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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS861-02

AGENCY DKT. NO. 2002-6199

F.W., Sr. o/b/o F.W, Jr.,

Petitioner,

v.

RIVERSIDE TOWNSHIP BOARD

OF EDUCATION,

Respondent.

_____

Jamie Epstein, Esq., for the petitioner

Roger A. Barbour, Esq., for the respondent, (Law Office of John T. Barbour, attorney)

Record Closed: July 8, 2 002 Decided August 21, 2002

BEFORE **ROBERT S. MILLER**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was initiated by a petition of F.W., Sr. ("petitioner") on behalf of his son, F.W., Jr., alleging that the Riverside Township Board of Education ("Board of Education" or "respondent") has failed to develop and prepare an appropriate accommodation plan for F.W., Jr. in accordance with ? 504 of the Rehabilitation Act of 1973 ("the Act") and the federal regulations implementing

that Act, especially with respect to its failure to provide his son transportation to and from school.

On March 6, 2002, petitioner's counsel filed a request for a due process hearing with the Department of Education, Office of Special Education, in which he waived petitioner's right to mediation and a transmission conference.

On March 11, 2002, the instant matter was filed in the Office of Administrative Law for determination as a contested case pursuant to the New Jersey Administrative Procedure Act.

By notice dated March 12, 2002, the Office of Administrative Law ("OAL") scheduled the matter for plenary hearing on March 20, 2002.

On March 20, 2002, with the agreement of counsel, the matter was converted to an application by petitioner for emergent relief, *viz.,* to require the Board of Education to provide free transportation to and from Riverside High School for F.W., Jr. On that date I heard arguments of counsel and denied the application for emergent relief. However, I ordered the Board of Education to have its ? 504 Committee meet no later then March 27, 2002, in order to determine what accommodations would be afforded to F.W., Jr., which determination was to be reduced to writing no later than April 3, 2002.

Plenary hearings were scheduled and held on April 17, May 10, and May 24, 2002. The record closed upon my receipt of the last submission by counsel.

The essential facts in this case are not in dispute, having been established by stipulations made by counsel at the outset of the hearing, by the credible testimony of five witnesses, and by numerous letters, reports, diagrams, and other documents. Accordingly, I make the following

FINDINGS OF FACT

1. F.W., Jr.'s date of birth is April 3, 1986.

2. F.W., Jr. resides in Delanco Township ("Delanco") and walks to the high school in neighboring Riverside Township ("Riverside").

3. F.W., Jr. is a student enrolled in the Riverside School District, pursuant to a sending-receiving agreement between Delanco and Riverside.

4. Prior to attending the Riverside School District, F.W., Jr., attended K through 8th grade in the Delanco School District.

5. F.W., Jr. has been diagnosed by one Dr. Cipkin as having Attention Deficit Disorder ("ADD"), which is his current diagnosis. At an unspecified time, Dr. Cipkin stated that F.W., Jr. suffers from a short attention span and exhibits inappropriate behavior, is easily distracted, is often impulsive, has poor self-control, does not follow directions and has trouble handling unstructured situations. Nevertheless, the Child Study Team of the Delanco Board of Education has found that he is not eligible for special education classification under the Individuals with Disabilities in Education Act.

6. F.W., Jr. lives 2.3 miles from school if he walks from home to school on sidewalks and public roadways by the shortest route possible. However, if he walks to school using the route recommended by the Delanco Township Chief of Police, which route he considers to be safer for pedestrians, the route is 2.59 miles.

7. During F.W., Jr.'s attendance within the Delanco School District, F.W., Sr. attempted on numerous occasions to obtain transportation for both of his school age children, asserting among other things, that the route that the children walked to school was dangerous.

8. In an undated letter directed to Superintendent of Schools Joseph Miller, Edmund T. Parsons, then Chief of Police of Delanco Township, stated that the roadway conditions in the vicinity of petitioner's residence included no discernible "shoulder markings" and no roadway curbs along a portion of the roadway, "lending credence to Mr. [W's] concerns for the safety of his children . . . and the danger to pedestrians."

9. In a handwritten note dated March 19, 2002 (not directed or addressed to any particular person) on his Prescription Blank, Henry P. Donnon, M.D. stated: "I suggest for your sake as well as [F's] that you supply him with transportation to and from school."

10. The Delanco Board of Education has determined on several occasions that the route that F.W., Jr. walked to school was not hazardous.

11. The route that F.W., Jr. now ordinarily walks from his home to Riverside High School is protected by sidewalks, crosswalks, guardrails and crossing guards the entire way to school.

12. Approximately 115 other children take the same route to the Riverside High School as does F.W., Jr.

13. Within the last two years, the intersections that F.W., Sr. has complained were hazardous have undergone extensive reconstruction and safety renovations.

14. On February 19, 2002, at the request of petitioner, John H. Comiskey, a graduate civil engineer and an expert in safety engineering, made an inspection of the route that F.W., Jr. ordinarily uses when walking from home to the high school. He was of the opinion that there were two particularly dangerous intersections along the route and concluded that the route was hazardous. He was also of the opinion that the reconstruction and renovation of the intersections and roadway made within the past two years have not rendered the route "completely safe" for pedestrians.

15. F.W., Jr. is neither physically handicapped nor mentally retarded.

16. F.W., Jr. has been a member of at least two varsity sports teams and is considered to be a good athlete.

17. In early November 1999 the ? 504 Committee of the Delanco School District prepared a ? 504/ADA Individual Accommodation plan for F.W., Jr., which was signed by Superintendent of Schools Joseph Miller on November 2, 1999 and by F.W., Sr. on November 15, 1999. Below his signature, however, F.W., Sr. added a "Parent's Note" which, in pertinent part, provided: "Please include under #VIII necessary accommodations . . . School to provide transportation to and from school for [F] Jr. . . . ."

18. By letters dated November 17, 1999 and November 30, 1999, Superintendent Miller informed F.W., Sr. that the ? 504 Plan could not be implemented "in the form in which it has been submitted by you. The three `Parent's Notes' which you have amended [*sic*] to the Plan draft are inadmissible."

19. In late March or early April 2002 the ? 504 Committee of the Riverside Public Schools prepared a ? 504 Accommodation Plan for F.W., Jr., which was signed by Superintendent of Schools James Waskovich and which was submitted to F.W., Sr. for his approval and signature.

20. By letter dated April 3, 2002 to Dr. James Waskovich, F.W. replied as follows: "I accept the 504 Accommodation Plan for [F]. Will you add (1) need transportation to and from school to be

provided by the school for [F] . . . and (2) exempt from his discipline for behaviors which are manifestations of his disability."

21. By letter dated April 12, 2002, Superintendent Waskovich advised petitioner that he was "not able to agree" to the two additions to the ? 504 Plan requested by petitioner.

22. The Delanco Board of Education and the child study teams for Riverside and Delanco townships have addressed the requests of F.W., Sr. for transportation and have determined that F.W., Jr. is not entitled thereto.

23. Neither the Delanco Township Council nor the Riverside Township Council have designated F.W., Jr.'s route to school as hazardous.

24. F.W., Jr. was enrolled in the Riverside School District beginning in September 2000. Prior to the filing of the instant petition, F.W., Sr. had not requested that the Riverside Board of Education provide F.W., Jr. with a ? 504 Plan nor free transportation from home to school and back.

25. At the time that F.W., Jr. began attending classes at Riverside High School in September 2000, Delanco did not forward any information to Riverside indicating that F.W., Jr. was eligible for, or in need of, a ? 504 Accommodation Plan or other educational services.

26. During the first two marking periods of the 2001-2002 school year, F.W., Jr.'s course grades were good to excellent. For the third marking period, his grades in two subjects (C.P. Biology and Spanish I) declined significantly. Specifically, he received a grade of 48 in C.P. Biology and a grade of 68 in Spanish I.

27. During the period from October 2000 to February 27, 2002, F.W., Jr. has exhibited a serious behavior problem at school. This has resulted in numerous suspensions and detentions for such offenses as "fighting," "disruptive behavior," "defiance," "lateness," and "gross misconduct."

ISSUES AND ANALYSIS

There are two issues in this case: (1) Does either the New Jersey School Law or the Rehabilitation Act of 1973 require the Riverside Board of Education to provide free transportation to F.W., Jr.? and (2) Has respondent met its burden of proving that it has prepared a reasonable and appropriate section 504 Plan for F.W., Jr.?

For the reasons that follow, I am of the opinion that both of these questions should be answered in the negative.

1. Transportation

Section 504 of the Rehabilitation Act, 29 *U.S.C.* ? 794 bars all federally funded entities (governmental or otherwise) from discriminating on the basis of disability. See *W.B. v. Matula,* 67 F.3d 484, 492 (3d Cir. 1995).

Section 504 states, in relevant part:

> "No otherwise qualified individual with a disability in the United States?.?.?. shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. 29 *U.S.C.* ? 794(a)."

To establish a violation of ?504, petitioner must demonstrate that (1) F.W., Jr. is disabled as defined by the Act; (2) F.W., Jr. is "otherwise qualified" to participate in school activities; (3) the Board of Education receives federal financial assistance; and (4) F.W., Jr., was excluded from participation in, denied the benefits of, or subjected to discrimination at, the school. *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1380 (3d Cir. 1991); 34 *CFR*. ? 104.4(a). In addition, to be liable, the Board of Education "must know or be reasonably expected to know of F.W., Jr.'s disability. *Nathanson*, 926 *F. 2d* at 1381. However, petitioner "need not establish that there has been an intent to discriminate in order to prevail under ?504." Id. at 1384 *Alexander v. Choate,* 469 U.S 287, 297 (1985). As noted in the *Matula* case, *supra*, "there appears to be a few differences, if any, between I.D.E.A.'s affirmative duty and ?504's negative prohibition." 67 *F. 3d* at 492-93.

Respondent does not deny that F.W., Jr. is "disabled" as defined by the Act, that he is otherwise qualified to participate in school activities, and that he is entitled to all the benefits of the Act. However, respondent contends - - and I agree - - that petitioner has been unable to show that F.W., Jr. has been excluded from participation in, denied the benefits of, or subjected to discrimination at the school. In particular, petitioner offered no evidence that F.W., Jr.'s ADD prevents him from safely walking to school or made it particularly difficult for him to do so. Furthermore, there is nothing in the Act, or the regulations promulgated pursuant thereto, requiring a Board of

Education to provide transportation to a student diagnosed with ADD. Nor, to my knowledge, is there any case law to that effect.

The cases relied upon petitioner's counsel - - especially, *Hurry v. Jones,* 734 *F2d.* 879 (1st. Cir. 1984); *Dubois v. Connecticut. State Board of Education,* 727 *F2d.* 44 (2nd Cir. 1984); and *Alamo Heights Independent School District v. State Board of Education,* 790 *F2d.* 1153 (5th Cir. 1986) - - are either inapplicable or readily distinguishable. *In Hurry v. Jones*, the student in question was a child suffering from cerebral palsy and mental retardation and was confined to a wheelchair by spastic quadriplegia. Both *Dubois* and *Alamo Heights* focused on the interpretation of a related but different Act, *i.e.*, the Education For All Handicapped Children Act (EAHCA). *Dubois* involved a minor child with a history of serious disciplinary problems resulting in suspension from school who was placed in an out-of-state private school. The *Alamo Heights* case concerned a child suffering from cerebral dysplasia who was severely mentally retarded, being able to walk only with assistance.

Turning to New Jersey school law, petitioner cites, and appears to rely upon, *N.J.S.A.* 18A:39-1.2 and *N.J.A.C.* 6A:27-1.2. That reliance is misplaced.

In his Brief (at page 7) he cites *N.J.S.A.* 18A:39-1.2 to support his contention that Riverside "has a duty to transport F.W., Jr. if the road condition he must travel is not safe for him." Subsection 1.2, however, *allows*, but does not require, a board of education to provide transportation for non-remote pupils *if* the governing body finds that safety reasons make it desirable to do so. Neither the governing body of Delanco nor that of Riverside have made such a finding. If petitioner believes that the failure or refusal to so find is unreasonable or arbitrary, he may bring a civil action in an appropriate forum. The OAL is not that forum.

Petitioner's counsel also cites *N.J.A.C.* 6A:27-1.2, which requires a board of education to provide transportation to students "who reside *remote* from their assigned school of attendance?.?.?.?." (emphasis supplied) "Remote" is declared to mean "beyond two and-one-half miles for high school students (grades nine through twelve) . . . ." Petitioner's counsel focuses on the testimony of his expert, Mr. Comiskey, who testified that, using the longer but safer route, it is 2.59 miles from F.W., Jr.'s home to the high school. Counsel, however, fails to mention that "for the purpose of determining eligibility for student transportation, measurements shall be made *by the shortest route along public roadways or public walkways . . .*" *N.J.A.C.* 6A:27-1.2(a)2. (emphasis supplied)

In sum, counsel had been unable to cite, nor am I aware, of any legal authority (statute, regulation or reported case) obligating either the Riverside Board of Education or the New Jersey Department of Education to provide transportation to an ADD student living less than 2. 5 miles from school, unless transportation is required under the student's ? 504 Plan or in an Individualized Education Plan (if he is a classified student under the *Individuals With Disability In Education Act*).

2. Section 504 Plan

The ? 504 Plan prepared by respondent is a one-page document (Exhibit R-10). Admittedly, it is a tentative or preliminary plan prepared by the Director of the Guidance Department (Pamela Faulkner) and is based upon the ? 504 Plan formulated about three years earlier by the Section 504 Committee of the Delanco School District. It is divided into three categories ("Academic," "Organizational," and "Other"). Each category has three items. Of the total of nine corrective or remedial measures suggested in the Plan, the teacher is responsible for six while the parent is responsible for three. Many, if not most, of the remedial measures are general, as, *e.g.*, "minimize classroom distractions," and "teachers will give encouragement and positive reinforcement when needed." In addition, when Ms. Faulkner prepared the Plan she was not aware of F.W., Jr.'s significantly declining grades in two courses. The Plan, moreover, was prepared without any current medical examination and evaluations of F.W., Jr. having been conducted. There was, moreover, no expert testimony to the effect that the Plan would be able to effectively meet F.W., Jr.'s needs.

Under these circumstances, I cannot fairly conclude that the proposed ? 504 Plan is appropriate for F.W., Jr.

CONCLUSION AND ORDER

For the reasons expressed above, I **CONCLUDE** that the determination of the Riverside Board of Education declining to provide F.W., Jr. with transportation to and from the Riverside High School is correct and should be **AFFIRMED.** I also **CONCLUDE** that respondent Board of Education has failed to carry its burden of proving that it has prepared an appropriate Section 504 Accommodation Plan for F.W., Jr. and, accordingly, a new section 504 Plan should be prepared as expeditiously as possible. It is so **ORDERED.**

This decision is final pursuant to 20 U.S.C.A. ?1415(i)(1)(A) and 34 CFR 300.510 (2000) 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(i)(2), 34 CFR 300.512 (2000). If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

August 21, 2002

DATE **ROBERT S. MILLER**, ALJ

tmp
