Special Education Bulletin

August 2006 Vol. 12, No. 5

summary

Student with behavioral disability should be placed at the school within the district that can administer the IEP (page 2). Parent fails to prove that child was entitled to an additional seven hours of home-based ABA therapy per week (page 2). Court affirms ALJ's decision finding that autistic student could not receive FAPE in mainstreamed classroom (page 3). Parents fail to prove that out-of-district placement was required for multiply disabled child (page 4). Plaintiff, who signed settlement agreement obtained through mediation, not a "prevailing party" and, therefore, not entitled to attorney's fees (page 6). Court orders board to pay attorneys' fees, costs and expert fees (page 6). Court reverses ALJ's decision ordering emergent relief to disabled student who was using drugs at school and was suspended for 20-days without manifestation determination (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

920 West State Street • Trenton, New Jersey 08618 • Tel: 609.599.2900 • Fax: 609.599.1893 • E-mail: info@njasa.net

Student with Behavioral Disability Should Be Placed at the School Within the District That Can Administer the IEP

S.C., on Behalf of M.C., Petitioner, v. Newark Board of Education, Respondent, EDS No. 2006-10611 (December 14, 2005) (Decided by Sandra Ann Robinson, ALJ).

M.C. attends school in the Newark School District. In 2004, he was assessed by the CST. Based on the assessment, he was classified as "behavioral disability AD classified." M.C.'s special education placement was made with the consent of the Division of Youth and Family Services, because M.C.'s mother, Sharonda Conley, was incarcerated. M.C. briefly attended the Morton Street School but was relocated to the Dayton Street School when the district was unable to provide a certified teacher at the Morton Street School to comply with M.C.'s IEP.

When M.C. could no longer attend the Morton Street School, which is across the street from his home, M.C.'s mother filed a due process petition alleging that M.C. no longer needed special education services, and that any services should be provided at the Morton Street School. Before the ALJ, the school district argued that, not only did M.C. need special education services, but the appropriate educational setting was a self-contained behavioral disabilities class at the Dayton Street School, where M.C. would be transported. Members of the CST testified that M.C. continues to be eligible for his classification based on their assessments; his academic achievement was low because his behavior needs to be controlled.

The ALJ concluded that M.C.'s mother failed to prove that he should no longer be classified, and failed to prove that the Dayton Street School was an inappropriate placement. Therefore, the ALJ ordered that M.C. attend the Dayton Street School so as to comply with the IEP, and dismissed the petition.

Parent Fails to Prove That Child Was Entitled to an Additional Seven Hours of Home-based ABA Therapy per Week

S.J.B., on Behalf of S.B., Petitioner, v. Haddonfield Borough Board of Education, EDS No. 6842-03 (December 19, 2005) (Decided by Ana C. Viscomi, ALJ).

S.B. is ten years old and classified as autistic. In accordance with his IEP, he attends an out-of-district placement at the Bancroft Day School and receives three hours of speech therapy and ten hours of Applied Behavioral Analysis (ABA) therapy per week at home.

On September 11, 2003, S.B.'s father, S.J.B., filed a due process petition seeking compensatory education for additional hours of home-based related services for the 2001-02, 2002-03, and 2003-04 school years. After extensive discussions and litigation proceedings, the parties reached a partial settlement of the claims for compensatory education, except for the claim that S.B. should receive seven additional hours of ABA therapy per week at home.

The first issue the ALJ had to resolve was the burden of proof. By the time the remaining claim was presented for a hearing, the United States Supreme Court in the case of *Schaffer v. Weast*, 126 *S.Ct.* 528 (2005) had determined that the burden of proof in IDEA cases lies with the party challenging the appropriateness of the IEP. Prior thereto, in accordance with *Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg. H.S. Dist.*, 116 *N.J.* 30 (1989), it was clear that the board had the burden of proof. In this case, the board argued that, regardless of the state of the law at the time the case was filed, *Schaffer* now controls the resolution of the case. S.J.B. argued that the Supreme Court was silent as to whether *Schaffer* should be retroactively applied and, although the general rule is that the Court's decisions should be given retroactive application, there are circumstances such as this where a party's reliance on the original state of

the law should preclude applying the change in the law. The ALJ agreed with the board and rejected the father's reliance argument; the ALJ determined that the burden of proof rests with the father as the petitioner.

The ALJ then turned to the issue of whether S.B. was denied a FAPE because his IEP for the 2003-04 school year did not contain an additional seven hours per week of home-based ABA therapy. The ALJ explained that the IEP provided for ten hours of ABA therapy, and that the resolution of the legal issue depended upon the parties' experts' opinions.

S.J.B.'s expert witness was Dr. Kimberly Schreck. Based on her observations and reviews of pertinent documents including S.B.'s IEP, Dr. Schreck opined that the ten hours which was currently allotted for home-based ABA therapy was not sufficient to allow for the completion of the IEP's goals and objectives. S.B.'s IEP included 40 goals and 130 objectives. Based on her observation of one ABA session, only seven ABA programs were completed within one hour. She extrapolated this information to estimate that only 17 percent of S.B.'s goals and 6 percent of his objectives were completed on a daily basis. In her opinion, a significant increase in hours was necessary for S.B. to practice each of his IEP goals daily. However, under cross-examination and upon review of S.B.'s ABA home programming book, she admitted that S.B. completed twice as many ABA programs per day in contrast to her estimate.

The board's expert witness, Dr. Vincent Winterling, testified that he observed S.B. during two home sessions. He opined that the IEP should not have included seven additional hours of ABA home programming. He testified that additional hours would be detrimental to S.B. because he would be frustrated in failing to perform the tasks.

Based on the evidence and testimony presented, the ALJ found that no education professional ever recommended home ABA services prior to S.B.'s enrollment in the district. He found that Dr. Schreck's report did not recommend an additional seven hours of ABA home therapy. The ALJ was critical of Dr. Schreck's opinion because she limited her review to six weeks' worth of data which followed a three-month period without home programming and a change in therapists. Ultimately, the ALJ found that the 2003-04 IEP provided a FAPE, and that petitioner failed to prove that his son was entitled to additional hours of ABA home programming. Therefore, the petition was dismissed.

Court Affirms ALJ's Decision Finding That Autistic Student Could Not Receive FAPE in Mainstreamed Classroom

L.E. v. Ramsey Board of Education, 435 *F.3d* 384 (3rd Cir. 2006).

M.S. was born on December 29, 1998. Before the age of three he was diagnosed as having an autistic spectrum disorder and speech and language dysfunctions. Prior to turning three, M.S.'s parents, L.E. and E.S., had enrolled M.S. in various preschool programs. When M.S. turned three he was determined eligible for special education and related services. The CST then attempted to determine the proper placement for him.

The CST received various opinions regarding the placement. M.S.'s early enrichment teacher believed that M.S. would benefit from a mainstream preschool class if accompanied by an aide trained in behavioral intervention. Dr. Debra E. Seltzer, M.S.'s developmental pediatrician, also opined that he should be in a mainstreamed preschool class.

The CST, on the other hand, believed that M.S. should have a segregated placement in which he would have more one-to-one contact with the teacher. On December 11, 2001, an IEP was developed which provided for a half-day at the Hubbard School, which contains a

self-contained class of disabled children, and supplemental services that are infused into the school day.

M.S.'s parents rejected the IEP. On January 3, 2002, the CST met without the parents and revised the IEP, and included a statement regarding the parents' desired placement and that an integrated preschool may be appropriate in September 2002. M.S.'s parents rejected this IEP as well, and continued M.S. in the programs in which he was already enrolled.

Subsequently, the CST began looking for integrated placements for M.S. On July 22, 2002, the CST prepared an IEP which included an integrated classroom in Park Ridge starting in September 2003. Although M.S.'s parents were pleased with the placement, they were concerned that inadequate supplemental services may be provided because they were uncertain of the qualifications of the unnamed providers. Additionally, they were unsatisfied with the goals in the IEP because it did not include progress he made in the spring. Therefore, they accepted the placement but made their own plans for the provision of supplemental services.

Subsequently, M.S.'s parents filed a due process petition alleging that the board failed to provide an IEP in the spring of 2002 which offered a FAPE, and that the 2002-03 IEP failed to include appropriate supplemental services. The ALJ determined that the parents did not prove that the board failed to provide a FAPE in the LRE, and dismissed the petition. The parents then filed a complaint in federal district court seeking to overturn the ALJ's decision. The district court affirmed the ALJ's decision and granted summary judgment to the board. The parents then filed an appeal to the Third Circuit Court of Appeals.

On appeal, M.S.'s parents argued that the district court erred in affirming the ALJ's FAPE and LRE analysis regarding the spring 2002 IEP. They argued that the ALJ improperly blended the FAPE analysis and the LRE analysis, rather than analyzing them as two distinct questions. The appeals court, however, explained that, while the ALJ may have stated language in his decision which conflated the FAPE and LRE analyses, she subsequently distinguished between the two, and properly framed the question as whether the Hubbard School placement was the LRE in which M.S. could receive a FAPE. Therefore, the appeals court rejected M.S.'s parents' argument.

With regard to the 2002-03 IEP, M.S.'s parents argued that the district court erred in affirming the ALJ's determination that the IEP only needed to provide "some educational benefit." The appellate court rejected this argument. The phrase "some educational benefit" means and requires that the board provide a "meaningful educational benefit" in accordance with *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 *F.3d* 572 (3d Cir. 2000). Therefore, the court of appeals affirmed the district court's decision, and dismissed the appeal.

Parents Fail to Prove That Out-of-District Placement Was Required for Multiply Disabled Child

J.B. and R.B., on Behalf of K.B., Petitioners, v. Flemington-Raritan Regional Board of Education, Respondent, EDS No. 6205-05 (January 26, 2006) (Decided by Douglas H. Hurd, ALJ).

K.B. was born on November 1, 1992, and was adopted by J.B. and R.B., from a Bulgarian orphanage, when she was two-and-one-half years old. In October 1996, K.B. was found eligible for special education services, and since September 1997, she has attended school in the district. She is classified as multiply disabled.

Starting in the sixth grade, K.B. began attending her local school, the Reading-Fleming Middle School. Her IEP included a combination of self-contained language and learning disabilities classes with mainstream classes. It also provided for speech and occupational therapies.

On March 9, 2005, the CST proposed continuing this IEP for the seventh-grade year. However, K.B.'s parents objected and sought modifications. The district agreed to some of the modifications, but a follow-up meeting was never held despite the CST's invitations to do so. K.B.'s parents subsequently requested an out-of-district placement at the New Grange School, but the district declined. Therefore, on July 18, 2005, K.B.'s parents filed a due process petition requesting compensatory education and an order approving the out-of-district placement. The petition alleged that the district failed to provide K.B. with a FAPE for the 2003-04, 2004-05, and 2005-06 school years.

The ALJ explained that, according to federal and state law, a disabled student must be provided with an IEP that is uniquely tailored to the child's needs. The child must be provided a meaningful educational benefit from the program. However, the burden of proving whether the child received a FAPE lies with the child's parents.

In order to prove that the district failed to provide a FAPE, K.B.'s parents relied on the expert testimony of Dr. Joel E. Morgan, a neuropsychologist. Dr. Morgan observed K.B. at her school, and evaluated her in May 2005. In his report, he recommended that she be placed in a private school setting for multiply-handicapped children. He opined that she needs an integrated comprehensive school-wide program to address her significant learning and memory problems.

Although Dr. Morgan's report did not mention the New Grange School, and although he admitted he had little familiarity with the school, he still testified that New Grange would be an appropriate placement. Dr. Morgan was not aware that K.B.'s current program was integrated, and he only "suspected" that K.B. feels lost in a mainstream class. Based on the foregoing, the ALJ gave diminished weight to his report and his opinion, and did not find his testimony persuasive.

K.B.'s parents also testified. They stated that K.B. has problems with homework, and that they essentially have to do the homework for her. They do not understand how she can get good grades, when they see her lack of learning. The ALJ found K.B.'s parents to be very sincere and caring. However, they lacked first hand knowledge of her placement, and the fact that K.B.'s homework was difficult is insufficient to justify a change in placement; it may simply require a modification to the IEP.

K.B.'s case manager, and two of her special education teachers testified on behalf of the district. K.B.'s case manager has 23 years experience as a school psychologist and was qualified as an expert in the development and implementation of special education programs. She testified that the district provides K.B. with a multi-sensory, integrated program. She opined that K.B.'s IEPs were reasonably calculated to provide her with an educational benefit.

Jennifer Renda was K.B.'s teacher for sixth-grade special education math and language arts. She also taught K.B. for seventh-grade special education math. Renda testified that K.B. was a social child that did not have any attendance or behavioral problems. Although K.B. was two grade levels behind her peers, Renda still felt sixth and seventh grade were appropriate for her.

Geoffrey Hewitt was K.B.'s sixth-grade science teacher. He testified that K.B. did well. He also saw her on the bus at the end of the day because he had bus duty. He did not observe any problems.

Based on the evidence presented, the ALJ concluded that the parents had failed to prove that the district did not provide a FAPE. He found their expert's testimony flawed and lacking. On the other hand, he found the district's witnesses to be credible and knowledgeable. Therefore, he ordered the petition dismissed.

Plaintiff, Who Signed Settlement Agreement Obtained Through Mediation, Not a "Prevailing Party" and, Therefore, Not Entitled to Attorney's Fees

A.B., Individually and on Behalf of A.B., Plaintiffs, v. Newark Board of Education, Defendant, 2006 *WL* 343909 (February 14, 2006) (Decided by Dennis M. Cavanaugh, U.S.D.J.).

During the 2003-2004 school year, the CST evaluated A.B. and determined that she was eligible for special education and related services. In September 2004, a dispute arose over the implementation of the IEP. On October 22, 2004, a non-attorney, lay advocate, named Tracee Edmondson, filed for mediation on A.B.'s behalf. The mediation was held on November 12, 2004, and resulted in a signed "Notice of Agreement." The Notice of Agreement provided that the parties would conduct an IEP meeting in order to revise A.B.'s program.

On February 2, 2005, A.B.'s mother filed a complaint in federal court seeking counsel fees as a "prevailing party" under the IDEA. The district subsequently filed a motion for judgment on the pleadings seeking a dismissal of the complaint.

The court explained that, pursuant to 20 *U.S.C.A.* §1415(i)(3)(B), it has the discretion to award attorney's fees to the parents or guardians if they are the prevailing party. In *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health & Human Resources,* 532 *U.S.* 598 (2001), the Supreme Court held that, in order to be a prevailing party, the party must have either obtained an enforceable judgment on the merits, or obtained a court-ordered consent decree. In *John T. v. Del. Cty. Intermediate Unit*, 318 *F.3d* 545 (3d Cir. 2003), the Third Circuit Court of Appeals determined that, in order for a settlement agreement to confer prevailing party status on a party, the agreement must: (1) contain mandatory language; (2) be entitled "Order;" (3) bear the judge's signature; and (4) provide for judicial enforcement.

In this case, the court determined that the Notice of Agreement did not confer prevailing party status on the plaintiff. The Notice of Agreement did not contain any of the required elements set forth in *John T.* Therefore, the court granted the district's motion and dismissed the complaint.

Court Orders Board to Pay Attorneys' Fees, Costs and Expert Fees

Township of Bloomfield Board of Education, Plaintiff, v. S.C., on Behalf of T.M., State of New Jersey, Department of Education, Defendants, 2006 *WL* 372918 (February 16, 2006) (Decided by Dickinson Debevoise, U.S.D.J.).

On March 12, 2004, S.C. filed a due process petition with OSEP seeking a residential placement of T.M. On June 29, 2004, the ALJ ordered the board to provide a residential placement for T.M. and to pay the costs of tuition, room and board and all nonmedical related services. The board appealed the ALJ's decision to the federal district court. On June 29, 2004, the federal district court affirmed the ALJ's decision. Subsequently, S.C., through the Special Education Clinic at Rutgers University School of Law, filed a motion for the recovery of attorneys' fees and costs.

The court explained that the IDEA gives it the discretionary power to award a parent of a disabled child who is a prevailing party, attorneys' fees. In accordance with 20 *U.S.C.A.* §1415(i)(3)(b), the attorneys' fees are based on the prevailing rates in the community for the kind and quality of services furnished.

Esther Canty-Barnes, Esq. was the attorney who represented the plaintiffs. She also supervised the law students who worked with her on the case. She submitted an affidavit in which she described the services she rendered. Between December 12, 2003 and June 16, 2005, she performed 218.5 hours of services. However, she reduced the number of hours by half to 109.5. Her usual hourly rate is $185, which the court found was within the prevailing

rates for the Newark area for the kind and quality of services rendered. The total amount for her time is $20,211.25.

Three law students collectively performed 431.25 hours of services. Ms. Canty-Barnes asserted that the prevailing rate for interns is $85 per hour. She discounted the number of hours by 75 percent to 107.8 hours. The total for the law students' services was $9,163. In addition, a request for $375 was made for the services of an expert witness, Dr. Ellen Fenster-Kuehl. Therefore, the total of all fees and expenses was $29,749.25.

The board asserted that there are a number of equitable considerations which militate against awarding fees. First, the board argued that S.C. unreasonably prolonged obtaining a residential placement by not consenting to cooperate with DYFS. The court rejected this argument based on the fact that negotiations with DYFS were part of a series of discussions to try to remedy a complex problem. Second, the board argued that S.C. was represented by a public clinic and did not have to pay any legal fees. The court also rejected this argument stating that, unless the board is itself suffering financial hardship, the fact that representation was provided by a public clinic should not matter. The court stated that the issue is not whether the public clinic should receive attorneys' fees, the question is how a reasonable fee can be determined given the special circumstances involved when a clinic is part of a law school's educational process. The court found that the clinic offered generous discounts on the time for services it rendered. It found that it was unlikely that a private attorney specializing in this field could have performed comparable work for $29,374.25. Therefore, the court ordered the board to pay the foregoing sum.

Court Reverses ALJ's Decision Ordering Emergent Relief to Disabled Student Who Was Using Drugs at School and Was Suspended for 20-Days Without Manifestation Determination

A.P., a Minor, Individually and by Her Parents and Legal Guardians, A.P. and M.S., Plaintiffs, v. Pemberton Township Board of Education, Defendant, 2006 *WL* 1344788 (May 15, 2006) (Decided by Robert B. Kugler, U.S.D.J.).

A.P. is a multiply disabled high school student. On January 5, 2005, a student told A.P.'s guidance counselor that A.P. had smoked marijuana before school. The school's substance abuse counselor subsequently found A.P. in a school bathroom apparently snorting a controlled substance. A substance abuse evaluation form was completed which indicated that A.P. had glassy eyes, a runny nose, and was nervous and uncooperative. She refused to submit to a drug test, and in accordance with board policy, was suspended from school for ten days. A manifestation conference was held in which it was determined that A.P.'s drug use and refusal to submit to the drug test was not a manifestation of her disability.

Although A.P.'s suspension was completed on January 20, 2005, she did not return until she complied with board policy which required a medical report confirming her fitness to return to school. On January 24, 2005, she submitted the report and returned to school.

On January 27, 2005, a student and a security officer separately observed A.P. smoking in a school bathroom. A substance abuse evaluation form was completed which indicated that she was trembling, nervous, and was physically and emotionally out of control. Once again, A.P. refused to submit to a drug test. This time she was suspended for twenty days in accordance with board policy. During the suspension, she was provided with ten hours of home instruction per week.

On February 4, 2005, A.P., through her parents, filed a due process petition seeking emergent relief. The petition requested that she be immediately returned to school and that the board be enjoined from suspending her for any future drug use. A manifestation conference

was scheduled for February 9, 2005 but was adjourned and never rescheduled because A.P.'s mother refused to participate.

On February 15, 2005, the ALJ determined that the board erred in removing A.P. from her educational placement for more than ten days without providing a manifestation determination. Therefore, he ordered the board to immediately reinstate A.P., to develop a behavioral assessment plan, and to perform a psychological evaluation.

On July 29, 2005, A.P., through her parents, filed a complaint in federal district court for attorney's fees and costs as a prevailing party. The board filed a counterclaim requesting that the ALJ's decision be reversed. The board then filed a motion for summary judgment which was not opposed. The board argued that the ALJ's decision was improper because 20 *U.S.C.A.* §1415(k)(1)(G) specifically authorizes the board to suspend a disabled student for up to 45 days for possession or use of drugs at school, regardless of whether the conduct was related to the student's disability.

The court explained that, pursuant to 20 *U.S.C.A.* §1415(k)(1)(B), the board may remove a disabled student from his current placement for up to ten days for violating the code of student conduct. In accordance with 20 *U.S.C.A.* §1415(k)(1)(C), the board can only suspend a disabled student for more then ten school days if "the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability." The manifestation conference must be held within ten school days of any decision to change the placement. However, 20 *U.S.C.A.* §1415(k)(1)(G), provides an exception to the general rule, and permits the board to remove a disabled student from his educational placement for up to 45 days "without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child ... knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school." Although, this provision does not relieve the board of the obligation to hold a manifestation conference, it renders the result of any such conference irrelevant. The court found that, while the board failed to hold the conference within ten days of A.P.'s suspension, the outcome would not have had any bearing on A.P.'s right to return to school.

The court further explained that a board's failure to comply with the IDEA's procedural requirements do not automatically constitute a denial of a FAPE; only those procedural violations that result in the loss of an educational opportunity or seriously infringe on the parents' opportunity to participate in the IEP process warrant granting of relief.

The court noted that another federal court in a case called *Farrin v. Maine Sch. Admin. Dist. No. 59*, 165 *F.Supp.2d* 37 (D.Me. 2001), found that a board's failure to conduct a timely manifestation determination is harmless error if the plaintiffs cannot present any evidence that demonstrates that the lateness impeded their ability to participate in the IEP process, or that it negatively affected the student. In this case, there was no evidence presented that the board's failure to provide a manifestation determination within ten days of the 20-day suspension caused A.P. a deprivation of educational benefits.

Although administrative decisions are entitled to some deference in IDEA cases, the court found that the ALJ did not address: (1) the exception contained in 20 *U.S.C.A.* §1415(k)(1)(G); (2) the fact that the plaintiffs filed for emergent relief only five days into the suspension; and (3) the fact that the failure to hold the manifestation conference was due to A.P.'s mother's refusal to participate. Therefore, the court found that A.P. failed to prove that she was entitled to any relief, and entered an order reversing the ALJ's decision.