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summary

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Court Overturns ALJ's Decision Denying Reimbursement for Unilateral Placement

J.B. and D.B., as Guardians Ad Litem of M.B., Plaintiffs/Counter-defendants, v. Watchung Hills Regional School District Board of Education, Defendant/Counter-claimant, 2006 WL 38936 (January 5, 2006) [Decided by Stanley R. Chesler, J. U.S. Dist. Ct.].

M.B. was born on September 1, 1986, and is currently 19 years old. Following an evaluation conducted in October 1990, it was recommended that she be placed in a self-contained classroom. In June 1992, she was referred to the Warren Township School District's (WTSD) CST to plan for her attendance in kindergarten. The CST classified her as NI, and placed her in a self-contained class for half the school day, and a regular class for the other half. She also received speech therapy and OT.

M.B. attended school in the WTSD through the fourth grade. Following an IEP meeting in May 1997 to plan for the fifth grade year, M.B.'s parents decided that the proposed IEP was not appropriate, and enrolled M.B. in the Lewis School at their own expense. M.B. attended the Lewis School for the 1997-98 through 2002-03 school years.

In March 2003, M.B.'s parents contacted the Watchung Hills Regional High School District (the High School District) to indicate their intent to enroll her in the eleventh grade and to have her evaluated. In May and June 2003, the High School District's CST conducted evaluations and classified M.B. as multiply disabled.

On July 2, 2003, the High School District CST proposed an IEP with a self-contained learning disabled class for all academic subjects, daily developmental reading and expository writing instruction, and three 30 minute sessions per week of speech and language therapy. M.B.'s parents did not approve the IEP, and on July 3, 2003, they notified the High School

District that they were enrolling M.B. at the Maplebrook School for its summer session.

M.B. attended Maplebrook for the summer session and for the 2003-04 and 2004-05 school years. On June 29, 2005, M.B.'s parents filed a due process petition requesting reimbursement from the High School District for the unilateral placement at Maplebrook. The High School District filed a motion for summary decision to deny the claim for reimbursement. On August 15, 2005, the ALJ granted the motion, in part, and denied the parents' claim for reimbursement for the 2003-04 and 2004-05 school years, but permitted the parents to proceed with their challenge to the IEP offered by the High School District.

While the case was still pending before the ALJ, the parents filed a complaint in federal district court to challenge the ALJ's ruling denying them reimbursement for the unilateral placement at Maplebrook. The parties then submitted cross-motions for summary judgment to the court, with the specific issue being whether M.B.'s parents are barred by the IDEA from seeking reimbursement for the unilateral placement.

The court explained that, in reviewing the ALJ's decision, it must give "due weight" to the proceedings and cannot impose its own view. Thus, it must consider the ALJ's findings of fact, but is not necessarily required to accept them.

The ALJ denied reimbursement based upon *N.J.A.C.* 6A:14-6.5 and 20 *U.S.C.A.* §1412(a)(10)(C)(ii) which states, in part:

If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing

officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment. (Emphasis added).

The ALJ found that, since M.B. did not previously receive special education services from the High School District, she did not satisfy the requirement of having received special education services from a “public agency.” The ALJ acknowledged that M.B. had previously received such services from WTSD, but found that, because WTSD and the High School District were two separate, autonomous entities, M.G.’s parents had not met the threshold requirement.

The federal court disagreed with the ALJ’s analysis and conclusion. The court found that WTSD is a public agency within the meaning of the law, and that under the plain language of the federal statute and state regulation, M.B.’s parents met the threshold requirement to be entitled to reimbursement for the unilateral placement. The court explained that the ALJ’s interpretation of the IDEA places additional procedural burdens upon parents who seek reimbursement for out-of-district placements merely because the elementary school and high school are organized in separate school districts. The court found such an interpretation to be contrary to the underlying purposes of the IDEA. Therefore, the court granted the plaintiffs’ motion and remanded the case to the ALJ to determine whether or not the High School District offered M.B. an IEP which provided a FAPE, which decision in turn, could impact whether plaintiffs are entitled to reimbursement.

Parent Failed to Prove FAPE Was Not Provided When Child Could No Longer Receive Math Tutoring from Sylvan Learning Center

P.V., on Behalf of J.S., Petitioner, v. Monmouth Regional High School Board of Education,

Respondent, EDS No. 536-06 (March 2, 2006) [Decided by Solomon A. Metzger, ALJ].

J.S. is 17-years-old and classified. She has dyslexia and neurological deficits and is at or near grade level in reading, but has not progressed past the fourth to early-fifth grade in math.

Beginning in December 2005 through the end of January 2006, J.S. was able to receive tutoring in math from the Sylvan Learning Center as a result of a federal grant received by the board. The grant, however, is no longer available, but J.S. and her mother P.V., believe that the tutoring helped improve J.S.’s math skills, and that the service should continue as part of her IEP. Therefore, they filed a due process petition.

The board’s director of special services, its school psychologist, and J.S.’s case manager all testified that they did not believe the tutoring from Sylvan would improve her math skills. The director of special services testified that J.S.’s neurological problems and dyslexia limit her ability to advance in abstract subjects. He also testified that she received supplemental instruction in math two to three times per week, and that she is in a resource room with only three students for math. The case manager also testified that she did not believe that J.S. improved her understanding of math concepts in the time she was tutored at Sylvan.

Citing *Schaffer v. Weast*, 126 S.Ct. 528 (2005), the ALJ explained that P.V. has the burden of proving that her daughter did not receive a FAPE by virtue of her failure to advance beyond the fourth to early fifth grade in math. The ALJ found that P.V. failed to meet that burden since she presented no expert testimony, no testimony from any Sylvan representatives, and did not take issue with any aspect of her daughter’s program beyond math. Therefore, the ALJ dismissed the petition.

Court Affirms Dismissal of Parent's Claim Seeking Out-of-District Placement

P.D., et al., Plaintiffs/Counter-defendants, v. Franklin Township Board of Education, Defendant/Counter-claimant, 2006 WL 753152 (March 23, 2006) [Decided by Stanley R. Chesler, J. U.S. Dist. Ct.].

J.D. began high school in the district in 2003 and is currently a tenth-grade student. J.D. was classified as perceptually impaired in April 1997, and was diagnosed with ADHD and an auditory processing disorder in March 1999.

In the ninth grade, J.D. participated in a pull-out resource program in math, and received regular education with out-of-class support for science and social studies for two periods per week. J.D.'s grades were mostly B's, and ranged from a 95 in health, to a 74 in English.

On March 24, 2004, an annual IEP review meeting was held, but an IEP could not be agreed upon. J.D.'s mother, P.D., requested that J.D. be re-evaluated prior to agreeing to a new IEP. Therefore, on June 30, 2004, the district's LDTC conducted an evaluation of J.D. The report indicated that J.D. had average listening skills and an average ability to apply academic skills. Her performance in reading comprehension and written expression was above average. She was low average in math, and the report predicted that she would have a lot of difficulty with math tasks.

On August 30, 2004, the IEP team met to finalize the IEP for the 2004-05 school year. The revised IEP offered in-class resource programs with supplementary aides and supports. J.D. would be enrolled in regular classes for history, dance, health, physical education, and biology. She would be provided in-class resource programs for English, geometry and Spanish.

Once again, P.D. rejected the proposed IEP, and requested a due process hearing the same day. She alleged that the IEP would not adequately prepare J.D. for graduation or college, and requested an out-of-district placement.

On December 8, 2004, an ALJ held the due process hearing at which P.D., J.D., the school psychologist, the LDTC, and a special education teacher testified. The expert testimony of the school psychologist and LDTC was that the IEP offered for 2004-05 was reasonably calculated to confer a meaningful educational benefit to J.D. The LDTC also testified that J.D. was doing quite well in tenth grade and was receiving A's and B's under the current IEP. P.D. and J.D. did not present any evidence to refute the district's expert testimony or to challenge the appropriateness of the IEP.

However, P.D. did testify that she believed the grades J.D. was receiving were not a true measure of her progress and did not understand how they were derived. She testified that she believed that the true measure of J.D.'s progress was the comparison of the results of J.D.'s Woodcock-Johnson tests which were administered in 2000 and 2004. In 2000, during fifth grade, J.D. was administered the Woodcock-Johnson Revised Achievement test. The results indicated that J.D. had a grade-equivalent proficiency of 5.0 in calculation, 4.9 in applied problems, 6.3 in writing samples, and 4.8 in broad math. In 2004, when J.D. was in the ninth grade, she was given the Woodcock-Johnson III test which revealed that J.D. had a grade equivalency of 5.3 in calculation, 5.4 in applied problems, 5.6 in writing samples, and 5.3 in broad math.

On April 14, 2005, the ALJ rendered his decision which concluded that the board provided J.D. with a FAPE in the LRE for the 2004-05 school year. On May 2, 2005, P.D. filed a complaint in federal district court to appeal the ALJ's decision. The parties then filed cross-motions for summary judgment.

Citing *Board of Education v. Rowley*, 458 U.S. 176 (1982) and *S.H. v. State-Operated School District of Newark*, 336 F.3d 260 (3rd Cir. 2003), the federal judge explained that when reviewing an ALJ's decisions under the IDEA, the court must give due weight to the administrative record by making its own findings of fact based on a preponderance of the evidence in that record, while giving some deference to the ALJ's findings. In this case, P.D. has the burden of proving that the board's proposed IEP failed to offer her daughter a FAPE. P.D.'s substantive challenge to the IEP is based on a comparison of the results of the Woodcock-Johnson tests. However, there was testimony presented by the board's experts that the results of the two tests are not readily comparable due to changes in the test content and the manner it was administered. For instance, unlike the 2000 test, the test given in 2004 was a timed exam. The court further explained that even assuming the two tests were comparable and that J.D. made little academic progress during the four year period between the tests, this information has no bearing on whether the IEP for the 2004-05 school year is appropriate. The appropriateness of an IEP is judged prospectively, and therefore, lack of progress under a past IEP does not render a current IEP inappropriate. In short, P.D.'s non-expert opinion regarding the test results is insufficient to prove the board failed to offer a FAPE.

P.D. also argued that the board committed procedural violations that deprived J.D. of her education, including alleged failures to make "a timely decision in an administrative matter" and failing to include in the IEP statements of J.D.'s present levels of educational functioning, objective strategies to evaluate progress, and whether the IEP team considered her assessments when developing the IEP. The court explained that in order for a procedural violation to constitute a denial of a FAPE, P.D. must prove that the violation resulted in the loss of educational opportunity or seriously infringed on her right to participate in the formulation of the

IEP. In this case, P.D. failed to show that any of the alleged procedural deficiencies resulted in the loss of any educational opportunity, or that it harmed her opportunity to participate in the IEP formulation process. Based on the foregoing, the court denied P.D.'s motion for summary judgment, and granted the board's motion for summary judgment to dismiss the complaint.

Student Entitled to Graduate Despite Transition Services

S.S., Petitioner, v. West Milford Township Board of Education, Respondent, EDS No. 7036-05 (June 17, 2005) [Decision by Irene Jones, ALJ].

S.S., a high school student classified as multiply disabled, had borderline to low-average intelligence scores. She attended the district's schools since age three, and had been placed in self-contained and life skills programs. Although she had met all academic requirements for graduation, she and her parents felt that she had not met her transition goals and sought additional services. She had been evaluated in 2003 with the conclusion that she needed vocational training. The district offered opportunities at a local grocery store, but S.S. declined as she felt overwhelmed by work and academic requirements.

After a meeting in April 2005, the district agreed to provide transition services, but also informed S.S. that she could not participate in the graduation ceremony that year. The district would have allowed her to participate if she had not requested the transition services. S.S. brought a petition for emergent relief stating that she had met all her academic requirements, and although she would not receive a diploma, she wanted to participate in the ceremony.

The ALJ granted the request. The petitioner only has one chance to graduate with her peers, and the denial of participation in the ceremony which was of "great significance" to students and parents, would result in irreparable harm. She noted that a prior case had found that the

participation of special education students in graduation ceremonies may substantially increase their self-esteem. Petitioner had the right to receive services until age 21, including transition services. The petitioner had met the graduation requirements, and the district would have let her participate but for the request for transition services.

The ALJ found the choice “tantamount to extortion.” She referenced a May 2005 letter from the Commissioner of Education advising districts to consider permitting students with special needs to participate in graduation ceremonies. In that letter, the Commissioner stated that requiring special education students to participate in graduation ceremonies after their peers have graduated “does not provide the same sense of achievement that participation with a student’s classmates does.” Finding that the application of the board’s policy was “irrational and impinges on her right to continue to receive a FAPE,” the ALJ concluded that S.S. had a substantial likelihood of prevailing on the merits. Therefore, emergent relief was granted.

Student Not Entitled to Aide for After-School Sports and SAT Prep Course

L.L., on Behalf of C.F., Petitioner, v. Princeton Regional Board of Education, Respondent, EDS No. 6219-04 (July 20, 2005) [Decision by Joseph F. Fidler, ALJ].

C.F. is a high school student whose classification is communication impaired. He has significant auditory processing deficits, receptive language problems, and difficulties with retention of information and organizational skills. The district provides a one-on-one aide for all academic subjects.

At a June 2004 re-evaluation meeting, L.L. requested that an aide be provided for extra-curricular and non-academic activities, as well as for an SAT preparation course. The CST rejected these requests. It was willing to find a

group or activity the student could participate in without the assistance of an aide. The CST noted that arrangements can be made for testing accommodations through the testing service, but that the district does not provide private tutors for such tests. The mother disagreed with the CST. She stated that her son had to drop out of lacrosse because he was incapable of following changes in directions and schedules. She also contended that the SAT assistance was part of the transitional planning that would enable him to attend college.

Members of the CST testified as to their rationale, which included the decision that an aide for non-academic activities would be frustrating and stigmatizing. The team did not feel that a private SAT or ACT course would be appropriate for the student, even with an aide. C.F. did participate in out-of-school activities such as karate, tennis and swimming without the assistance of an aide.

The ALJ found that the board had met its burden of persuasion. (Note, this was prior to the change in case law which now places the burden on the party bringing the action.) The ALJ, while noting that the mother was very involved in her son’s education, found that the district’s witnesses had substantial experience in their fields. That the child needed an aide for all academic subjects, did not mean that he needed an aide for other activities. Therefore, the ALJ dismissed the due process petition.

Districts Jointly Responsible for Money Owed for Residential Placement

I.G., on Behalf of L.G., Petitioners, v. Cumberland Regional High School District Board of Education, Third Party Respondent, EDS No. 2994-02 and 6938-02 (July 27, 2005) [Decision by Anthony T. Bruno, ALJ].

In 2002, I.G. filed a due process petition on behalf of his daughter, L.G., seeking that the Freehold Regional High School District Board

of Education assume responsibility for L.G.'s residential placement in Virginia. L.G. had previously been at Bancroft, which discharged her in November 2001, on the basis that it could no longer meet her complex needs. Freehold apparently did not find a placement in a timely manner, so I.G. arranged for placement at Cumberland, Virginia, where she stayed until December 31, 2002. Thereafter, she was placed, by consent order in a facility in Florida, and Freehold was ordered to assume responsibility for the costs of the placement. While at Cumberland, Virginia, private insurance paid for part of the costs, but a balance of \$35,771 remained, which was the subject of the instant case.

When L.G. was initially placed in Bancroft, her parents were married and living in Freehold Township, however, they separated in 1999 and divorced in 2001. The parents were designated as co-guardians. I.G. still lives in Freehold, but the mother remarried. She first lived in Newport, New Jersey, and then moved to Bridgeton in February 2001. She did not notify those districts when she moved. Her current residence is located within the Cumberland Regional High School District. Freehold sought contribution of one half of the costs from Cumberland Regional.

The ALJ looked to *Somerville Board of Education v. Manville Board of Education*, 332 N.J.Super. 6 (App. Div. 2000) in which it was held that, where parents shared joint legal and physical custody of a special education child, the two districts where the parents lived were to split the costs of the child's education. Here, however, the child was in a residential placement before the parents divorced, and currently she visits each parent for three or four weekends per year. The ALJ stated that, although there has been a rule that a child could only have one domicile, "the rigid single domicile rule does not reflect the real-life living arrangements of many children," and that the rule may "have to give way to a more flexible approach in certain situations."

As the child has no clear domicile in this case, it was determined that equity demanded a flexible approach. Therefore, for the period of time commencing with the instigation of this litigation, through the date of the child's 21st birthday, the two districts must share the costs of the education, including the back sum due and owing from the Cumberland, Virginia placement.

Visually Impaired Student Entitled to Dual Busing

C.R., on Behalf of C.R., Petitioner, v. Bridgewater-Raritan Regional Board of Education, Respondent, EDS 10150-04 (August 30, 2005) [Decision by John R. Futey, ALJ].

C.R.'s parents, C.R. and B.R., were divorced in California in 1995, but both now lived within the district. Their son, C.R., alternated weeks between his parents' residences. The child was born in 1992; in September 2001, he was diagnosed with a rapidly progressing rare eye disease and was now legally blind.

In October 2001, an IEP meeting took place. Certain accommodations regarding transportation were made and, apparently, he received busing to both residences, but this was not in the IEP. At that time, all students could obtain dual busing. A June 2002 IEP meeting was held, and the transportation statement regarding accommodations remained in his IEP. On September 2002, the parents made a request for dual busing that was apparently honored.

In May 2003, before C.R. entered middle school the following fall, the mother contacted the principal advising that dual busing was needed. On June 4, 2004, the annual IEP meeting was held. As had been done in a prior year, the case manager asked the mother to summarize the meeting in writing for inclusion in the IEP. The mother composed a three-page e-mail which was ultimately included in the middle of the IEP. That document stated that C.R. would take the bus to and from the parents' residences on an

alternating schedule. He would sit in the front of the bus and would have help in telling him when it was his stop. There was also mention of a continued need for assistance in organizational skills.

In September 2003, a meeting was held to address a change in teaching teams. A re-evaluation meeting took place in December 2003. This IEP did not contain language regarding dual busing, but did mention other transportation needs. At a May 2004 IEP meeting, switching C.R. from a special education bus to a regular one was discussed, but this was not reflected in the IEP. The May 2004 IEP, however, was not received by the parents until late August 2004. In the meantime, the parents received a letter in late May from the district's transportation department advising that dual busing would no longer be offered.

In November 2004, another IEP meeting was held, and the issue of bus transportation and the impact on C.R.'s homework were discussed. IEP team members stated it was not an IEP issue, but one member of the team volunteered to talk to the special education director. She did so, but was told the busing was not an IEP issue, and that C.R. was doing well educationally. The parents then filed a petition seeking the dual busing.

Various witnesses for the district, as well as the parents, and their expert, testified. The district witnesses claimed the busing was not needed. There was testimony about C.R.'s organizational issues, including the amount of time needed for the child to set up and breakdown his materials in order to do homework, and that he had assistive technology and accordion files for work at both homes. The single busing arrangement was causing an increased burden and workload.

The ALJ held for the parents. Although the matter initially seemed to be one of parental convenience, the ALJ found that the lack of dual busing had a negative impact on the student. The

student, now in middle school, was facing increasing demands academically. The refusal to provide the busing kept the student from working on his homework load at his father's home after school. The ALJ also found that the IEP team had failed to analyze and observe the student in his father's home to determine whether his issues with homework were due to the lack of dual busing. Therefore, the district could not justify its decision not to provide the busing.

The ALJ noted that the district was within its right to change the dual busing policy for regular education students, however, it should not have done so for C.R. without considering the student's specific needs. In this case, there were issues in moving equipment and materials and forgetting assignments. The disability already made it more difficult for C.R. to do his work, and the dual busing would permit him not only to address his academic needs, but emotional and functional ones, including headaches and lost sleep.

The ALJ noted that the parties spent a lot of time arguing about whether or not busing had been provided as a related service. However, he found that it was the intent of the parties to provide C.R. the service based on his specific disability, and not as a convenience to the parents. The ALJ found the IEP team reversed itself based on pressure from others. Additionally, the failure to timely reject the accommodation and provide reasons violated administrative code then in effect. The ALJ also found numerous other procedural violations that he characterized as "shabby."

Therefore, the ALJ ordered dual busing to be resumed. He also ordered the board to conduct a functional assessment in the homes of both parents and, if needed, provide an aide to help C.R. after school with homework organization. He also ordered appropriate guidance services and continuous monitoring of C.R.'s level of success and to make all appropriate adjustments in order to facilitate his education.