

summary

Parents cannot recover attorneys' fees as a prevailing party unless they can establish that their child is a "child with a disability" (page 2). Board barred from presenting evidence that was not disclosed at least five business days before the hearing (page 3). ALJ denies parents' request to place child in out-of-state, non-approved, sectarian school (page 4). Pursuant to "stay put" provision, disabled child entitled to remain in out-of-district public school placement even though that district has reached capacity (page 5). ALJ denies parents' emergent relief request for "stay put" order following termination of child's placement at out-of-district private school (page 7).

The materials contained herein are not intended to provide legal opinions and should not be regarded by subscribers as furnishing a legal opinion. Subscribers are advised in all circumstances to consult counsel relative to legal questions.

RIGHT OF REPRODUCTION AND REDISTRIBUTION RESERVED

Parents Cannot Recover Attorneys' Fees as a Prevailing Party Unless They Can Establish that Their Child is a "Child with a Disability"

D.S. and S.S., on Behalf of Z.S., Plaintiffs, v. Neptune Township Board of Education, Defendant, 2006 WL 2711504 (D.N.J. 2006) [Decided by Anne E. Thompson, U.S.D.J.].

Z.S. is currently seventeen years old. In July 2003, DYFS removed him from the home of his parents, D.S. and S.S., because he sexually molested two of his younger siblings. Z.S. was subsequently charged, and sentenced to three years probation. As a condition of his probation, Z.S. was required to complete a residential sex offender program.

In September 2003, Z.S. began attending high school in the district. On May 7, 2004, Z.S.'s mother requested an evaluation of Z.S. by the CST. The CST met on May 26 and August 5, 2004, and during one of these meetings Z.S.'s mother provided the CST with reports from independent evaluators indicating that Z.S. should be given psychotherapy and placed in a residential program. Subsequently, the CST denied the request to evaluate Z.S.

Z.S.'s mother continued to make requests to the CST. On November 22, 2004, the CST convened an eligibility meeting and determined that he was not eligible for special education and related services.

In December 2004, Z.S.'s parents filed a due process petition and requested emergent relief. Z.S.'s parents wanted Z.S. evaluated, and placed in an out-of-district residential treatment program with the district paying for the educational component of the program. On December 22, 2004, the ALJ denied the request for emergent relief, but ordered the

district to conduct assessments to determine whether Z.S. was eligible for special education and related services.

Parallel to the due process litigation, on December 3, 2004, a family court judge determined that Z.S. should be placed in a residential program called KidsPeace in Orefield, Pennsylvania. On January 7, 2005, the judge ordered Z.S. into the custody of DYFS for placement in KidsPeace. On January 26, 2005, NJDOE determined that the board was responsible for the educational costs of Z.S.'s placement at KidsPeace.

As a result of his placement at KidsPeace, the CST could not assess him. On February 4, 2005, the ALJ amended his order dated December 22, 2004, and stayed the issue of whether the board should be required to pay the educational component of Z.S.'s residential program until the board completed its appeal of the decision by NJDOE regarding its responsibility for the costs of KidsPeace.

Subsequently, the CST completed its evaluations and determined that Z.S. should not be classified. Z.S.'s parents then requested an independent evaluation which was granted by the ALJ. The ALJ designated Dr. Joseph Conroy to evaluate Z.S. at board expense. Z.S.'s parents were also permitted to amend their original petition to challenge the CST's eligibility determination. However, in September 2005, they withdrew this claim.

In 2006, the board's challenge to the decision by NJDOE was resolved – NJDOE's determination that the board was responsible for the educational costs of Z.S.'s placement at KidsPeace was affirmed. Thereafter, Z.S.'s parents filed a complaint in federal court requesting payment of \$35,492.50 in attorneys' fees as prevailing parties under 20 U.S.C.A. §1415(i)(3)(B). The board argued

that Z.S.'s parents cannot be awarded attorneys' fees because Z.S. has not been classified as a "child with a disability."

The federal court explained that, in accordance with 20 *U.S.C.A.* §1415(i)(3)(B), the court, in its discretion, may award reasonable attorneys' fees to a prevailing party who is the parent of a child with a disability. Citing *J.O. ex. rel. C.O. v. Orange Twp. Bd. of Educ.*, 287 F.3d 267 (3d Cir. 2002), the court explained that, in order for a party to be a "prevailing party," the court must find: (1) the party obtained relief on a significant claim in the litigation; and (2) there was a causal connection between the relief obtained and the litigation. In accordance with 20 *U.S.C.A.* §1401(3)(A), a "child with a disability" is a child

(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), 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.

The court commented that this definition does not explicitly require a determination by a CST as to a child's disability. However, it implies the need for such a determination. But, Z.S.'s parents never pursued the claim before the ALJ to reach such a determination. Since the purpose of the IDEA is to provide a FAPE to disabled children, and the statute reserves the rights to children with disabilities and their parents, the court concluded that Z.S.'s parents could not seek attorneys' fees unless they first establish that Z.S. has a disability. Therefore, the court denied the request for attorneys' fees.

Board Barred from Presenting Evidence That Was Not Disclosed at Least Five Business Days Before the Hearing

Z.J. and V.J., on Behalf of L.J., Petitioners, v. Audubon Board of Education, Respondent, EDS No. 6203-06 (September 11, 2006) [Decided by Joseph F. Martone, ALJ].

L.J. is seven years old and attends school in the district. He is classified as autistic. His parents filed a due process petition requesting, among other things, a positive behavioral plan with a qualified behavioral specialist to address L.J.'s behaviors, and an increase in the level of applied behavior analysis services in his IEP.

The case was eventually scheduled for a hearing on August 18, 2006, and hearings were held on August 18 and 29, 2006. During the hearing, the petitioners' attorney raised an evidentiary objection to certain documents offered for identification by the board on the basis that they had not been provided in discovery as required by *N.J.A.C.* 1:6A-10.1. The board attorney acknowledged that the documents had not been provided in discovery. The petitioners' attorney then requested that the ALJ exclude all testimony and evidence that the board intended to proffer at the hearing. The board attorney argued that, if the board's documents and testimony were barred, it would be precluded from defending itself, and that, as a matter of fairness, the board should be permitted to use the documents and testimony to defend itself.

In ruling in favor of the petitioners, the ALJ cited *N.J.A.C.* 1:6A-10.1 which states, in relevant part:

(a) All discovery shall be completed no later than five business days before the date of the hearing.

(b) Each party shall disclose to the other party any documentary evidence and summaries of testimony intended to be introduced at the hearing.

(c) Upon application of a party, ***the judge shall exclude any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing***, unless the judge determines that the evidence could not reasonably have been disclosed within that time. (Emphasis added).

The ALJ explained that *N.J.A.C.* 1:6A-1.1(c) provides that, “[s]ince these rules are established in implementation of Federal law, they may not be relaxed except as specifically provided herein or pursuant to Federal law.” The only provision that permits relaxation is if the ALJ determines that the evidence could not have been reasonably disclosed within the time provided.

The ALJ found that, while the board may have provided the petitioners with copies of evaluation reports, IEPs and other documents at some date in the past, that disclosure was not made within the context of discovery in litigation. The ALJ believed he had no discretion and was constrained to follow the dictates of *N.J.A.C.* 1:6A-10.1 in excluding the board’s evidence. Therefore, the ALJ entered an order excluding at the hearing any evidence that the board did not disclose at least five business days prior to the hearing, unless it is shown that the evidence could not reasonably have been disclosed within that time.

ALJ Denies Parents’ Request to Place Child in Out-of-State, Non-Approved, Sectarian School

J.C. and D.C., on Behalf of C.C., a Minor Child, Petitioners, v. Passaic City Board of Education, Respondent, EDS No. 7644-06 (September 18, 2006) [Decided by Ken R. Springer, ALJ].

C.C. is age five. He was previously classified as preschool disabled, but is currently classified as having a specific learning disability. He has a significant language delay, and since his first birthday he has been receiving speech therapy, OT and PT. C.C. is very small in stature. He is the average height of a three-year-old, has poor muscle tone, and poor physical endurance.

C.C.’s parents are raising him, and their eleven other children, in the tradition of Orthodox Judaism. Prior to the start of the 2005-06 school year, C.C.’s parents declined the board’s offer to place him in a preschool disabled class. Instead, they placed C.C. at the Yeshiva Katana of Passaic Preschool.

When C.C. transitioned from preschool to Kindergarten, the board proposed to place him in a self-contained class in a neighborhood school. However, C.C.’s parents rejected this placement; they wanted him placed in a non-approved, sectarian school called The Skill Building Center (SBC) which is located in Monsey, New York. SBC is attended by children of the Orthodox Jewish faith. It is a 35- to 45-minute bus ride from C.C.’s home. On June 19, 2006, C.C.’s parents filed a due process petition to request their placement preference.

At the hearing, C.C.'s mother testified that C.C. is emotionally immature, and gravitates to younger children as playmates. She and her husband are worried that, if C.C. is exposed to the general population in a public school, he will become a victim of bullying by older and bigger children. Their family pediatrician opined that placement in a classroom with older or larger children could make C.C. feel vulnerable and severely impede his ability to learn. C.C.'s parents stated that the ideal placement would be one in which the children are all approximately the same age, and that the furniture and equipment would be suitable for C.C. so he will not be made to feel different. C.C.'s pediatric endocrinologist recommended a classroom with accommodations for C.C.'s physical limitations, such as a desk of appropriate height, a bathroom designed for a young child, and access to and from the building for a child of his size.

The board's supervisor of special services testified that the in-district placement would meet C.C.'s needs. The placement would be a school located a few blocks from C.C.'s home. The class would have a maximum of twelve students, ages five- to seven-years old. There would be a special education teacher, a teacher's aide, and an additional aide for C.C. and another child, if C.C.'s parents consent. C.C. would be given a desk and chair that is appropriate to his size and he would be provided transportation. Teachers meet the school bus at the curb and escort the children into school. C.C. would have the opportunity to interact with non-disabled peers at lunch, on the playground, and during school assemblies.

The ALJ found that C.C. could derive a meaningful educational benefit from the board's proposed placement. Other than the parents' demand for a class with children of

the same age, the board would furnish nearly all of the recommendations of the educational experts. The ALJ commented that no school can guarantee that a small child will be immune from bullying. However, the district is aware of the potential problem and can devise strategies to protect him. The ALJ further commented that "[i]n today's diverse society, exposure to children from other backgrounds and cultures is a positive value, which will add to, rather than detract from, [C.C.'s] educational experience."

In ordering the dismissal of the petition, the ALJ concluded that the board offered a FAPE. Moreover, the ALJ concluded that the petition must be dismissed because *N.J.S.A.* 18A:46-14(h) prohibits school districts from arranging placements for disabled students in religious schools.

**Pursuant to "Stay Put" Provision,
Disabled Child Entitled to Remain
in Out-of-district Public School
Placement Even Though That
District Has Reached Capacity**

R.B. and C.B., on Behalf of A.B., Petitioners, v. Great Meadows Regional Board of Education and Byram Township Board of Education, Respondents, EDS No. 10163-06 (October 12, 2006) [Decided by Ken R. Springer, ALJ].

A.B. is four years old and resides with his family in the Great Meadows Regional School District (Great Meadows). A.B. was diagnosed with autism and was classified by Great Meadows as eligible for preschool handicap services.

For the 2005-06 school year, A.B. was placed out-of-district in a program operated by the Byram Township Board of Education (Byram). In April 2006, representatives of both districts met and developed an IEP for the 2006-07 school year. The IEP placed A.B. in Byram. During the summer of 2006, A.B. had an ESY in Byram. A.B. did well in these programs. The regular school year and ESY placements were accomplished through contracts between Great Meadows and Byram.

On July 19, 2006, Byram notified Great Meadows that it could not provide services to A.B. because its program reached capacity. Byram's letter stated that "[D]ue to our increased number of in-district autistic students identified through Early Intervention, our program will be at capacity going into the School Year."

Despite the notice from Byram, Great Meadows did not convene an IEP meeting within ten days, nor did it notify A.B.'s parents in writing that the placement in Byram would no longer be available. Great Meadows did provide A.B.'s parents with verbal notice of the change in placement, and began to search for alternate placements. Great Meadows contacted 16 potential placements. Of those 16, A.B.'s parents rejected five, and six had no space or did not accept tuition students.

On September 27, 2006, A.B.'s parents filed a due process petition regarding A.B.'s placement. They followed-up on September 29, 2006 with a request for emergent relief to return A.B. to his placement in Byram pending the outcome of the due process hearing. On October 2, 2006, Byram refused to admit A.B., and A.B. had not been receiving educational services other than OT and speech therapy.

A.B.'s mother was concerned that, unless A.B. returned to school soon, he will regress and his behavior will become so disruptive that he would pose a risk of danger. A.B. engages in dangerous behaviors including eating wooden objects such as mulch and chewing on wooden swing sets. A.B.'s pediatrician stated that A.B. "becomes markedly more repetitive and attention-seeking at the end of just a weekend away from school."

Both school districts argued that the request for emergent relief was untimely because A.B.'s parents failed to act within 15 days of receiving notice of the change in placement in accordance with *N.J.A.C. 6A:14-2.3(h)*, and thereby waived their right to invoke the "stay put" provision. Byram also argued that it is not responsible for providing A.B. with a FAPE, and has the right not to renew a contract for an out-of-district placement at the end of a school year.

The ALJ rejected the districts' arguments and ruled in favor of A.B.'s parents. Citing 20 *U.S.C.A. §1415(e)(3)* of the IDEA, the ALJ explained that the "stay put" provision requires a disabled child to remain in his current educational placement unless the local school district and parents agree otherwise. The ALJ determined that the 15-day notice provision was not applicable because A.B.'s parents never received written notice of the change in placement as required by *N.J.A.C. 6A:14-2.3(h)* and (g); oral notice is not sufficient to trigger the running of the 15-day period.

With respect to Byram's argument, the ALJ stated that Byram did not have to admit A.B. However, once it admitted him and accepted federal funding for his placement, it became subject to the "federal strings attached to the receipt of federal IDEA funding."

Citing *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859 (3rd Cir. 1996), the ALJ explained that the Third Circuit has held that the language in the stay put provision is unequivocal, and requires that the child remain in the then current educational placement. As such, it is unnecessary for an ALJ to consider the criteria for granting emergent relief under *N.J.A.C. 1:6A-12.1(e)*. Moreover, the stay put protection is equally applicable if a private, receiving school is involved. Therefore, the ALJ determined that A.B. is entitled to the protection of the stay put provision pending the outcome of the due process hearing.

ALJ Denies Parents' Emergent Relief Request for "Stay Put" Order Following Termination of Child's Placement at Out-of-District Private School

J.R. and M.R. on Behalf of T.R., Petitioners, v. Somerville Borough Board of Education, Respondent, EDS No. 8134-06 (October 18, 2006) [Decided by Richard F. Wells, ALJ].

T.R. is currently in the tenth grade and is eligible for special education and related services. During the 2005-06 school year, T.R. was placed out-of-district at the Sage Day School (SDS), which is a private school. On June 2, 2006, an IEP meeting was held and her placement at SDS was continued for the 2006-07 school year.

On October 3, 2006, T.R.'s parents attended a meeting at SDS, with SDS staff and T.R.'s case manager from the district. Apparently, T.R. made some kind of threatening statements including a statement that "[t]his school makes me want to shoot myself in the

face." A decision was made by SDS personnel to terminate T.R.'s placement at that meeting. By letter dated October 4, 2006, T.R.'s parents were given 15 days notice of the termination of T.R.'s placement. Nevertheless, T.R. was denied access to SDS effective October 4, 2006, and T.R.'s parents filed a request for emergent relief that day. However, T.R.'s parents' application for emergent relief only named the school district as a respondent; it did not name SDS as a respondent.

T.R.'s parents argued that SDS unilaterally terminated T.R. without due process, and without written notification. T.R.'s parents asserted that the termination of her placement violated the procedural safeguards of *N.J.A.C. 6A:14-2.3*. They requested an order requiring T.R. to remain in her current placement at SDS pending the outcome of a due process hearing.

The district argued that SDS is an indispensable party to the proceeding. It asserted that, unless SDS is joined as a party, the district had no legal authority to compel SDS to reinstate T.R. SDS advised the district that, even if a court order is obtained, it would not be in a position to return her to her prior program due to her behavior. SDS advised that, if T.R. is ordered to be reinstated, it would place her in a restricted, one-on-one setting. The district also argued that OAL has no jurisdiction over SDS since it is a private school. Lastly, it argued that T.R.'s parents failed to meet the criteria for the issuance of emergent relief under *N.J.A.C. 1:6A-12.1(e)*.

The ALJ did not reach the issue of whether SDS was an indispensable party since it decided to reject the application for emergent relief on other grounds. However,

assuming SDS was joined as a party, the ALJ rejected the district's argument that OAL lacked jurisdiction over private schools that accept out-of-district placements. Based on decisions in *J.N. v. Ridgewood Bd. of Educ.*, 282 F.Supp.2d 221 (D.N.J. 2003) and *R.B.H. v. Paterson Sch. Dist.*, EDS No. 1345-00 (February 4, 2000), the ALJ concluded that, because SDS accepted placements of students protected by IDEA, it is subject to IDEA regulations and could be held responsible for its failure to comply with the rules regarding the termination of T.R.'s placement. Thus, T.R. could be entitled to a "stay put" order.

The ALJ then analyzed the four criteria for granting emergent relief under *N.J.A.C. 1:6A-12.1*. As to the first two criteria, the ALJ found that the legal right underlying T.R.'s due process claim is settled in her favor, and there is a likelihood that she will prevail on the merits of her underlying claim since SDS

violated the procedural requirements under the IDEA.

However, the ALJ found that T.R.'s parents failed to satisfy the third and fourth criteria. T.R.'s parents did not demonstrate that T.R. will suffer irreparable harm if she is not reinstated at SDS. Although her education has been disrupted, the district has offered at home instruction, and there is no legal authority which indicates that a temporary infringement on the right to "stay put" is considered irreparable harm. With respect to balancing of the equities of the parties, the ALJ found that T.R.'s potential suicidal ideation should not be discounted, and that, if she is reinstated, there is a danger that she may cause harm to herself. Based on the foregoing, the ALJ denied the request for emergent relief.

address all comments and questions to

Maria M. Lepore
Beth L. Finkelstein
Andrew Babiak
Association Counsel
info@njasa.net