

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

OAL DKT. NO. EDS 10556-15

AGENCY DKT. NO. 2015 22962

**PITTSGROVE TOWNSHIP
BOARD OF EDUCATION,**

Petitioner,

v.

K.D. ON BEHALF OF D.D.,

Respondent.

Janelle Edwards-Stewart, Esq., for petitioner (Porzio, Bromberg & Newman,
P.C., attorneys)

No appearance by or on behalf of respondent

Record Closed: January 20, 2016

Decided: May 5, 2016

BEFORE JOSEPH F. MARTONE, ALJ/t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this case, the petitioner-school district seeks parental consent to obtain educational evaluations in connection with the parent's request for a change in placement, as well as a determination that the petitioner has provided a free and appropriate public education (FAPE) to D.D. and, therefore, has no liability under the IDEA in connection with D.D.'s persistent failure to attend school.

Petitioner filed a due process hearing request on June 10, 2015, and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing, which was scheduled for July 13, 2015, before Hon. John F. Russo, Jr., ALJ. On that initial date,

Judge Russo intended to conduct a settlement conference and advised the parties of that fact. Approximately thirty minutes before the conference, K.D. called into the OAL indicating she could not attend in person because of car trouble but would call into the settlement conference upon its commencement at 11:00 a.m. However, K.D. failed to call in or otherwise contact the OAL on that date. At 11:20 am, Judge Russo initiated a series of calls to K.D. requesting an immediate return call, to no avail.

Judge Russo then concluded the initial session by scheduling a follow-up telephone conference call with the parties to be held on August 3, 2015, at 3:00 p.m. The OAL Clerk sent a notice of the scheduling of this conference call to the parties. On August 3, 2015, K.D. again failed to appear.

This case was then scheduled for a hearing to be held on October 26, 2015. Prior to that date, petitioner filed a Notice of Motion for Summary Decision on October 8, 2015 (P-1) with supporting documentation. No response to the motion was ever provided by respondent.

The October 26, 2015, hearing was adjourned at the request of petitioner's attorney because of a court conflict. The hearing was rescheduled to January 19, 2016, and the OAL Clerk sent a notice of the scheduling of this hearing to the parties.

On January 4, 2016, the undersigned was appointed as a temporary ALJ to preside over this case pursuant to N.J.S.A. 52:14F-5m, because of Judge Russo's appointment to the Superior Court of New Jersey.

On January 19, 2016, K.D. again failed to appear, and she has failed to provide an explanation for her nonappearance within one day as required by N.J.A.C. 1:1-14.4(a).

N.J.A.C. 1:1-14.4(d) states that if the appearing party requires a decision on the merits, the party shall ask the judge for permission to present ex parte proofs. In this case, the school district requested permission to rely on its Motion for Summary Decision (P-1) as its ex parte proofs. Based upon the school district's efforts to obtain

parental cooperation and consent, I **FIND** good cause exists for a decision on the merits if it is supported by the contents of the petitioner's summary decision motion.

FACTUAL DISCUSSION

The following factual discussion is based upon the submissions of the petitioner Pittsgrove Township Board of Education, and, in particular, the Certification of Christine Battiato (P-2) attached to the petitioner's Motion for Summary Decision (P-1). Ms. Battiato is the Director of Special Education Services for the school district.

D.D. is currently age seventeen (D.O.B. January 28, 1999), and was sixteen years of age at the time the petition in this matter was filed. He remains enrolled in the Pittsgrove Township school district (P-1 at para. 1). He was diagnosed with oppositional defiant disorder and he was initially found eligible for special education and related services on May 31, 2011, under the emotionally disturbed (ED) classification (P-1 at para. 2). This was based largely upon his behavioral difficulties which included cursing, hitting, fighting, pushing, throwing objects, verbally attacking and insulting others, damaging or destroying objects, shouting and threatening (P-1 at para. 3).

In her Certification (P-2 at para. 4), Ms. Battiato certifies that D.D. was offered an appropriate IEP containing appropriate goals and objectives and an appropriate Behavior Intervention Plan and counseling services to deal with his negative behaviors (P-2, Exhibit A). He was also provided with placement in an appropriate self-contained Behavior Disabilities program (P-2 at para. 5).

During the 2014-15 school year, D.D.'s absences eclipsed his behavior difficulties as the primary area of concern. Before the end of the first semester in 2014-15 he had accumulated more than sixty-five absences from school (P-2 at para. 6-8). Numerous attempts were made by D.D.'s special education teacher, his case manager and petitioner's attendance officer to discuss his attendance with D.D. and K.D., but with no success (P-2 at para. 10-14). Petitioner also initiated a truancy action against K.D., which K.D. disregarded leading to the issuance of a bench warrant. (P-2 at para. 15-16). K.D. failed to take any action to address the warrant and there was no

improvement in D.D.'s attendance (P-2 at para. 17-18).

On January 13, 2015, K.D. delivered a physician's note dated January 12, 2015, and requested home schooling for D.D. (P-2 at para 19). The note appears to state that D.D. needs home schooling based on a diagnosis of ADD, MDD, school phobia, and to please provide home tutoring and curriculum (P-2, exhibit C).

In order to properly assess this request for a change in the program and placement being requested by K.D., petitioner undertook to reevaluate D.D. and an evaluation planning meeting was scheduled to eventually occur on February 26, 2015 (P-2 at para. 20-24). Although she was duly notified of this meeting she failed to appear and continued to disregard the petitioner's efforts (P-2 at para. 25-30). Based on K.D.'s lack of cooperation, the petitioner filed the within due process action in June 2015 (P-2 at para. 31).

As stated in the procedural history above, the matter was transmitted to the OAL on July 14, 2015, for a hearing, which was scheduled for July 23, 2015. On that initial date, Judge Russo intended to conduct a settlement conference and advised the parties of that fact. Approximately thirty minutes before the conference was to commence, K.D. called into the OAL indicating she could not attend in person because of car trouble but would call into the settlement conference upon its commencement at 11:00 a.m. However, K.D. failed to call in or otherwise contact the OAL on that date. At 11:20 a.m., Judge Russo initiated a series of calls to K.D. requesting an immediate return call, to no avail. Judge Russo concluded the initial session by scheduling a follow-up telephone conference call with the parties to be held on August 3, 2015, at 3:00 p.m. The OAL Clerk sent a notice of the scheduling of this conference call to the parties. On August 3, 2015, K.D. again failed to appear in response to calls to her residence.

This case was then set down for a rescheduled hearing to be held on October 26, 2015. Prior to that date, petitioner filed the within Notice of Motion for Summary Decision on October 8, 2015 (P-1) with supporting documentation. No response to the motion was ever submitted by respondent.

The October 26, 2015, hearing was adjourned and rescheduled for a hearing on January 19, 2016, and the OAL Clerk sent a notice of the rescheduling of this hearing to the parties.

On January 4, 2016, the undersigned was appointed as a temporary ALJ to preside over this case, and on January 19, 2016, K.D. again failed to appear, and failed to provide an explanation for her nonappearance as required by N.J.A.C. 1:1-14.4(a). It should be noted that if K.D. had appeared on January 19, 2016, I intended to permit K.D. to respond to petitioner's motion with her testimony.

In view of K.D.'s failure to appear, the school district's attorney requested permission to rely on its Motion for Summary Decision (P-1) as its ex parte proofs. Based upon the school district's efforts to obtain parental cooperation and consent, I **FIND** good cause exists for a decision on the merits pursuant to N.J.A.C. 1:1-14.4(d), supported by the contents of the petitioner's summary decision motion.

CONCLUSION AND DECISION

Based upon the foregoing facts, which have not been disputed by respondent and which appear to be supported by the certification of Christina Battatio, petitioner's Director of Special Education Services, which has not been disputed by respondent, I **CONCLUDE** that petitioner has made a free appropriate public education available to D.D. by way of an appropriate program and placement for the 2013-14 and 2014-15 school years. I further **CONCLUDE** that petitioner has made extraordinary efforts to communicate with K.D. concerning D.D.'s education and truancy and concerning its request to reevaluate D.D. in light of the medical not supplied to it. I further **CONCLUDE** that K.D. and D.D. have forfeited D.D.'s receipt of a free and appropriate public education in the 2014-15 school year through D.D.'s truancy and a complete lack of responsiveness to the efforts of the petitioner to provide a free and appropriate public education.

Based upon the foregoing, I **ORDER**:

- (a) Petitioner's request for summary decision is hereby granted.
- (b) Petitioner is hereby granted consent to conduct any and all evaluations of D.D. which it deems appropriate including but not limited to a social assessment, a functional behavioral assessment, an educational evaluation, a psychiatric evaluation, a neuropsychiatric evaluation, a neuropsychological evaluation and/or a speech language assessment.
- (c) Petitioner shall furnish to K.D. a list of anticipated evaluations as well as a schedule for the administrative of each assessment within twenty days of this Decision.
- (d) K.D. shall produce D.D. for evaluation on each and every date indicated in petitioner's schedule, unless K.D. has communicated to petitioner and petitioner has agreed to accommodate a specific scheduling conflict.
- (e) K.D.'s production of D.D. for evaluation shall be such that D.D.'s full evaluation shall be completed within sixty days of this Decision.
- (f) In the event that K.D. and D.D. fail to comply with the provisions of this Decision, it is hereby determined that the petitioner shall have no further obligation to provide a free and appropriate public education to D.D.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2007) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2007).

May 5, 2016

DATE

JOSEPH F. MARTONE, ALJ t/a

Date Received at Agency

Date Mailed to Parties:

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