



Special Education Bulletin

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summary

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School Districts May Not Sue State Under IDEA for Reimbursement of Special Education Costs

Lawrence Township Board of Education v. State of New Jersey, 415 F.3d 368 (3d Cir. 2005).

E.E. resides with her family in Lawrence Township. She is a special education student who suffers from diabetes and autism, and engages in self-injurious behavior. Her parents registered her with the Department of Human Services, Division of Developmental Disability (DDD) so that she could receive specialized services.

E.E. was originally a student at the Eden Institute which has specialized programs for autistic children. However, E.E.'s self-injurious behavior could not be controlled at home. Therefore, her parents and the board agreed that she should be placed at Allies, Inc., a residential facility in Hamilton, New Jersey.

E.E.'s parents requested DDD to fund the placement but it refused. Instead, E.E. was placed on a DDD-waiting list of persons eligible for a residential placement. Therefore, the board financed the placement, and paid \$235,367 for the 2003-2004 school year.

Subsequently, the board filed suit in federal court against the State, alleging that, under the IDEA, the State was obligated to assume the cost of the placement. Specifically, the board alleged that, under 20 U.S.C.A. §1415(b)(6), the funding for E.E.'s placement is a matter relating to the provision of her FAPE, and that the State is ultimately responsible for fulfilling the mandates of the IDEA. The State filed a motion to dismiss the complaint arguing that the IDEA does not confer a private right of action on school districts, and that the board did

not have standing to sue. The district court granted the State's motion, and the board appealed to the Third Circuit Court of Appeals.

The Third Circuit explained that federal courts are courts of limited jurisdiction that can only entertain cases which Congress has authorized. Courts will interpret a statute to determine whether it authorizes a private right of action and a private remedy.

In this case, §1415(a) of the IDEA requires the establishment of procedures "to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a [FAPE]." In addition, §1412(a)(6) provides that "[c]hildren with disabilities and their parents are afforded the procedural safeguards required by [§1415]."

The appellate court found that the language in these two sections of the IDEA strongly suggest that Congress only intended to provide a private right of action to disabled children and their parents. It rejected the board's argument that §1415(b), which requires the opportunity to present complaints with respect to any matter relating to the identification, evaluation, educational placement of a child, or provision of a FAPE, demonstrates a congressional intent to permit persons or entities other than parents and children to bring an action under the IDEA. It found this language in the context of other provisions of the IDEA to be ambiguous in terms of providing a private right of action to third parties. Moreover, the court found that the board had no implied right of action under the IDEA, and that budgetary disputes between local and state agencies are not contemplated by the IDEA. Therefore, the Third Circuit affirmed the district court's decision to dismiss the board's complaint.

Parents' Claims for Tuition Reimbursement and Compensatory Education Are Barred by Equitable Limitation of Actions

Oakland Board of Education, Petitioner, v. D.M. and K.M., on Behalf of R.M., Respondents, and D.M. and K.M., on Behalf of R.M., Petitioners, v. Oakland Board of Education, Respondent, EDS Nos. 3985-03 and 9935-04 (consolidated) (April 19, 2005) [Decided by Robert J. Giordano, ALJ].

R.M. is a classified student who attends school in the district. On December 24, 2002, a due process petition was filed by her parents against the board. The petition sought reimbursement and compensatory education dating back to October 2001. On March 19, 2003, the petition was withdrawn.

In the Spring of 2003, the board filed an application for emergent relief to compel R.M.'s parents to consent to R.M.'s re-evaluation. R.M.'s parents filed an answer and a cross-petition for emergent relief. The parents' petition requested reimbursement for the costs of R.M.'s unilateral placement at Small World Child Development Center and for related services.

On July 20, 2003, the parties settled the reevaluation issue, and an order was issued to that effect. In addition, the parents' application for emergent relief was denied. The remaining issues were to be tried on December 11, 2003. At that time, the parties settled the issue regarding R.M.'s current placement, and the settlement was placed on the record. Other issues which were not raised in the parents' petition were also discussed. These included compensatory education and reimbursement for educational costs for the period from October 2001 to August 2003, ABA home instruction,

extended break services, and fees and costs related thereto. R.M.'s parents were directed to file an amended petition by December 16, 2003 to address these new claims.

R.M.'s parents did not file an amended petition as directed. Therefore, on February 7, 2004, the board filed a motion for summary decision regarding the parents' claim for reimbursement for the 2003 extended school year (ESY) program, to enforce the December 11, 2003 settlement, and to dismiss the remaining claims.

On May 13, 2004, an order was entered denying the board's motion seeking to dismiss the claim for reimbursement for the 2003 ESY program. The order also incorporated the terms of the December 11, 2003 settlement on the record, and directed that the issues in the parents' cross-petition be scheduled for a plenary hearing. Lastly, the order directed that any issues not raised would not be considered unless there is a separate due process petition.

On September 1, 2004, R.M.'s parents filed another due process petition which included among other things, claims for reimbursement and for compensatory education for the period from October 2001 to August 2003. On December 14, 2004, the board filed a motion to dismiss the claims for reimbursement and compensatory education. Citing *Bernardsville Bd. of Educ. v. J.H. and E.H., on Behalf of J.H.*, 42 F.3d 149 (3d Cir. 1994) and *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80 (3d Cir. 1999), the board argued that the parents' claims for relief preceding September 1, 2003 must be dismissed on the grounds that they are barred by an equitable limitation on administrative actions under the IDEA. The board maintained that only claims related to the 2003-2004 school year and the 2003 ESY program were viable.

R.M.'s parents countered that the claims arising before September 1, 2003 were still viable because they made a "reservation of rights" in connection with the settlement reached on December 11, 2003. They also argued that the board could not assert the equitable limitations defense based on the doctrines of equitable estoppel and unjust enrichment.

In considering the board's motion to dismiss, the ALJ stated that, during the settlement conference on December 11, 2003, R.M.'s parents did in fact reserve the right to assert any and all claims related to compensatory education and reimbursement for services from October 2001 through August 2003. However, they had filed no formal petition with respect to those claims at the time the reservation was made. The ALJ explained that he had ordered the parents to file a petition containing such claims by December 16, 2003, but they did not file that petition until September 1, 2004. The board asserted the affirmative defense that the claims were barred by the applicable "statute of limitations" in the *Bernardsville* case.

The ALJ found that the board did not waive the defense of limitation of actions at the time of the settlement conference and that, although the limitation of actions defense was improperly plead as "statute of limitations," it was still posed as a separate defense.

The ALJ rejected the parents' argument that the board is equitably estopped from asserting the equitable limitation defense. The ALJ explained that, in order for a party to establish a claim of estoppel against a governmental agency, the party must show evidence of a "knowing and intentional" misrepresentation which the parents relied upon to their detriment. In this case, there is no such evidence.

The ALJ also rejected the parents' assertion of the doctrine of unjust enrichment. The parents contended that, by asserting the limitation of action defense, the board was

denying them the benefit of the bargain they derived from the reservation of rights that occurred at the settlement conference. The ALJ found that, since the parties had reached a settlement agreement, the doctrine of unjust enrichment is inapplicable.

The ALJ then analyzed the board's defense of limitation of actions. He explained that Third Circuit in *Bernardsville* had ruled that parents who sought reimbursement for a unilateral placement but waited over two years to file a due process petition, without any mitigating excuse were barred from recovery because the delay in filing was unreasonable.

In this case, R.M.'s parents contended that the due process petition filed on September 1, 2004 was timely. However, they voluntarily withdrew the petition they originally filed back in December 2002 which contained those claims. The parents withdrew that petition because their prior attorney had failed to properly prepare for the case. By withdrawing that petition without obtaining a waiver of the limitation of action defense from the board, the defense remained available to the board. The ALJ then concluded that the limitation of action defense barred the parents' claims for reimbursement for the time period prior to September 1, 2003.

Board Violated Classified Student's Due Process Rights by Suspending Him Without Notice and a Hearing; Board Ordered to Immediately Reinstate Student

I.R., on Behalf of R.R., Petitioner, v. Totowa Board of Education, Respondent, EDS No. 5510-05 (June 30, 2005) [Decided by Daniel B. McKeown, ALJ].

R.R. is a ten-year-old student who attends school in the district. On January 28, 2005, he was referred by his classroom teacher for an evaluation by the CST. A meeting with the

CST with R.R.'s mother, I.R., was scheduled for February 21, 2005 to obtain her consent to have him evaluated.

However, on February 2, 2005, R.R. was suspended from school effective February 4, 2005 "for behavior disruptive to the educational environment." I.R. was notified of the suspension by a letter from the principal. The letter advised that R.R.'s suspension would continue "until the release of the psychiatric evaluation." However, at that time, I.R. had not yet consented to have a psychiatric examination as part of the CST's evaluation of her son. Sometime near the end of February 2005, I.R. was told R.R. could return to school.

On April 27, 2005, the CST completed its evaluation of R.R.; he was diagnosed with ADHD and an eligibility meeting was set for May 17, 2005. However, once again, on May 9, 2005, R.R. was suspended for ten days by the principal for "behavior disruptive to the educational environment and threatening and being disrespectful to staff members." Sometime near the tenth day of the suspension, the superintendent telephoned I.R. and told her not to return R.R. to school. I.R. then filed a petition for emergent relief to have R.R. reinstated.

The ALJ explained that, pursuant to *N.J.S.A. 18A:37-2*, a pupil can be suspended or expelled for good cause. However, students who are subject to serious discipline have due process rights guaranteed by the Fourteenth Amendment. The fundamental requirements of due process are notice and a hearing, although the nature of the notice and of the hearing can vary depending on the circumstances.

In the present case, the ALJ concluded that neither R.R. nor his mother, was afforded notice of the charges nor an opportunity to be heard with regard to both suspensions. Both suspensions have been served and R.R.'s

educational time has been lost. The ALJ found that irreparable harm will continue unless R.R. is reinstated. Therefore, the ALJ ordered the board to immediately reinstate R.R. to regular school attendance, and ordered the board to direct the CST to immediately arrange a program to deal with the deficits R.R. suffered during his suspensions. The ALJ also reminded the board that, if R.R.'s behavior becomes an issue in the future, it has an obligation to conduct a manifestation determination and to provide him with some fair notice and an opportunity to at least deny the charge.

Board Ordered to Reimburse Parents for Costs of Child's Placement in a "Wilderness Program" Which Placement Occurred Prior to Child's Classification

B.S. and A.S., on Behalf of D.S., Petitioners, v. Northern Valley Regional Board of Education, Respondent, EDS No. 5718-05 (July 18, 2005) [Decided by Caridad F. Rigo, ALJ].

D.S., a sixteen-year-old who attends high school in the district, was an average student throughout middle school and through the first half of his freshman year in high school. Towards the second half of his freshman year, his academic and social performance deteriorated. At the beginning of his sophomore year, D.S.'s parents sought help from the school due to his attention difficulties in taking tests, maintaining concentration, and for behavioral problems.

It was determined that D.S. has ADD, and he was deemed eligible for special services and was provided a §504 plan. It was also determined that D.S. has issues related to depression and had accumulated a gambling debt of \$20,000.

On February 10, 2005, the school called D.S.'s parents to advise that he had cut his wrist slightly and told his friends he was contemplating suicide. D.S.'s mother had him evaluated at the Bergen Regional Medical Center, and he was cleared that same day to return to school. When he returned to school, D.S. and his parents met with the intervention referral service team (IRST). The IRST referred D.S. for evaluation by the CST.

On March 4, 2005, D.S.'s parents met with the assistant principal to discuss D.S.'s problems. After the meeting, D.S. ran away and was missing for 20 hours. On April 6, 2005, D.S. attempted suicide by overdosing on Tylenol. He was initially taken to an outpatient drug treatment facility, and was then subsequently admitted to the Payne Whitney Clinic in White Plains, New York.

On May 2, 2005, D.S. returned to school. However, the school refused to allow him to attend until he received a psychiatric evaluation. That same day he went to New York Presbyterian Hospital (NYPH) and was observed by its psychiatric unit until his release on May 4th.

On May 5, 2005, D.S. returned to school and attended until May 12th. That day he ran away from home and went missing until May 15th. On May 15th, he was admitted to NYPH and remained in its psychiatric unit until May 24th. During his stay, his physicians recommended that he attend a "wilderness program" called the Adirondack Leadership Expeditions Program (ALEP), and that he be placed in a residential academic facility. He was diagnosed with mood disorder, polysubstance abuse disorder, and an emerging borderline personality type combined with ADHD. ALEP was recommended because it would provide D.S. with a "bridge" between his hospitalization and his eventual placement in a

residential academic facility. It was determined that D.S. would not be safe if he remained at home while receiving treatment. Therefore, on May 24th, D.S. was placed in ALEP.

On May 31, 2005, D.S.'s parents filed an emergent application seeking the immediate classification of D.S. as eligible for special education and related services. The petition also requested reimbursement for the expenses of D.S.'s attendance at ALEP.

On June 15, 2005, two members of the CST evaluated D.S. while he attended ALEP. D.S. was subsequently classified ED, and the CST recommended a placement in a therapeutic residential program.

Based on a review of the evidence, the ALJ found that the district failed to provide D.S. with a FAPE in a timely manner. The ALJ believed that the CST should have evaluated D.S. back in February 2005 after he had slit his wrist. Given the fact that the IRST referred D.S. for an evaluation, the ALJ found that the district knew or should have known that D.S. had serious problems that needed to be addressed. He found that D.S.'s parents acted reasonably under the circumstances in following the recommendations of D.S.'s physicians to place him in ALEP. The ALJ found the district's failure to address D.S.'s problems to be "inexcusable" and such failure denied him the opportunity for a FAPE.

With respect to the parents' claim for reimbursement for the costs of ALEP, the district argued that they did not give sufficient notice prior to placing D.S. at ALEP. The ALJ agreed; however, the ALJ found that they did not have sufficient time to provide such notice since D.S. could not be safely maintained at home, and they could not wait for the district to classify him.

Based on these findings, the ALJ framed the issue as whether ALEP is an educational placement. The district contended that it was not an educational placement because there are no academic components to the program. Once again, the ALJ agreed with the district's position. However, the ALJ explained that the IDEA defines "related services" to include counseling services. In this case, D.S. required the placement at ALEP in order to transition from the hospital to a more normal intermediate setting to be able to benefit educationally. Therefore, the ALJ found that D.S.'s placement at ALEP was proper, and ordered the district to reimburse D.S.'s parents for the placement.

Where Child Has Not Previously Received Special Education and Related Services from a Public Agency, Parents Are Not Entitled to Reimbursement for Tuition Expenses in Connection with Unilateral Placement

M.S., on Behalf of J.S., Petitioners, v. Princeton Regional Board of Education, Respondent, EDS No. 402-05 (August 9, 2005) [Decided by Joseph F. Martone, ALJ].

J.S. was born on March 9, 1990 and resides with her parents in the district. In 1995, when she was four, she attended a private preschool called the Stuart Country Day School (SCDS). While in preschool, she was referred to the Project Child Assessment Service (Project Child) of the Mercer County Special Services School District. The board contracts with Project Child to perform its child find responsibilities.

In December 1994 and January 1995, J.S. was observed by Project Child, and the evaluators recommended that she be classified as preschool handicapped and placed at the J.F.

Capello School, a special services school, for the remainder of the school year. The parents elected to have J.S. remain at SCDS.

On May 27, 1995, the CST met with J.S.'s parents to discuss special education options. However, her parents rejected them, and decided to place her at the Chapin School at their own expense.

J.S. spent two years at the Chapin School and was then privately placed by her parents at the Princeton Friends School, where she attended grades one through four. Her parents then requested that the board pay for her tuition to attend the Newgrange School in Trenton. In August 2001, the board advised them that they had the option of either enrolling J.S. in the district and have her evaluated by the CST, or apply for services for students in nonpublic schools. The parents did not respond and J.S. was placed at the Newgrange School for fifth grade.

In August 2003, the parents' attorney wrote the board and advised that the Newgrange School staff believed they could no longer address J.S.'s educational needs. Therefore, the parents re-registered her in the district, and the parties agreed that she would be temporarily placed at the Pine Ridge School (PRS), which is an approved residential placement in Vermont.

On October 22, 2003, an eligibility conference was conducted; the CST determined that J.S. was eligible for special education and related services, and classified her as multiply-disabled. An IEP meeting was held the same day. The CST proposed a placement at J.S.'s neighborhood middle school which included out-of-class placement in language arts, math, social studies, science, along with speech therapy, OT, adaptive physical education, and transportation. The parents did not consent to

the proposed IEP and retained an expert to evaluate it along with PRS's program.

On August 25, 2004, the parents' expert's report was presented to the CST. On September 7, 2004, just two days prior to the start of school, J.S.'s parents attempted to enroll her in the middle school. However, they indicated that J.S. would be returning to PRS.

The CST prepared an IEP for J.S. for the 2004-2005 school year which was similar to the prior IEP with a placement at the local middle school. The IEP was presented to the parents on November 24, 2004. Once again, they did not consent to its implementation. Thereafter, on January 14, 2005, D.S.' parents filed a due process petition seeking reimbursement for their unilateral out-of-district placement.

In response to the petition, the board filed a motion to dismiss. The board argued that the parents were not entitled to reimbursement since J.S. had never previously received special education and related services under the authority of a public agency as required by 20 U.S.C.A. §1412(a)(10)(C)(ii).

The ALJ explained that this statutory provision was a 1997 amendment to the IDEA. It states the following:

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 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 [FAPE] available to the child in a timely manner prior to that enrollment. (Emphasis added.)

New Jersey's regulatory counterpart to this federal statute is *N.J.A.C.* 6A:14-2.10(b) and contains similar language.

The ALJ reviewed the cases regarding reimbursements for unilateral placements that occurred both prior to and after the 1997 amendments to the IDEA. After considering the parties' arguments and, in particular, the cases of *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150 (1st Cir. 2004) and *Board of Educ. of the City of New York v. Tom F.*, 2005 WL 22866 (S.D.N.Y. 2005), the ALJ granted the board's motion to dismiss.

The ALJ explained that, in the *Amy N.* case, the parents had unilaterally placed their child outside the school district after fourth grade without ever previously raising the issue of special education services. The court in that case made clear that, based on 20 U.S.C.A. §1412(a)(10)(C), a threshold requirement for tuition reimbursement is that the child have received "special education and related services" while in the public school system. This serves the purpose of giving the school the opportunity, before the child is removed, to evaluate the child, devise an IEP, and determine whether the school can provide a FAPE. Similarly, in *Tom F.*, the child attended private school since Kindergarten and never received special education and related services while in public school. Again, the court determined that the parents were not entitled to reimbursement for their unilateral placement based on 20 U.S.C.A. §1412(a)(10)(C)(ii).

Based on the foregoing cases and the evidence presented, the ALJ found while J.S. received a "related service" from the board in the form of the Project Child early identification and assessment of J.S.'s disability, J.S. never received both "special education" and "related services" from a public agency as required by 20 U.S.C.A. §1412(a)(10)(C). Therefore, J.S.'s parents were not entitled to reimbursement for the unilateral placement.