

D. v. Fort Lee Board of Education

Office of Administrative Law

10384-94

June 21, 1995

Sebastian Gaeta, Jr., Administrative Law Judge

Counsel for Parents: Theodore A. Sussan, Esq., Sussan and Greenwald.

Counsel for Board: Robert T. Tessaro, Esq.

Statement of the Case and Procedural History

[], father of [], seeks a determination that []'s present residential placement at Bancroft School (Bancroft), Haddonfield, New Jersey is the appropriate placement in the least restrictive environment and that respondent, Fort Lee Board of Education, should bear the educational and residential costs at Bancroft.

Procedural History

The matter was transmitted to the Office of Administrative Law on October 21, 1994. In accordance with 20 U.S.C.A. § 1415 and 34 C.F.R. §§ 300.500 to 300.587 the Commissioner of Education requested that an administrative law judge be assigned to conduct a hearing on this matter. The Acting Director of the Office of Administrative Law assigned the undersigned to hear this matter pursuant to his powers under N.J.S.A. 52:14F-5o.

On the initial hearing date of November 18, 1994, respondent requested an order joining the mother of [], who has legal and physical custody of the child, as an indispensable party pursuant to Rule 4:28-1, *Rules Governing Civil Practice*, as made applicable to administrative hearings by N.J.A.C. 1:1-1.3(a). After entertaining presentations by both parties that motion was denied. Transcript of 11-17-94, pp.50-52. A formal order was issued on November 22, 1994.

Additional hearings on this matter were conducted on November 21, 1994, March 15, March 21, March 23, and April 25, 1995. The matter was adjourned to June 1, 1995, for additional evidence and closing statements with leave for counsel to file written submissions. Both

parties submitted written presentations whereupon the record was closed.

Matters Presented and Discussion

[], now nine years old, is a multiply handicapped child with various diagnosed disorders including attention deficit hyperactivity disorder, pervasive developmental disorder not otherwise specified, oppositional defiant disorder, epilepsy, minimal brain dysfunction, episodic discontrol, intermittent explosive disorder, static encephalopathy, borderline intellectual functioning, dyslexia, dyspraxia, dysgraphia, and multiple specific learning disabilities.

The parents were divorced in May 1992, and the decree of divorce was entered into evidence as Exhibit R-11. Legal and actual custody of [], an only child, was placed with his mother. The father, the herein petitioner on behalf of [], has rights of visitation and obligation to provide support.

At the time of the divorce [] was attending the Stephen Gaynor School (Gaynor) in New York City. A dispute arose with respondent regarding that placement and the father requested a due process hearing. The matter was resolved by a settlement between petitioner and respondent indicating that the costs of Gaynor would be shared as long as [] was domiciled in Fort Lee and remained enrolled at Gaynor. That settlement was approved by the administrative law judge on March 15, 1993. *ZD. v. Fort Lee Board of Education*, OAL Dkt. No. EDS 7132-92.

[] had been treated and evaluated by several physicians and psychologists. A principal therapist, Stanley Spergel, Psy.D., clinical psychologist, testified in these proceedings. The severe problems of [] have been ongoing for several years. Although he was treated with various medications, including Ritalin, Tegretol, Dexedrine, Clonidine, and Thorazine, episodes of explosive behavior were not controlled and in fact worsened. The record is replete with numerous incidents of erratic and bizarre behavior. A recitation of a few is sufficient to appreciate the nature of []'s outbursts of behavior.

On one occasion he handed a cup of his feces to the mother's housekeeper when he was in the bath tub. At Gaynor his class was at a nearby gymnasium and at the end of the physical education class, when told to put on his coat, he became uncontrollable, hit, bit and kicked a teacher and was only restrained when a male teacher enveloped him in his arms. When his mother did not accede to his demand for pizza while driving him in a car, his outburst forced her to pull over to avoid an accident and employ behavior techniques that she

had been taught. Even when he was at the office of his therapist, Dr. Spergel he bounced from couch to floor, to sofa, kicking furniture until he had to be physically restrained.

In sum [] is a child whose spectrum of emotions and conduct range from loving and sweet to violent and potentially injurious. In the autumn of 1993 as the behavior of [] began to deteriorate, []'s doctors advised the mother that he should be hospitalized. He was admitted to the Child Psychiatry Inpatient Unit, Long Island, Jewish Medical Center (Exhibit P-5) on November 24, 1993, and he was discharged on December 14, 1993. Upon discharge, recommendations included that [] remain at Gaynor for an interim period to explore placing him in a "small, structured classroom," and, if such setting were unsuccessful, a residential program should be considered. (Exhibit P-6).

When [] returned home, he was at first better behaved and not as prone to outbursts. The mother believed that it would be better for [] to be placed in a school closer by and to have him live with her at home. She found one school in Ridgefield Park unacceptable. Placement at Early Childhood Learning Center (ECLC) was explored and the mother visited the Ho-Ho-Kus Campus in December 1993. On March 8, 1994, [] and his parents were interviewed at ECLC and on April 5, 1994, ECLC informed the Fort Lee Board of Education that [] was offered enrollment in the ECLC Neurologically Impaired Program. The letter of acceptance (Exhibit R-8) noted that it would be necessary to obtain a waiver of classification, inasmuch as [] was classified as multiply handicapped by the individualized education program (IEP) (Exhibit R-4).

It was understood by the child study team (CST) and board of education that [] would enroll in ECLC in the autumn of 1994. [] continued at Gaynor, however, the improvement following his care at Long island Jewish Hospital began to erode and [] began to act out in erratic and disturbing ways, including incidents described above. In late spring 1994, the mother began to have serious reservations about continuing [] in a day school setting and living at home. It had always been her strong desire to keep [] with her. When, however, the positive changes in [], after his hospitalization, were replaced by repeated and often dramatic incidents, she increasingly became concerned that [] required a residential placement in order to derive any meaningful educational benefit.

This conclusion was confirmed by Dr. Spergel in his May 12, 1994 letter to Dr. Zelig Block, Chairman of the Fort Lee Child Study Team (Exhibit P-11). Dr. Spergel reported the decline in []'s behavior and the temper

outbursts requiring that he be sent home from school. Dr. Spergel concluded that:

Indeed, the last time I worked with a child so behaviorally compromised was when I was staff psychologist at the Children's Psychiatric Unit of Bergen Pines Hospital, a residential program. I am therefore strongly recommending that you consider [] for a residential program. It is only with the high staff ratios, significant behavioral component and consistency of programming that we will see a change for []. I am hopeful that with such a program in place [] may begin to enjoy a childhood that has thus far been unavailable to him.

Similarly, a child psychiatrist, Daniel J. Williams, M.D. believed that:

The clinical data available to date strongly suggest that []'s continuing to live at home with his mother is an untenable prospect, likely to result in serious injury by [] to either himself, his mother, or both. The best prospects for behavioral stabilization and appropriate educational functioning would be in a structured residential environment with the opportunity for both psychopharmacologic and behavioral management of a youngster who have substantial histories of severe neuropsychiatric impairment.

[Dr. Williams' neuropsychiatric summary, dated May 16, 1994, Exhibit P-13.]

Boris Rubinstein, M.D., also believed that:

[] will need a residential school which provides a behavior management plan which is followed in the classroom as well as during after school recreational activities, pre-vocational activities and dormitory activities. [Psychiatric summary of March 1994, Exhibit P-15.]

The reports which the CST received from Gaynor seemingly presented a different portrait of []. A report dated May 1994 describes a child with learning disabilities but does not suggest the serious problems which Dr. Spergel, Dr. Williams and Dr. Rubenstein recount. Instead, the report from Gaynor contains these comments:

READING COMPREHENSION

[] scans pictures for clues. What he doesn't understand from text, he comprehends with these aids. Comprehension at his level is good.

...

SCIENCE

[] loves science. He has learned the names and functions of all of the major body organs. Good Work [].

...

PHYSICAL EDUCATION

Although with [] (it is always trial and error) he has made tremendous progress this year. Most noticeable is his awareness and strategies in the games that we play. A tough, aggressive, good athlete. I am happy with his progress.

...

ART

[] has been working well in art lately. He did a superb picture of a bird. He does have trouble concentrating on his work and following instructions.

In *WORK HABITS* and *SOCIAL BEHAVIOR*, his grades ranged from "excellent" to "need improvement." In the subcategories of "cooperates with others," his "consideration for others," "respects property of others," and "respects authority," he was rated "excellent." (Exhibit P-16)

As succinctly noted by counsel for respondent:

It is difficult to reconcile the day to day observations of []'s classroom teachers at the Gaynor school in the spring of 1994 of a charming little boy making progress with his studies despite his handicaps, albeit capable of occasional temper tantrums when annoyed, with the bleak evaluations of [] compiled by the several professionals retained by the parents to evaluate [].

[Respondent's post hearing brief, p.13.]

The testimony of one of []'s teachers at Gaynor as to the considerations underlying the Gaynor report is enlightening. As for the evaluation of social behavior, the teacher explained:

The reason the social behavior is marked excellent and very good was because when [] was not in a rage he was very kind, very sweet, very

good intentioned. He had a very charming, lovely manner about him and he did not disturb the other children.

What happened is he became more and more withdrawn, and more and more bizarre in his behavior. He didn't disturb them in terms of starting fights with the so that---so his behavior was tending towards more self-destructive behavior rather than destructive to the whole group, except during the periods when there were rages.

Therefore, when he was not upset or when he---when he did have the ability to reason, he was very sweet. He did respect authority, he did respect the property of others. He did demonstrate responsibility. He did share. I mean, his nature was that basically of a very lovely, kind, sharing child, therefore, these marks in social behavior.

[Transcript 3-24-1995, pp.37-38.]

As for the comments about art class and his "superb picture of a bird," she stated that:

[] spent the entire year making circles. That was all he could do. He could not---he did not have the ability to make symbolic representation.

The picture that he did of the bird was the first picture he ever did that was symbolic. And it was not the assignment that was given that day or the general assignment. He had an inability to follow instructions. He couldn't and so he was kind of sometimes sent to a more individual isolated area and allowed to just draw his circles, unfortunately, because he could not be drawn into the other art activities as much as we tried.

So, he finally produced this one picture that had some symbolic representation and we all made a fuss over it. He didn't disturb anybody, he just didn't have the capabilities of doing what was asked of him and when he finally did produce something we were all thrilled, therefore this comment.

[*Id.*, p.39.]

Although the teacher related serious educational problems with [] and periods of rage, the Gaynor report provided the CST does not compel or even strongly suggest the conclusion that a residential placement was necessary for [].

By her letter of June 7, 1994 (Exhibit R-2) the mother provided Dr. Block and the CST with five Psychological evaluations including those of Dr.

Spergel, Dr. Williams and Dr. Rubenstein. The mother indicated that she no longer believed that ECLC could meet []'s need and that he needed "a 24-hour-7-day per week-12 month educational residential setting." She noted two potential placements, one in Massachusetts, and one in Connecticut. The letter concludes asking that:

The request that I am making at this time is for Fort Lee Board of Education to fund the *educational tuition only for a 12 month program and those related services that are identified in [[]'s] IEP*. I am attempting to secure finalization of an agreement, through the efforts of both matrimonial attorneys, whereby my ex-husband, [] would assume the responsibility of the residential/therapeutic costs. [emphasis in original.]

After reviewing available residential placements the mother decided that Bancroft in Haddonfield, New Jersey was best for [] Respondent, which had agreed to fund []'s education at ECLC, agreed to fund the educational portion of []'s placement at a residential facility. [] was enrolled in Bancroft as a residential student for the 1994-95 school year in September 1994.

Respondent was not aware of the decision to place [] in the residential Bancroft program until the August 25, 1994 letter of []'s attorney Margaret F. Mignogna, Esq. (Exhibit R-9). This letter advised the CST of []'s acceptance at Bancroft and requested that the respondent, Fort Lee Board of Education "approve funding of the educational tuition for Bancroft for the 1994-95 school year as expeditiously as possible. Bancroft will need to have Fort Lee's commitment for funding in order to 'hold' his placement open."

At the same time this request was made, petitioner and []'s mother were engaged in the ongoing matrimonial matter which resulted in the order approving settlement signed September 9, 1994 (Exhibit R-13b). In her certification supporting the application for the order to show cause, the mother stated that:

By correspondence dated May 20, 1994, I specifically enumerated my position relative to []'s residential placement and Dr. [FS's] responsibility relative to the cost of the residential program. When I was conferring with my educational attorney, Ms. Mignogna, I was at all times apprised, that there may be a possibility that the Fort Lee Board of Education will not endeavor to pay for the residential costs of []'s placement but only the educational costs. I was also advised that if litigation commenced with the Fort Lee Board of Education for full funding of []'s residential placement (both the education and residential costs) the process will impede, frustrate and delay his full

admission whereby he would not be able to attend Bancroft on a timely basis. To this end, I always communicated my position to the defendant stating that I would cooperate with the defendant if he wants to seek reimbursement of the residential costs he is to incur from the Fort Lee Board of Education *after* [] is placed at Bancroft. It is further my understanding that if defendant prevails in his due process litigation, then payment would be reimbursed to him retroactively. [emphasis in original]

[Exhibit R-13b, par. 17]

Pursuant to an order to show cause brought by the mother, a settlement between her and []'s father, petitioner, was entered into on September 9, 1994. (Exhibit R-13c). The residential costs at Bancroft were calculated at approximately \$4,033.55 per month, \$48,402.65 per year. The payments were to be divided between the father of 85% or \$3,450.22 per month and the mother 15% or \$583.33 per month. The educational cost to Fort Lee was estimated at \$23,710. Along with other provisions, the order incorporating the settlement states that:

9. The defendant represents that he has elected to make an appropriate application to the Fort Lee Board of Education for reimbursement of the residential costs incurred or any portion thereof relative to [FS]'s attendance at Bancroft and if he is successful, then the parties shall share in any and all sums received for that reimbursement, with the plaintiff receiving 15% and the defendant receiving 85% of that reimbursed sum of money, if any.

[Exhibit R-13c]

Petitioner's counsel by letter of October 3, 1994, requested a mediation conference in regard to the placement of [] at Bancroft and requested that the entire financial responsibility be that of the respondent, Fort Lee Board of Education because the "residential placement is educational in nature."

The circumstances surrounding []'s placement at Bancroft is viewed by respondent as a contrivance calculated to circumvent the IEP and the function of the CST. Respondent believes that, while the CST acted properly and in complete good faith, the parents crafted an agreement whereby [] would be unilaterally enrolled at Bancroft with the CST agreement it would bear the educational costs and then, when [] was in place, to require respondent to bear the entire costs. Relying upon *Lascari v. Board of Education of the Ramapo Indian Hills Regional School District*, 116 N.J. 30 (1989), respondent asserts that the

demonstrated lack of good faith by the parents should bar petitioner's request for residential costs.

In *Las cari* the district failed to provide an appropriate education and the parents enrolled their child in an out-of-state residential school. The Supreme Court determined that when a school district failed to provide an educationally handicapped child with an appropriate education and the parents demonstrate that in placing their child in a private facility, they acted in good faith, the district will be responsible for that educational cost. *Las cari* at 50. Respondent has correctly identified the equitable principles involved in the *Las cari* reasoning, however, in view of the instant facts such principles do not bar the relief sought.

Although the parents' failure, be it by omission or intent, to make respondent contemporaneously aware of the decision to place [] in a residential school and the efforts to place him may connote bad faith on their part, in the context of []'s circumstances, the question is whether it is relevant?

Except for Dr. Spergel's letter of May 1994 (Exhibit P-11) to Dr. Block, the CST had every reason to expect that ECLC would receive [] into its day school for the 1994-1995 school year. Certainly, the positive statements which comprised the report from Gaynor (Exhibit P-16) as to []'s conduct and progress gave no reason to believe otherwise.

Following the deterioration of []'s behavior after his hospitalization in late 1993, the parents and their experts strongly believed that a day placement was inappropriate. However, rather than sharing this recognition with the CST with a view of an amended IEP which would authorize a residential placement, the parents chose to locate a facility, obtain agreement that respondent would underwrite the educational portion and then sought to have respondent pay all costs, educational and residential.

The CST accepted the program at Bancroft. It apparently concluded that it was equally efficacious for []'s needs as was ECLC, and it would serve to accommodate the mother's desire for her son, with comparable costs, including transportation, with ECLC. Unlike *Las cari*, here there is no dispute as to placement, just whether a residential setting is educationally required.

The evidence, including reports of eminent specialists, established that [] had become an extremely difficult child. His explosive outbursts occurred in a variety of situations including in the office of a long time therapist. Those specialists are unanimous that [] needs full-time residential placement.

That, however, does not end the inquiry. Merely, because a child needs a residential placement for medical, emotional or other problems does not entitle that child to have the school district pay the residential costs. It is only when the educational needs require such placement does its cost become the school district's responsibility. *Kruelle v. Newcastle County School District*, 642 F.2d. 687 (3d Cir. 1981). Such is the case with [].

Regardless of the palliatives of the Gaynor report of May 1994 (Exhibit P-16), [] was not making educational progress there. As testified to by his teacher and contained in her letter of May 18, 1994 (Exhibit P-17), Gaynor was not meeting his needs and a residential placement was recommended. As a result of his inappropriate conduct at Gaynor [] was sent home before the conclusion of the school day, a clear interruption in his education. That Gaynor was unsuitable was accepted by the mother and CST.

The mother and the CST initially concurred that ECLC would be an appropriate placement. Respondent continues to believe that ECLC is appropriate for []'s needs and that the assumption of the educational costs at Bancroft can only be viewed as an accession to the mother's request and not a change in its position.

It was agreed that the central issue to be decided is whether the day school program at ECLC is an appropriate placement for [] or is the residential program at Bancroft the only appropriate placement for []? (Transcript 3-23-95, pp.41, 42).

If ECLC was ever a suitable placement for [], his deteriorating condition and increasingly bizarre, dangerous behavior made it inappropriate and inadequate. This was established by the testimony of the executive director of ECLC that the school is not approved to serve children classified as multiply handicapped, although a waiver may be obtained. ECLC, however, did not have the expertise or staffing necessary to serve children with severe behavioral disorders.

Upon petitioner's counsel reading portions of the psychiatric and psychological reports in evidence, the executive director of ECLC stated that:

Had I been the professional reviewing the records, I would have undoubtedly concluded that there was not a good match, vis-a-vis the student and the program.

(Transcript 3-23-95, p.25)

The matters adduced at this hearing established that ECLC was inadequate for []'s needs. Applying the standard under *Kruelle* that the educational needs require residential placement, I FIND that Bancroft is the appropriate placement for [] and that ECLC is not.

There remains, then, respondent's contention that the parents did not deal in good faith with respondent and therefore, under *Lascari*, petitioner should not prevail as to the costs for residential placement not agreed to by the CST. Notwithstanding the language of *Lascari* as to the apparent requirement of "good faith," its presence or lack of in this matter would not change the conclusion that Bancroft is the only appropriate placement. That would have been the result had the mother provided the CST with all evaluations of [], as they were received and had she kept the CST abreast of her altering position regarding the feasibility of her son living at home while attending a day school. Her lawyer's request on August 25, 1994, that respondent pay for the educational costs at Bancroft, followed shortly thereafter by the agreement in the matrimonial order that petitioner would seek to recover all costs, might show a lack of forthrightness of the parents with respondent, but it would not have changed the ultimate fact that [] is properly at Bancroft.

Order

It shall be the obligation of the Fort Lee Board of Education to pay necessary educational and residential costs at Bancroft on behalf of [] It is further ORDERED that the Fort Lee Board of Education shall reimburse the parents for any educational and residential costs actually expended by them.

It is further ORDERED that counsel for petitioner shall coordinate with counsel representing the mother to ensure that any payments here ordered shall be distributed between the parents in accordance with their respective rights thereto.

This decision is final pursuant to 20 U.S.C.A. § 1415(e) and 34 C.F.R. § 300.509 (1994) and is appealable by filing a complaint and bringing a civil action either in the Superior Court of New Jersey or in a District Court of the United States. 20 U.S.C.A. § 1415(e)2, 34 C.F.R. § 300.511. If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Division of Special Education.