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Expert Witness Fees Are Not Recoverable to Prevailing Parents in IDEA Cases

Arlington Central School District Board of Education v. Murphy, 126 S.Ct. 2455 (2006).

Pearl and Theodore Murphy filed an action on behalf of their son, Joseph, alleging that the board violated the IDEA. They were successful in federal district court in having the board pay for Joseph's tuition to attend private school; the court's decision was affirmed on appeal by the Court of Appeals for the Second Circuit.

The Murphys then sought to recover \$29,350 in fees for the services of an educational consultant named Marilyn Arons. The district court granted the Murphy's request in part, holding that the value of Arons' time spent, between the time the hearing was filed and the time it was adjudicated, were recoverable under the IDEA. In addition, the court held that Arons, a non-lawyer, could only be compensated for expert consulting services, and not for time spent on legal representation. Therefore, the court allowed the Murphys to recover \$8,650, and the Second Circuit, again, affirmed on appeal. The board then appealed to United States Supreme Court, which granted *certiorari*, to resolve the conflict among the Circuits as to whether Congress authorized the recovery of expert fees to prevailing parents in IDEA cases.

The Supreme Court reversed the lower court decision, and held that the IDEA's fee-shifting provision does not authorize prevailing parents to recover expert witness fees. The Court explained that Congress enacted the IDEA pursuant to the Spending Clause of the Constitution, Article I, §8, clause 1. When Congress provides federal funds to states and attaches conditions to a state's acceptance of those funds, Congress must make those conditions unambiguous; a state cannot knowingly accept the funds if it is unaware or

unable to ascertain the condition. In this case, the issue is whether the IDEA provides clear notice to state officials of the obligation to compensate prevailing parents for expert fees.

The Court began its analysis with a "plain" reading of the text of 20 U.S.C.A. §1415(i)(3)(B), which states, in pertinent part, as follows:

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs –

(I) to a prevailing party who is the parent of a child with a disability; . . .

The Court found that this provision speaks to an award of reasonable attorneys' fees. However, there is no "hint that acceptance of IDEA funds makes a State responsible for reimbursing prevailing parents for services rendered by experts."

The Court rejected the parents' argument that the term "costs" should be interpreted in accordance with its ordinary usage and would therefore authorize reimbursement of all costs incurred by parents in IDEA cases. The Court explained that "costs" is a term of art found in 28 U.S.C.A. §1920; this statute contains a list of costs which can be awarded in federal court. The Court found that the term "costs" was not meant to be an open-ended provision making states liable for all "expenses" to prevailing parents in IDEA cases such as travel and lodging. Moreover, the Court previously decided two cases—*Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) and *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991) – in which the Court construed cost-or fee-shifting provisions in the Federal Rules of Civil Procedure and from a civil rights statute, 42 U.S.C.A. §1988. It determined in these cases that such provisions will not be read to permit a prevailing party to recover expert fees unless there is explicit statutory authority.

The parents also argued that their interpretation of §1415(i)(3)(B) is supported by a provision in the Handicapped Children's Protection Act of 1986 (HCPA) that required the General Accounting Office (GAO) to collect certain data including "the number of hours spent [in IDEA cases] by personnel, including . . . consultants." They contended that this congressional request to the GAO would be meaningless if Congress did not intend for consultant expenses to be recoverable. The Court disagreed, stating that there is nothing in the HCPA provision about the award of fees to consultants, and there are many reasons why Congress might have wanted the GAO to gather information on expenses including future procedural amendments to the law.

The Murphys made two final arguments. First, they argued that their interpretation of the IDEA supports the law's goal of ensuring that disabled children are provided a FAPE. Second, they argued that Congress intended for prevailing parents to be compensated for expert fees based on the legislative history of §1415. In particular, they cited the following statement in the Conference Committee Report:

The conferees intend the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case.

The Court, again, rejected these arguments. It stated that the IDEA seeks to promote the goal of ensuring that disabled children receive a FAPE but not at the expense of all other considerations, including fiscal considerations. With regard to the legislative history, the Court did not find it persuasive enough. The Court stated that, in a Spending Clause case, "the key is not what a majority of the Members of both Houses intend, but what the States are clearly told regarding the conditions that go along with the acceptance of those funds." Therefore, the Court reversed the appellate court's decision.

ALJ Denies Parent's Request for Emergent Relief Seeking Order Requiring Board to Perform a Full Evaluation

J.T., on Behalf of T.T., Petitioner, v. Washington Township Board of Education, Respondent, EDS No. 00893-06S (March 20, 2006) [Decided by Jeff S. Masin, ALJ].

T.T. is a 15-year old, tenth-grade student who is not classified. His father, J.T., filed an application for emergent relief on March 6, 2006, requesting a full CST evaluation and demanding that the board take "full responsibility for T.'s two failures and arrange for reinstatement for athletics."

On March 17, 2006, the ALJ conducted the emergent relief hearing. At the hearing, it was learned that T.T. is taking advanced English and honors chemistry despite the board's recommendation against him taking them. T.T. failed the courses during the first marking period and passed advanced English in the second marking period. However, his average made him ineligible to play lacrosse. Mr. T. represented that an evaluation performed at Children's Hospital in Philadelphia concluded that T.T. had ADHD. However, Mr. T. did not provide a copy of the report, nor did he offer any expert testimony. A §504 Plan with accommodations just recently had been agreed upon. However, Mr. T. still wanted a full evaluation.

The ALJ explained that, in order for emergent relief to be granted, the standards set forth in *N.J.A.C. 6A:14-2.7(m)(1)* needed to be satisfied. This regulation requires the ALJ to determine: (1) whether the petitioner will suffer irreparable harm if the relief is not granted; (2) that the legal right underlying the petitioner's claim is settled; (3) that the petitioner has a likelihood of prevailing on the merits; and (4) that, in balancing the equities, the petitioner will suffer greater harm than the respondent if the relief is not granted.

The ALJ found that neither party presented much evidence to support their positions. The ALJ stated the §504 Plan with accommodations may be sufficient to deal with T.T.'s educational issues. However, the ALJ determined that it would be inappropriate to order a full CST evaluation on an emergent basis without any expert opinion that a learning disorder exists. Therefore, the ALJ denied the request for emergent relief.

With regard to T.T.'s athletic ineligibility, the board attorney advised that there is a waiver provision under the rules of the New Jersey State Interscholastic Athletic Association (NJSIAA) for classified students. However, T.T. is not classified. Moreover, the athletic eligibility determination rests with NJSIAA. Therefore, the ALJ denied the request regarding T.T.'s athletic eligibility.

Court Affirms ALJ's Decision Denying Tuition Reimbursement for Unilateral Placement in a Parochial School for 2002-03 School Year, but Awarding Tuition Reimbursement for 2003-04 School Year

A.Z., on Behalf of M.Z., Plaintiff, v. Mahwah Township Board of Education, Defendant, 2006 WL 827791 (March 30, 2006) [Decided by Katherine S. Hayden, U.S.D.J.].

M.Z. is currently nine years old. In the fall of 1999, when he had just turned three, M.Z.'s mother, A.Z., had him evaluated by the Center for Child Development and Wellness in Ridgewood where he was diagnosed with "moderate expressive language deficits and mild to moderate articulation deficits."

In December 1999, A.Z. requested that the board evaluate M.Z. The CST evaluated M.Z. but did not find that he was eligible for any preschool special education services.

During M.Z.'s second year of preschool, his mother had him evaluated by the Pediatric

Otolaryngology Department of NYU's School of Medicine, where he was diagnosed with an "articulation disorder associated with oromotor weakness." It was recommended that M.Z. receive speech therapy and oromotor exercises.

In the fall of 2001, M.Z. attended Kindergarten in the district. At that time, A.Z. requested another evaluation. This time, the CST determined that M.Z. was eligible for special education. The IEP provided for 30 minutes of speech therapy per week.

In April 2002, after A.Z. requested another evaluation, the CST determined that M.Z. had ADHD, a fine and visual motor coordination disorder, and speech and language deficits, among other problems. Nevertheless, the board's learning consultant determined that M.Z. was able to manage grade-level tasks. The proposed IEP for the 2002-03 school year offered a first-grade placement with separate special education classes for four 40-minute sessions each day, and two 30-minute speech and language sessions weekly. Although the CST recommended occupational and physical therapy, none was included in the IEP.

On June 21, 2002, M.Z.'s parents rejected the IEP, and opted for M.Z. to repeat Kindergarten. In August 2002, M.Z.'s parents enrolled him in a private parochial school. M.Z. attended parochial school for the 2002-03 and 2003-04 school years. During the course of the 2003-04 school year, M.Z.'s parents filed a due process petition alleging that the board failed to provide a FAPE and sought tuition reimbursement for their unilateral placement.

Relying on *N.J.A.C. 6A:14-2.10(c)*, the ALJ denied the request for tuition reimbursement for the 2002-03 school year because of the parents' failure to provide written notice to the board, at least ten business days prior to removal of the child from the school, of their intent to enroll him in the parochial school. The ALJ also found that the demand for reimbursement for the 2002-03 school year was untimely since the

first time the board received notice of the tuition reimbursement claim was on December 2, 2003. However, the ALJ granted the parents' request for tuition reimbursement for the 2003-04 school year, finding that the board failed to develop an appropriate IEP before the school year began.

Following the ALJ's decision, A.Z. filed a complaint in federal district court to appeal the ALJ's decision. A.Z. and the board then filed cross-motions for summary judgment based on the ALJ's rulings. The court explained that, in reviewing the ALJ's decision, it must give due weight to his determinations.

With respect to the ALJ's decision regarding the claim for tuition reimbursement for the 2002-03 school year, A.Z. argued that the ALJ erred by finding that she was required to notify the board of her rejection of the IEP at the latest IEP meeting, and had to provide written notice of her intent to remove M.Z. She argued that *N.J.A.C. 6A:14-2.10(c)*, only required her to do one or the other, and she had implicitly rejected the IEP by not approving it.

The court rejected this argument, and explained that *N.J.A.C. 6A:14-2.10(c)* states that the cost of tuition reimbursement may be reduced or denied:

1. If at the most recent IEP meeting that the parents attended prior to the removal of the student from the public school, the parents did not inform the IEP team that they were rejecting the IEP proposed by the district;
2. At least 10 business days . . . prior to the removal of the student from the public school, the parents did not give written notice to the district . . . of their concerns or intent to enroll their child in a nonpublic school;
3. If prior to the parents' removal of the student from the public school, the district proposed a reevaluation of the student and provided notice . . . but the parents did not

make the student available for such evaluation; *or*

4. Upon a judicial finding of unreasonableness with respect to actions taken by the parents. (Emphasis added).

According to basic rules of statutory construction, the word "or" carries a natural disjunctive usage unless there is evidence of contrary legislative intent. However, a disjunctive usage should be rejected if it will render a part of the regulation superfluous or meaningless. The court found that a disjunctive interpretation, as advanced by A.Z., would render *N.J.A.C. 6A:14-2.10(c)(2)* inoperative because of the use of the word "If" in subparagraph (1). Therefore, the court found that "or" in the context of this regulation must be read conjunctively, and therefore, M.Z.'s parents were required to comply with subparagraphs (1) and (2). Since they did not give written notice of their intent to enroll M.Z. in the parochial school, they are not entitled to tuition reimbursement.

Moreover, the court agreed with the ALJ's finding that the claim for tuition reimbursement for the 2002-03 school year was untimely. In accordance with *Bernardsville Bd. of Educ. v. J.H.*, 42 *F.3d* 149 (3d Cir. 1994), parents have a duty to initiate proceedings for tuition reimbursement within a reasonable time of the unilateral placement. A delay of more than one year is unreasonable.

With regard to the claim for tuition reimbursement for the 2003-04 school year, the court affirmed the ALJ's determination that the board failed to develop an appropriate IEP before the start of the school year and that the parochial school was an appropriate placement. The board had raised two arguments to the claim which the court rejected. First, the board argued that reimbursement is only permitted if the child previously received special education services from the district. The court agreed with the ALJ's determination that M.Z.'s parents should not be denied reimbursement

because they refused to place their child in a public school program that they found inappropriate. Otherwise, this would place the parents in the untenable position of acquiescing to an inappropriate placement to preserve their right to reimbursement. Second, the board argued that it was not required to develop an IEP for M.Z. until he actually began to attend school. The court agreed with the ALJ's conclusion that, since M.Z. had already been found eligible for special education services, *N.J.A.C.* 6A:14-1.3 and -3.7 triggered the board's obligation to have an IEP in effect at the start of the school year. The ALJ found that, between June and August 2003, A.Z. had written to various district officials to discuss an appropriate placement, and therefore, the board was on notice that she might enroll M.Z. in a non-public school. Based on the foregoing, the court affirmed the ALJ's decision which denied tuition reimbursement for the 2002-03 school year, but granted reimbursement for the 2003-04 school year.

Board Failed to Provide FAPE Because IEP Did Not Include ABA or DTT, and Parents Entitled to Full Recovery of Attorney and Expert Fees

S.A., et al., Plaintiffs, v. Riverside Delanco School District Board of Education, Defendant, 2006 WL 827798 (D.N.J. 2006) [Decided by Robert B. Kugler, J. U.S. Dist. Ct.].

G.A. was born on January 9, 2001. He was diagnosed with autistic spectrum disorder. His behaviors include disrobing, fecal smearing, biting, and general obsessive conduct. In addition, he has almost no use of verbal language. The board's CST found G.A. eligible for special education and related services. On December 23, 2004, the CST presented G.A.'s parents with an IEP with a proposed placement at Burlington County Special Services School District (BCSSSD). The program included a half-day class with 20 minutes of speech therapy three times per week, 30 minutes of

occupational therapy two times per week, and a one-to-one aide.

G.A.'s parents rejected the IEP and filed a due process petition. They believed that G.A. required a full-day program using applied behavior analysis (ABA) implemented with discrete trial training (DTT). Both of G.A.'s doctors, Drs. Carlo B. Melini and Anna Baumgaertel, recommended a program using ABA. In particular, Dr. Melini, a specialist in developmental pediatrics, opined that G.A. required an autistic class with a full day of ABA and DTT.

At the hearing, G.A.'s parents presented Dr. Justin DiDemenico as an expert witness on ABA/DTT techniques. He testified that he personally observed the BCSSSD program and concluded that it would confer "no educational benefit" to G.A. The board's expert was Barbara Haas-Givler, a behavioral specialist. Haas-Givler agreed that ABA is an important facet for a program for G.A., that the IEP did not contain an ABA program, and conceded that the IEP should provide a behavior specialist to oversee the provision of ABA/DTT.

On July 16, 2004, the ALJ issued a decision which rejected the proposed IEP. The ALJ did not find either of the experts particularly credible or compelling. However, both experts agreed that ABA /DTT was necessary to provide G.A. a FAPE; ABA/DTT was not included in the IEP, nor did the IEP address G.A.'s behaviors such as biting, undressing or fecal smearing. However, he found that a half-day transitional program of approximately six months would be appropriate for G.A. to be ready for a full-day program.

On September 23, 2004, G.A.'s parents filed a complaint in federal district court requesting fees and costs as a prevailing party under 20 *U.S.C.A.* §1415(i)(3)(B). The board counterclaimed for reversal of the ALJ's decision. G.A.'s parents then filed a motion to recover attorneys' fees and costs of \$44,924.04,

and expert fees of \$2,487.50. The board filed a motion requesting a reversal of the ALJ's decision and for a reduction in the plaintiffs' attorneys' fees.

The federal court judge explained that, in reviewing ALJ decisions in IDEA cases, the court applies a modified version of *de novo* review. The court must make its own findings by a preponderance of the evidence, but it must also afford due weight to the ALJ's decision.

In this case, the court agreed with the ALJ that the most compelling factor is that both experts agreed that G.A. requires ABA/DTT. This testimony is sufficient to establish by a preponderance of the evidence that the board's IEP failed to provide a FAPE. Therefore, the court affirmed the ALJ's decision.

With regard to the request for attorneys' fees, the plaintiffs' attorneys, Staci J. Greenwald, Esq., and Robin S. Ballard, Esq., each submitted a Certification of Services. Greenwald certified that her hourly rate is \$250.00, and that rate has been approved by boards in other cases. Ballard certified that her hourly rate is \$225.00. They also submitted a Certification from special education attorney, Monica Dodd Palestis, Esq., to verify that these fees are customary, and a computer generated bill indicated the attorneys provided 185.35 hours of services. The board contended that the attorneys' fees should be discounted for two reasons: (1) the plaintiffs only partially prevailed before the ALJ—they requested a full-day program and only received a half-day program; and (2) the attorneys failed to document their hours with specificity.

The court explained that, in calculating fee awards, it must reduce the hours claimed by the number of hours spent litigating claims which were not successful and which were distinct from the successful claims. However, if a plaintiff has obtained excellent results, the attorney should recover his/her full fee even if the plaintiff failed to win on every claim. In

determining whether a partial victory entitles a plaintiff to fees and costs, a court examines the degree of success obtained.

The board characterized the plaintiffs' challenge to the IEP as two distinct claims—one for a full-day program and a second for the provision of ABA/DTT. The board argued that the fee award should be reduced by 50 percent because the plaintiffs did not prevail on the demand for a full-day program.

The court rejected this argument. It found that the parents were fully successful in having the IEP overturned, and that the program length and the methodology of providing G.A. a FAPE were intertwined. The court found that it was impossible to separate out the time spent litigating the program length from the provision of ABA/DTT. Therefore, the court refused to discount the fee award for lack of success in obtaining a full-day program.

With regard to the board's assertion that the attorneys' bill lacked specificity, the court explained that the fee petition is required to be specific enough to determine if the hours are reasonable. In this case, the attorneys submitted a computer generated bill that lists the services in chronological order, including a general description, date and their duration. The court found this sufficient and ordered the board to pay the plaintiffs \$47,411.54 which included the attorneys' and expert's fees.

ALJ Orders Emergent Relief Requiring Reinstatement of Disabled Student Whom the Board Suspended and Temporarily Transferred to Alternative School

T.G., on Behalf of Minor Child, C.R., Petitioners, v. Mount Laurel Township Board of Education, Respondent, EDS No. 2878-06 (May 19, 2006) [Decided by Donald J. Stein, ALJ].

C.R. is a thirteen-year-old, seventh-grade middle school student. He is classified as communications impaired. On April 28, 2006, C.R. and two or three other students were running in the hallway, despite being told several times to stop. While running, at least one of the students ran into a teacher, causing her to fall.

On May 1, 2006, the district met with C.R.'s mother, T.G., and gave C.R. a five-day suspension. On May 2, 2006, T.G. received a letter from the district stating that C.R. "had committed an assault, inflicted serious bodily injury upon a student (sic), and was being removed from school" to attend an alternative school for 45 days.

On May 4, 2006, a manifestation hearing was held, and it was agreed by all parties that C.R.'s behavior was not a manifestation of his disability. On May 5, 2006, T.G. visited the alternative school and learned that it was attended by students with violent behavior. Therefore, she refused to allow C.R. to attend, and a meeting was held with the district. At the meeting, T.G. apparently agreed that C.R. would have two hours of home instruction per day during the pendency of litigation.

On May 12, 2006, T.G. filed an application for emergent relief on behalf of her son, requesting his immediate reinstatement in middle school. During the hearing, it was agreed that the teacher was knocked down but the district could not identify which of the students knocked her down. T.G. claimed that another student, T.R., knocked the teacher down. A third student involved in the incident, C.M., received a five-day suspension. The

district explained that the disparity in punishment between C.R. and C.M. was that fact that C.M. expressed remorse after the incident and C.R. did not. In addition, C.M. did not have a disciplinary record like C.R.'s, although C.R. did not have a history of violent behavior. No evidence was presented that knocking down the teacher was an intentional act.

The ALJ explained that emergent relief will only be granted if the petitioner demonstrates the following: (1) he will suffer irreparable harm if the relief is not granted; (2) the legal right underlying his claim is settled; (3) he has a likelihood of prevailing on the merits of the underlying claim; and (4) in balancing the equities of the parties, he will suffer a greater harm if the relief is not granted.

In this instance, the ALJ determined that C.R. will suffer irreparable harm if he is not permitted to return to middle school. He based this determination on the fact that special needs students derive greater satisfaction and self-esteem by participating in a mainstream education than regular education students, and C.R. would be stigmatized if the discipline was carried out. In addition, there was no showing by the board that C.R. acted intentionally. Given the uncertain role C.R. played in the incident, the ALJ found that there is a substantial likelihood that the penalty was excessive based on the five-day suspension given to another student who acted in an identical manner. Therefore, the ALJ granted the application for emergent relief and ordered C.R. returned to the middle school.