



Special Education Bulletin

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summary

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Twenty-Year-Old Classified Student Not Entitled to Compensatory Education and is Found to Have Graduated High School As of June 2004

J.T., Petitioner, v. Winslow Township Board of Education, Respondent, EDS No. 8071-04 (May 1, 2006) [Decided by Joseph F. Fidler, ALJ].

J.T. is a twenty-year-old adult, who was eligible for special education and related services, and was classified as Other Health Impaired. After J.T.'s birth, he was not expected to live more than two years. J.T. has never walked and always attended school in a wheelchair. He has a tracheotomy and uses a ventilator 24 hours per day.

On September 14, 2005, J.T. filed a due process petition and an application for emergent relief. He alleged that the board failed to provide him a FAPE for the 2002-03 and 2003-04 school years. He requested compensatory education and related services. Apparently, his emergent relief application requested invoking the stay-put rule even though he had passed all of his twelfth grade classes. Eventually, the parties stipulated that J.T. was not deemed graduated as of June 2004, and a hearing would be held to determine whether he was provided a FAPE for the 2002-03 and 2003-04 school years.

J.T.'s mother, K.T., was his sole witness at the hearing; J.T. could not attend because he was recuperating from surgery to insert a rod in his neck. K.T. admitted participating in the formulation of his IEPs for the 2002-03 and 2003-04 school years. She also had a parent advocate present with her. She agreed to the implementation of both IEPs in which J.T. was mainstreamed for all classes, except for 11th grade science. She did not file a due process petition either school year, and now regretted agreeing to the IEPs. Apparently, she was not satisfied that he was provided with sufficient assistive technology following hearing tests and

a cerebral palsy evaluation. She was also dissatisfied with the transition services provided to J.T., and felt that the board should have provided him with occupational and physical therapy.

An assistant principal, who taught J.T.'s 12th grade British Literature class, testified that J.T. was correctly placed in a regular education classroom, that he was competitive in her class, and earned his passing grade. The district's social worker testified that J.T. was active socially, and had no attendance or discipline problems. She also testified that none of J.T.'s teachers expressed concerns with his program. J.T.'s final grades for the 2002-03 school year were: 86 in English/American Literature; 87 in Managing Money; 80 in Marketing I; 95 in Physical Education/Health; 94 in Science Concepts; and 83 in U.S. History. J.T.'s final grades for the 2003-04 school year were: 88 in Art I; 70 in CAD I; 83 in English/British Literature; 90 in Physical Education/Health; 92 in Spanish I; and 98 in Theater Arts I. The social worker testified further that, on September 9, 2003, she attended the CST conference with K.T. and J.T. to discuss transition planning including the availability of services from the Division of Vocational Rehabilitation (DVR).

The DVR counselor also testified at the hearing. She indicated that the DVR helps disabled individuals return to work if they have the potential to do so, and that she assists disabled children leaving school to become employed. The counselor testified that DVR is ready, willing and able to assist J.T. but that K.T. has not given her consent.

The final witness to testify was the district's school psychologist. He testified that J.T. became more independent and assertive as he got older, and that he actively participated in the development of his IEPs. J.T. never indicated to him that his program was inappropriate or that he needed physical or occupational therapy.

A.H.'s preschool teacher testified that A.H. interacted appropriately with peers and adults alike, and as time went on she no longer required prompting to maintain eye contact. She believed that A.H. was ready for Kindergarten without substantial assistance. The classroom aide testified that A.H. was frustrated at first, but got over it, and never had to be removed from the classroom.

The speech and language expert testified that she tested A.H. on December 1, 2005, and found her skills to be age appropriate. She found that A.H. had difficulty making eye contact and requesting help, but these were mild issues that did not require classification. The Kindergarten teacher testified regarding the class size and composition, and the chief school administrator testified about procedural issues involving the evaluation of A.H.

The ALJ explained that the burden of proof rests with A.H.'s parents, and that they failed to prove that A.H. could not receive a meaningful educational benefit by attending Kindergarten in the district. The ALJ questioned whether the PDD-NOS label applied to A.H. at all. The ALJ stated that Dr. Breslin failed to identify any specific behaviors that were severe or pervasive as required under *N.J.A.C. 6A:14-3.5*. The ALJ explained that, while Dr. Breslin believed A.H. needed a proactive approach because of her perfectionist tendencies which could impact her in the future, the IDEA, however, is primarily concerned with current impediments to learning. All the professionals testified that A.H. was a successful student, and while the shadow aide was probably useful, that was insufficient to justify reimbursement for the unilateral placement.

Furthermore, the ALJ found that, even if A.H.'s parents had proved that the district's Kindergarten program was inappropriate, the award of tuition would have been reduced because of the parents' delay in having A.H. evaluated. The ALJ stated that "[p]arents

cannot resist evaluation for fear of the results and at the same time seek reimbursement for a unilateral placement." Based on the foregoing, the ALJ ordered the petition dismissed.

Parents Entitled to Recover Reduced Amount of Attorneys' Fees Because They Were Partially Successful in Preventing Board from Reducing Amount of ABA Therapy

A.S., a Minor Child, by His Parents, V.S. and G.S., Appellant, v. Colts Neck Board of Education, 2006 WL 1795134 (3d Cir. 2006).

A.S. is a twelve-year-old boy who is eligible for special education and related services. He suffers from autism and other mental disabilities. During the 1999-2000 school year, he attended a class for autistic students in the district. Beginning in December 1999, A.S. also received 15 hours per week of in-home Applied Behavior Analysis (ABA) therapy.

In August 2000, a dispute arose between A.S.'s parents and the board over the appropriate amount of ABA and speech/language therapy that A.S. should receive. In February 2001, the parties agreed that he would receive 12 hours of ABA therapy per week, and that the issue of the amount of speech/language therapy would be submitted to an independent expert, whose recommendation would be binding. On April 30, 2001, the expert issued his report that required the provision of three 30-minute speech/language therapy sessions per week, a computerized voice output device, and 40-minutes of training per week on using the device.

On May 15, 2001, the board prepared a new IEP in which A.S.'s ABA therapy was reduced to six hours per week. A.S.'s parents then filed a due process petition. They contended that A.S.'s ABA therapy should be increased to 21 hours per week. They requested "compensatory services" for ABA therapy that the board

allegedly failed to provide during the 2000-01 school year. Lastly, they alleged that the board “unduly delayed” implementation of the expert’s recommendations in that the board had not provided the voice output device and training, and they requested compensatory services for speech/language as required by the expert.

During the litigation, the parties entered into an agreement regarding the provision and protection of the computerized voice output device. However, the parties were unable to reach agreement regarding the three other issues and the case proceeded to a hearing.

The ALJ determined that 12 hours per week of ABA therapy was appropriate, and thus, denied both the board’s request to reduce the number of hours and the parents’ request to increase them. The ALJ also dismissed the parents’ request for compensatory services.

On April 4, 2003, A.S.’s parents filed a complaint in federal district court seeking \$70,208.81 in attorneys’ fees, \$804.33 in costs, and \$6,153.20 in expert fees pursuant to 20 U.S.C.A. §1415(i)(3)(B). The parties then filed cross-motions for summary judgment.

On September 9, 2004, the district court granted A.S.’s parents’ motion, in part, and awarded them \$13,636.45 in attorneys’ fees, and the full amounts requested for costs and expert fees. A.S.’s parents then filed an appeal to the Third Circuit Court of Appeals.

The Third Circuit affirmed the district court’s decision. The Third Circuit noted that the board did not challenge the recovery of expert fees despite the decision by the Supreme Court in *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 126 S.Ct. 2455 (2006) and, therefore, waived any argument regarding this aspect of the award.

The appellate court explained that it reviews the trial court’s denial of attorneys’ fees on the basis of whether the court abused its discretion. The trial court found that A.S.’s parents qualified as prevailing parties under 20 U.S.C.A. §1415(i)(3)(B) because they were partially successful on the issue of ABA therapy—they were able to prevent the board from reducing the ABA therapy to six hours per week. Although the trial court concluded that the parents’ attorneys rendered reasonable services and had reasonable hourly rates, it reduced their fees by 80% due to the fact that they prevailed only on one claim.

Citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the appellate court stated that, when a plaintiff is only partially successful, a reduction in the fee award is warranted, and the trial court may either identify the hours that should be eliminated, or it may reduce the award to account for the limited success. In this case, the trial court was unable to identify the specific hours to be eliminated because the attorney’s fee certification did not indicate the number of hours spent working on any particular issue. Therefore, the court simply reduced the award to account for their partial success.

The Third Circuit rejected the parents’ argument that the district court abused its discretion by applying a rigid mathematical formula to reduce the fee by 80%, rather than taking into account the fact that ABA therapy was the “primary issue” in the litigation. The appellate court did not find that the district court applied a strict mathematical approach without considering other relevant factors, such as the importance of the legal claims. Therefore, the Third Circuit affirmed the judgment of the district court.

J.T. told him that he was looking forward to moving on after high school.

Based on the testimony and evidence presented, the ALJ found that J.T.'s IEPs for the 2002-03 and 2003-04 school years were reasonably calculated to provide him with a meaningful educational benefit. He found that J.T. succeeded by receiving passing grades in all of his classes, and earning sufficient credits to graduate in June 2004. The ALJ concluded that J.T. did not prove that the board failed to provide him with a FAPE, and also concluded that J.T. is deemed to have graduated as of June 2004. Therefore, he ordered the petition dismissed.

Disabled Student Attending School at Jointure Commission was not Denied a FAPE When the District Changed Her Designation from Fourth to Third Grade In Order to Comply with the No Child Left Behind Act

J.G., on Behalf of E.G., Petitioner, v. Dumont Board of Education, and Jointure Commission of South Bergen, Respondent, EDS No. 5122-06 (May 15, 2006) [Decided by Carol I. Cohen, ALJ].

E.G. is nine years old and resides in Dumont. She suffered brain injuries at birth, and has received special education and related services since preschool. Her current placement is at the Jointure Commission of South Bergen (JCSB). Classes at JCSB are not graded, and E.G. is in a self-contained class with students performing at a second or third grade level. Because JCSB is a self-contained facility, there is no retention policy. For the 2004-05 school year, E.G. was performing at a second grade level, although the front of her IEP designated her as grade three.

Sometime after October 12, 2004, the board's director of special education received a memorandum from the Office of Special Education Programs (OSEP) regarding the

assignment of grade levels. According to the memo, all districts were to assign grade levels to disabled students who were placed in ungraded programs. Grade levels were based on the age of the child and the school year. If the child turns the designated age anytime in a school year, s/he would be assigned the corresponding grade level. According to a chart in the memo, a child who turns age nine is assigned grade level three. The memo emphasized the distinction between a student's assigned grade level and his/her level of performance. The purpose of the grade level assignment was to facilitate accurate reporting of data under the No Child Left Behind Act and to help implement transition services.

As a result of the memo, E.G. was re-designated as grade three. However, the board did not notify E.G.'s parents of the memo or the re-designation. The change in designation did not affect the educational services provided to E.G.

During the 2004-05 school year, E.G. did not take the NJASK 3 exam. E.G.'s parents agreed with the teacher's recommendation that E.G. not take the test because she was not able to deal with the testing environment.

In February 2006, E.G.'s IEP originally designated her as grade four. However, that designation was crossed out and grade three was inserted. E.G.'s mother, J.G., refused to consent to this designation. She filed a due process petition and application for emergent relief requesting that E.G. be given the NJASK 4 exam instead of the NJASK 3. The ALJ denied this request, and J.G. kept E.G. home from school during the examination period.

However, J.G.'s petition also requested that E.G. be placed in the fourth grade and that she be provided with compensatory education to bring her up to grade level. J.G. argued that labeling E.G. as a third grader has affected her teachers' perceptions of E.G.'s abilities, and that E.G. has been injured emotionally. In

addition, she contended that labeling E.G. as a third grader for two years in a row is a violation of the board's promotion and retention policy and *N.J.S.A. 18A:35-4.9*.

The ALJ explained that J.G., on behalf of her daughter, has the burden of proving that the designation of E.G. as a third grade student denied her a FAPE. In this case, J.G. asserted that procedural defects, namely the board's failure to notify her of the OSEP memo and the grade change on the IEP caused E.G. to be denied a FAPE. However, the ALJ explained that procedural defects alone are not sufficient to prove the denial of a FAPE. J.G. did not present any expert testimony to indicate that E.G.'s grade designation has any effect on her educational program. The ALJ also rejected J.G.'s argument that the board violated its retention policy and *N.J.S.A. 18A:35-4.9* under which it was promulgated. The ALJ accepted the testimony of two board employees, who testified that the retention policy does not apply to special needs children in self-contained classes. Therefore, the ALJ ordered the petition dismissed.

ALJ Finds Application of Board Policy, Which Would Bar Emotionally Disturbed Student from Participating in High School Graduation Ceremony, is Arbitrary and Capricious

K.W., on Behalf of Y.M., Petitioner, v. Washington Township Board of Education, Respondent, EDS No. 4020-06 (May 31, 2006) [Decided by Douglas H. Hurd, ALJ].

Y.M. was a high school senior at the time the litigation began. She transferred to the district's high school in 2002-03 as a freshman. On February 24, 2003, she was involved in a fight with another student in a classroom after school. A number of teachers had to intervene to stop the fight. After an expulsion hearing, Y.M. was placed at the Gloucester County Alternative High School for the remainder of the 2002-03 school year. Y.M. was given a

second chance to return to the district's high school, and she returned for her sophomore year.

On February 18, 2004, she was involved in another fight with a student. She also yelled profanities and broke away from school personnel after being restrained. Following this fight, the administration recommended that Y.M. be expelled.

Following the expulsion recommendation, the CST and Y.M.'s mother, K.W., agreed to have Y.M. evaluated to determine if she is eligible for special education and related services. Y.M. received homebound instruction for the remainder of the 2003-04 school year. As a result of the evaluations, Y.M. was determined eligible for special education and was classified as emotionally disturbed. Due to her eligibility under the IDEA, the board cancelled the expulsion hearing. Moreover, since she was not classified at the time of the fight, the board did not conduct a manifestation determination.

Y.M.'s IEPs for the 2004-05 and 2005-06 school years placed her at the Brookfield Academy. Y.M. made educational progress at Brookfield Academy and avoided disciplinary problems.

The board has a policy governing participation in the high school's graduation ceremony. That policy states, in pertinent part, that a student "will be denied the privilege of participation if he/she . . . (d) has been . . . placed in an out-of-district program due to disciplinary infractions."

K.W. filed a due process petition seeking emergent relief in order to have Y.M. participate in the high school's graduation ceremony. There was no question that Y.M. would receive her diploma; the only issue is whether she can be barred from the ceremony. The board argued that Y.M. falls within the policy because her out-of-district placement was for disciplinary reasons.

The ALJ found that the board was acting unreasonably in barring Y.M. from the ceremony. The ALJ recognized that the board has great deference in such matters, but that K.W. has demonstrated that its actions in this instance are arbitrary and capricious. The ALJ recognized that Y.M.'s participation in the fights is reprehensible, but they occurred more than two years prior, and she has not been subject to further discipline since that time. Moreover, Y.M. was classified as emotionally disturbed right after the second fight. The behavior intervention plan in her IEP indicates that she needed help to deal with anger management and fighting. The ALJ stated, that, if "she had been classified before the fight, she would have been entitled to a manifestation determination which could have affected the course of events thereafter." The ALJ believed that Y.M. was probably in need of special education services prior to the fight. Therefore, the ALJ found that the board's policy should not apply to Y.M., and ordered the board to allow her to participate in the graduation ceremony.

ALJ Upholds Board's Decision to Bar Emotionally Disturbed Student from Participating in Middle School Moving-Up Ceremony

C.L., on Behalf of P.L., Petitioner, v. Sayreville Board of Education, Respondent, EDS No. 4385-06 (June 20, 2006) [Decided by Douglas H. Hurd, ALJ].

P.L. is an eighth grade student and is classified as emotionally disturbed. As a result of an incident that occurred on May 9, 2006, the board banned him from participating in the middle school moving-up ceremony. In that incident, P.L., after being provoked by another student, retrieved a broom handle, unscrewed it from its base, and walked back to the student for the purpose of hurting or frightening him. P.L. disobeyed his teacher's orders to put down the handle.

The IEP team subsequently conducted a manifestation determination and concluded that his actions were not a manifestation of his disability. P.L. was then suspended for seven days.

P.L.'s mother, C.L., then filed a due process petition seeking emergent relief. She requested that P.L. be permitted to participate in the moving-up ceremony. The board opposed the petition, and argued that it acted reasonably under its policies.

The ALJ found that P.L.'s actions on May 9th were deliberate and planned, and that he could have changed his conduct, but chose not to. There was no evidence that the board acted in an arbitrary, capricious or unreasonable manner. Therefore, the ALJ affirmed the board's decision to bar P.L. from the moving-up ceremony.

Board Appropriately Declassified Student and Parents not Entitled to Reimbursement for Unilateral Placement at Goddard School

W.H. and E.H., on Behalf of A.H., Petitioners, v. Bloomsbury Board of Education, Respondent, EDS Nos. 8666-05 and 8667-05 (August 2, 2006).

A.H. was born on December 10, 1999, and at age three she was classified as preschool disabled. During the 2003-04 school year, she attended an out-of-district placement at Three Bridges Elementary School in Readington. Because of significant gains she made, for the 2004-05 school year, A.H. transitioned into the district's preschool program. Her IEP required a full-day program, with the afternoon devoted to special services. She attended a half-day integrated pre-school class in the morning, and was offered an afternoon program for special services. However, A.H.'s parents declined the district's afternoon program and sent her to a private nursery school.

Toward the end of the 2004-05 school year, A.H.'s classroom teacher recommended declassification. In the teacher's opinion, A.H. was ready for Kindergarten without substantial support. In May 2005, the CST met to address the issue of declassification. E.H.'s parents were unwilling to discuss the issue and resisted having her evaluated, despite being offered multiple testing dates.

At the outset of the 2005-06 school year, the district would not offer A.H. a shadow aide. Subsequently, E.H.'s parents unilaterally enrolled A.H. in a regular education Kindergarten at the Goddard School and paid for an aide. They then filed a due process petition seeking tuition reimbursement for the 2005-06 school year and compensatory education for speech services not provided during the 2004-05 school year.

The board then filed a cross-petition to have A.H. evaluated. After the cross-petition was filed, A.H.'s parents consented to have A.H. evaluated. The evaluation was conducted by the district's school psychologist on December 5, 2005. A.H. had a full-scale IQ of 114, placing her in the high average range of intelligence. A.H. was then declassified in April 2006. The district acknowledged that A.H. needs speech and language services but believed it can provide them without classification.

At the hearing, six witnesses testified on behalf of A.H., including her mother, father, grandfather, Dr. Anita Breslin, a psychologist, A.H.'s teacher at the Goddard School, and A.H.'s shadow aide at the Goddard School. A.H.'s mother testified that A.H. has difficulty with abstraction and that she must be given exact instructions. She testified that A.H. gets frustrated easily and needs to win at everything she does. She interacts poorly with other children and tends to play by herself.

A.H.'s father testified that A.H. becomes anxious in new social settings, and has to be prepared well in advance for unfamiliar

activities. A.H.'s grandfather testified as to the events that occurred at the May 2005 IEP meeting which he attended.

Dr. Breslin testified that A.H. suffers from Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS). Dr. Breslin testified that this disability is described in the DSM IV manual, and is diagnosed based on twelve behavioral criteria. Individuals who have six or more are considered autistic, and those having less than six are PDD-NOS. To fall within these designations, a child must suffer in a severe and pervasive way.

Dr. Breslin observed A.H. in her preschool class in the district, and at the Goddard School. Her testing indicated that A.H. had a verbal IQ of 91, a non-verbal IQ of 123 and a full-scale IQ of 105. She testified that A.H. has difficulty interacting with peers and making eye contact. A.H. is a perfectionist, and Dr. Breslin opined that, as school becomes more demanding, these traits will weigh on her to a greater degree. Dr. Breslin found that A.H. functioned well at the Goddard School but she attributed this in part to the shadow aide, who would bring A.H. back on task.

A.H.'s teacher at the Goddard School testified that A.H. is intelligent but must be monitored to keep her on task. She explained that A.H. takes losing badly, tends to blame others, interacts poorly with fellow students, and tends to play by herself. The shadow aide's testimony corroborated this testimony.

The district also presented six witnesses including the school psychologist, A.H.'s preschool teacher, a preschool classroom aide, a speech and language expert, the Kindergarten teacher, and the chief school administrator. The school psychologist testified that, based on her observations of A.H. and on A.H.'s evaluations, she did not think A.H. was within the PDD spectrum.