch. Dist.*, 78 *F.3d* 859 (3d Cir. 1996), the ALJ explained that with the IDEA, Congress adopted an absolute rule in favor of maintaining the status quo rather than a court’s discretionary consideration of other equitable factors.

In this case, R.H. was still attending OFS in June 2007, and did not attend the in-district

placement in September 2007. The ALJ determined that, when an IEP has not yet been implemented, the then-current educational placement for purposes of §1415(j) is the one in place when the dispute arose. Therefore, the ALJ entered an order continuing R.H.’s placement at OFS until a final determination is made as to an appropriate placement. The ALJ commented that a Naples Act issue may arise but that the Department of Education should consider extending the approval of the Naples Act application to OFS for the 2007-08 school year.

Board Ordered to Pay Tuition for Parents’ Unilateral Out-of-District Placement of Their Autistic Child

M.F. and L.F., on Behalf of N.F., Petitioners, v. Secaucus Board of Education, Respondent, EDS No. 10762-06 (September 18, 2007) [Decided by Barry N. Frank, ALJ].

N.F. was born on September 12, 2001 and was classified in 2003 under the category autistic spectrum disorder. During the 2005-06 school year, N.F. began attending the district’s autism program. N.F.’s parents removed N.F. from the program because they did not believe he was progressing. They placed him in a home-based Applied Behavior Analysis (ABA) program with an inclusion component, and filed a due process petition. A settlement was reached in which the district agreed to fund the placement, and N.F. was to be re-evaluated. In order to expedite the re-evaluation process, N.F.’s parents and the district agreed to have Shelby Conneely, a board certified behavior analyst (BCBA), perform a full assessment.

N.F.'s parents cooperated with the evaluations. However, they believed that little progress was being made, so on May 15, 2006, they notified the district that N.F. had been accepted to the Educational Partnership for Instructing Children (EPIC) program and wanted the district to consider that as a possible placement. The district did not respond and did not consider EPIC as a possible placement. On August 21, 2006, the parents notified the district that N.F. would be unilaterally placed at EPIC and at the Ridgewood Cooperative Preschool (RCP) with an EPIC shadow for the 2006-07 school year and the extended school year.

On August 31, 2006, an IEP and classification meeting was held. At the meeting, although the evaluations of N.F. recommended a preschool program, the district proposed a kindergarten program for his IEP. The district's supervisor of special services disagreed with the preschool program because she believed N.F. was too high functioning academically.

Subsequently, N.F.'s parents placed N.F. at EPIC and RCP. On September 18, 2006, they filed a due process petition alleging that the proposed IEP failed to provide a FAPE. They requested tuition reimbursement and a determination that the unilateral placement was appropriate. The district asserted that EPIC was more restrictive and that it can provide him a FAPE in the LRE.

The ALJ found that the proposed IEP was deficient for both procedural and substantive reasons. He found that the individuals who actually taught and observed N.F. were not consulted for input. Although *N.J.A.C. 6A:14-2.3(k)(1)* and (2) require a teacher with

knowledge of the student to participate in the development of the IEP, N.F.'s case manager admitted at the hearing that she received no input from staff.

The ALJ found that the proposed IEP failed to state the frequency and duration of services as required by *N.J.A.C. 6A:14-3.7(e)*. The ALJ stated that all of the recommendations pertaining to aides and services in the IEP describe the frequency and duration as "variable."

The ALJ noted that the independent evaluator, Conneely, concluded that N.F. needed a full-time ABA program with a full-time behavior analyst. Conneely believed that N.F. needed ten hours of ABA training beyond the school day which was not provided in the IEP. She also indicated that N.F. required intensive services, parent training and a center-based ABA school such as EPIC.

The parents' expert, Lorie Bechner, a BCBA, testified that N.F.'s negative behaviors affect his ability to learn in a group setting and affect his peer relationships. She believed he needed one-to-one teaching using the principles of ABA.

Based on the evidence and testimony presented, the ALJ concluded that the proposed IEP did not provide a FAPE. The ALJ criticized the IEP as "so sketchy, it fails to provide much of anything." The ALJ determined that N.F.'s placement at EPIC and RPC was the LRE. Therefore, the district was required to reimburse N.F.'s parents for all charges associated with N.F.'s placement at EPIC and RPC, and to continue to pay them for as long as the placement remains appropriate.

ALJ Approves Parties' Request to Place Child at an On-Line School

S.D. and K.D., on Behalf of C.D., Petitioners, v. Lenape Regional Board of Education, EDS No. 6752-07 (September 20, 2007) [Decided by John R. Futey, ALJ].

C.D. is 14 years old and is classified as other health impaired. Since age ten, she has been diagnosed with narcolepsy, cataplexy, lyme disease and dysautonomia. These disabilities have caused her to experience pain, and have limited her ability to maintain a routine level of alertness and consciousness during the school day. In addition, she has serious problems maintaining her balance which poses a safety risk.

Because of C.D.'s medical issues, she has been unable to attend school on a consistent basis. As a result, in January 2007, her parents investigated numerous alternative placements. They filed a due process petition seeking the placement of C.D. at the Keystone National High School (KNHS), which is an on-line, accredited school.

The district agreed that, for the present time, C.D.'s interests would be served by allowing her to be placed at KNHS. Although KNHS has been recognized by the New Jersey Department of Education as an accredited school, it is not an approved placement for classified students. Therefore, the parties jointly sought permission from the Office of Administrative Law to approve the placement.

The ALJ found that C.D. is unable to receive any meaningful education in the regular school environment, and that KNHS can provide appropriate educational services to her. Therefore, the ALJ approved the placement, and ordered the district to pay all costs associated with the placement so long as it remains appropriate.

ALJ Grants Emergent "Stay Put" Relief Request to Maintain Disabled Child at Her Local School

S.A. and I.A., on Behalf of N.A., Petitioners, v. West Windsor-Plainsboro Board of Education, Respondent, EDS No. 8094-07 (September 27, 2007) [Decided by Ana C. Viscomi, ALJ].

N.A. is seven years old and classified as eligible to receive special education due to blindness and cerebral palsy. An IEP developed in November 2006 for the 2006-07 school year placed N.A. at her home school, Dutch Neck Elementary School (DNES), in a combination mainstream and resource room program.

An IEP meeting was scheduled by the district for June 5, 2007 to prepare an IEP for the 2007-08 school year. However, N.A.'s parents' attorney requested, and the district agreed, to provide a draft IEP, waive the 15-day requirement to respond to the IEP, while the parents waited the results of private evaluations; the IEP meeting would then be held after the evaluations were received. On June 8, 2007, the district provided N.A.'s parents a draft IEP which proposed changing N.A.'s placement to a self-contained classroom with children with multiple disabilities at the Town Center School in Plainsboro.

On August 30, 2007, the IEP meeting was held, and the district continued to assert that the change in placement was warranted. On September 18, 2007, N.A.'s parents filed a due process petition and a request for emergent relief to maintain N.A.'s placement at DNES.

Before the ALJ, N.A.'s parents asserted that they satisfied the four conditions under *N.J.A.C.* 1:6A-12.1(e) to entitle them to emergent relief. They argued that N.A. would be irreparably harmed if the relief were not granted because the change in placement could cause her to develop "school phobia" by being in a loud class of children with behavioral issues. They argued that N.A. has made progress in her current placement, and they would have a likelihood of success on the merits. They also argued that, in balancing the equities, N.A. would suffer a greater harm than the district if the relief was not granted. Lastly, they argued that the legal right to "stay put" is well-settled in their favor. The district, on the other hand, contended that N.A.'s parents did not meet any of the four required prongs for granting emergent relief.

The ALJ essentially ignored the parties' arguments regarding emergent relief and decided the case based on 20 *U.S.C.A.* §1415(j) and *N.J.A.C.* 6A:14-2.7(u). The federal law and state regulation prohibit a change in a student's then-current educational placement unless the parties agree or emergent relief is granted. Since these provisions govern "stay put" determinations, the considerations for emergent relief under *N.J.A.C.* 1:6A-12.1(e) are not applicable.

In this case, the last agreed upon IEP from November 2006 maintained N.A. at DNES. Since the parties agreed to waive the 15-day requirement until the IEP meeting was held, then pursuant to *N.J.A.C.* 6A:14-2.3(h)(ii), the proposed IEP must not be implemented until the due process petition is heard. Therefore, the ALJ granted N.A.'s parents' request for a "stay put" order to maintain N.A. at DNES.

ALJ Denies Parents' Requests to Increase Hours of Home-Based ABA Program and to Have the Board Retain the Behaviorist and Shadow That the Parents Unilaterally Hired

L.Z. and S.Z., on Behalf of K.Z., Petitioners, v. Springfield Township Board of Education, Respondent, EDS No. 9419-06 (October 5, 2007) [Decided by Jesse H. Strauss, ALJ].

In July 2005, the district determined that K.Z. was eligible for special education and related services under the classification of preschool disabled. K.Z. was diagnosed with Asperger's Syndrome. The district's proposed IEP placed K.Z. in a preschool disabled class with part-time inclusion in a general education pre-kindergarten class in the late fall or early winter. K.Z.'s parents rejected the IEP and unilaterally placed K.Z. in a half-day preschool program at Temple Shalom in Springfield. They also hired behaviorist Joanne O'Sullivan to set up a home-based Applied Behavior Analysis (ABA) program for ten hours per week, and bi-weekly clinics.

In May 2006, K.Z. registered for kindergarten. During the extended school year, K.Z. attended camp with Christine Orrico as her shadow. K.Z. continued to receive ten hours of home-based ABA.

On August 3, 2006, an IEP meeting was held. The district proposed an IEP which placed K.Z. in a general, full-day kindergarten class with a one-on-one ABA trained aide. Among other services, the IEP provided for five hours of home-based ABA therapy per week. The parents and O'Sullivan did not believe that five hours of home-based ABA therapy was adequate.

On August 17, 2006, K.Z.'s parents filed a due process petition and a request for emergent relief. The petition requested reimbursement for the full cost of their unilateral preschool placement, a shadow trained in ABA, ten hours per week of home-based ABA therapy, and four hours per week of ABA consultation services. In terms of the request for emergent relief, K.Z.'s parents requested an order to continue the provision of ten hours of home-based ABA therapy, and to require the district to hire O'Sullivan and Orrico, or to have O'Sullivan train a new shadow.

At the emergent relief hearing on September 5, 2006, for transition purposes only, the ALJ ordered the district to retain O'Sullivan and Orrico for 30 days and to provide ten hours of home-based ABA for that period. During that time Orrico worked alone until September 18, 2006, when the district hired Susan Gavlak to be K.Z.'s one-on-one aide. They then worked together until the expiration of the ALJ's order on October 6, 2006. O'Sullivan continued to provide her services until February 2007, when the district made arrangements with the Morris-Union Jointure Commission to retain Barbara DeLoretto. After the expiration of the order, K.Z.'s parents continued to privately arrange for ten hours of home-based ABA, with the district only paying for five of those hours.

On November 13, 2006, the ALJ dismissed the parents' request for reimbursement for the unilateral preschool placement. The ALJ then conducted six days of hearings on the remaining issues.

Based on K.Z.'s educational evaluation and the testimony of K.Z.'s kindergarten teacher, the ALJ found that K.Z.'s academic skills were above average. Her grade equivalency is comparable to third grade, second month, and her age equivalency was eight years, six months.

However, K.Z.'s mother, O'Sullivan, and her kindergarten teacher observed that K.Z. exhibited problem behaviors at the beginning of 2006 including, among others: skipping and hopping around the classroom; not walking in line; not shutting the restroom door; not knowing to raise her hand to participate.

It was O'Sullivan's opinion that K.Z.'s problem behaviors affected her learning because they would distract her from learning. She believed that the home-based ABA program was necessary to address these behaviors, and that the ABA therapy be continued at ten hours per week although she had no scientific basis for reaching the number of hours. On the other hand, the district's LDTC opined that five hours of ABA therapy was sufficient because K.Z. would be attending an all-day kindergarten in the district accompanied by a shadow who would facilitate ABA services.

O'Sullivan also testified that the shadow the district retained, Gavlak, was not fully trained to collect ABA data, and that she would have worked with Orrico during the full 30-day transition period. K.Z.'s parents believed that Gavlak's lack of training would have a negative impact on K.Z.

The ALJ found that, although Gavlak admittedly was not fully-trained early on, it was reasonable to expect a period of adjustment. The district's expert in special education programming, Dr. Kathleen Rotter, opined that Gavlak worked very well with K.Z., that she did not have to be changed, and that any errors Gavlak made would not negatively affect K.Z.'s overall educational or emotional progress. Dr. Rotter also opined that K.Z.'s program was addressing her issues associated with Asperger's Syndrome, and that she was demonstrating improved social interaction in accordance with the goals of her IEP.

The ALJ found K.Z.'s kindergarten teacher's testimony regarding K.Z.'s behavior and academic progress to be compelling and persuasive. The teacher noticed a progression in K.Z.'s social and behavior skills between September and March. She testified that, by March 2007, K.Z. was functioning nicely in the classroom and with her peers. K.Z. progressed through the curriculum in all of the language arts areas and met all expectations, and was above grade level in math.

Based on the testimony and evidence presented, the ALJ concluded that the district provided K.Z. a FAPE, and that her parents failed to prove otherwise. With regard to the issue of the amount of home-based ABA therapy, the ALJ was unconvinced that ten hours was needed in order to confer a meaningful educational benefit since K.Z. would be in full-day kindergarten with an ABA trained shadow. With respect to continuing O'Sullivan and Orrico as K.Z.'s behaviorist and shadow, respectively, the ALJ explained

that he made a temporary emergent relief order only to facilitate a transition, and that the district retained the discretion and prerogative to select personnel. One remaining dispute was the hourly rate the district should pay O'Sullivan and Orrico between September 5, 2006 and October 6, 2006. K.Z.'s parents had been paying O'Sullivan \$110 per hour and Orrico \$45 per hour. The district paid them \$80 and \$13.40 per hour, respectively. The ALJ noted that the matter of the rate of pay is a contract matter that should be addressed in a different forum. However, since he ordered the 30-day retention of O'Sullivan and Orrico, he determined it was appropriate to require the district to pay them for that period the rates the parents had been paying. Therefore, the ALJ entered an order denying the petition, except that the district was ordered to pay O'Sullivan and Orrico the difference between \$110 and \$45 per hour, and the rates the district actually paid them.

address all comments and questions to

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