

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 14876-13
DCR DOCKET NO. PC38ME-61993

D.W. Parent/Guardian o/b/o C.W.,)	
a minor, and D.W., Individually,)	
)	
Complainant,)	<u>Administrative Action</u>
)	
v.)	FINAL AGENCY DECISION
)	
Willingboro Public Schools,)	
)	
Respondent.)	

This is a school bullying case. D.W. (Complainant) filed a verified complaint with the Division on Civil Rights (DCR) alleging that his daughter, C.W., was harassed in elementary school based on her disability, and that the Willingboro Public School District (Respondent) was aware of the misconduct but failed to adequately respond, in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. (ID2).¹

Respondent denied the allegations of discrimination in their entirety. During the DCR investigation, Complainant asked that the matter be transmitted to the Office of Administrative Law (OAL) for an administrative hearing without a probable cause determination. DCR ceased its investigation and transmitted the case to the OAL pursuant to N.J.A.C. 13:4-11.1, on or about October 17, 2013.

On March 6 and September 15, 2015, Administrative Law Judge (ALJ) Elia A. Pelios held hearings. Complainant presented his case *pro se*. The ALJ left the record open to allow Complainant to produce "date-stamped" copies of two letters that he had introduced into evidence, and for parties to submit written summations. (T2:164-166:2-4). On November 19, 2015, the record closed.

¹ "ID" refers to the ALJ's February 19, 2016 initial decision. "T:" refers to the transcript of the September 15, 2015 hearing. "Ex. P-" and "Ex. R-" refer to exhibits admitted into evidence at the hearing by Complainant and Respondent, respectively. "CE" refers to exceptions filed by Complainant.

On February 22, 2016, ALJ Pelios issued an initial decision dismissing the complaint.

On March 1, 2016, Complainant filed exceptions to the initial decision.

After a careful review of the record including Complainant's exceptions, the ALJ's initial decision is hereby affirmed.

The ALJ's Decision

Complainant and his wife, M.W., testified that their daughter told them that she was bullied at school, and that a taxi driver told them that he saw her bullied at school. The parents testified that they reported their concerns to school officials who failed to take prompt, effective remedial action, and that their daughter suffered adverse health impacts as a result. (ID2-3). Complainant testified that he sent a May 9, 2011 letter to Assistant Principal Dezoray Moore notifying her that C.W. continued to be targeted with disability-based slurs in school.

Respondent presented testimony of four school employees. Each testified that he or she could not recall C.W. ever being bullied. Three of the witnesses—Assistant Principal Moore, Special Education Teacher Cathy Jones-Alalouf, and High School Principal Kimberly Ash (who formerly taught 4th grade math)—were directly involved in C.W.'s education during the relevant time. (ID4-6). Moore testified that she did not recall C.W. ever complaining about bullying or anyone else complaining on her behalf. (ID5).

The ALJ found that Complainant and M.W. testified credibly about the information they received from C.W. and a taxi driver. However, the ALJ found that their testimony, by itself, was not enough to prove the allegations of the complaint. (ID6-7). The ALJ noted that because neither C.W. nor the taxi driver testified at the hearing, Respondent did not have the opportunity to cross-examine them about the alleged incidents. (ID6). The ALJ concluded that because Complainant did not present any non-hearsay evidence to support the testimony about the alleged bullying, their testimony was insufficient to prove by a preponderance of the evidence that Respondent violated the LAD. (ID7-8). The ALJ noted:

Their testimony detailed what they clearly and credibly believed were to be frank, troubling instances of bullying and harassment against C.W. However, neither witness has any first-hand knowledge of the actions that were the foundation of the allegations. They have relied on the statements from their daughter, and from an incident relayed to them by a taxi driver. While they clearly believe what has been relayed to them, it does not change the fact that none of the witnesses offering testimony have first-hand knowledge of the incidents alleged.

[ID7].

The Director's Decision

In New Jersey, it is settled that “[w]hen a student is subjected to severe or pervasive bullying on the school bus, in the classroom, or at the playground, and a school district fails to adequately respond to that misconduct, that student has a right to redress.” L.W. v. Toms River Reg’l Schs. Bd. of Educ., 189 N.J. 381, 412 (2007); see N.J.S.A. 10:5-1 to -49.

It is similarly settled that hearsay is admissible in administrative hearings, so long as the agency's factual findings are supported by a residuum of legally competent evidence. The “residuum rule” was set forth in Weston v. State, 60 N.J. 36 (1972), where the New Jersey Supreme Court noted:

It is common practice for administrative agencies to receive hearsay evidence at their hearings . . . However, in our State as well as in many other jurisdictions the rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

Id. at 50-52 (citations omitted). The Weston residuum rule was subsequently codified in the Uniform Administrative Procedure Rules. See N.J.A.C. 1:1-15.5(a) & (b); see also N.J.S.A. 32:23-49 (the Rules of Evidence do not apply in Commission hearings); N.J.S.A. 52:14B-10.

In this case, Complainant relies on hearsay to support his LAD claim. Neither parent observed any bullying. Instead, they testified about incidents that were reported to them by C.W. and the taxi driver. Their September 24, 2010 and May 19, 2011 letters to school officials are reports of information they received from C.W. (Ex. P-1 & P-2). In other words, the letters are hearsay too. The ALJ correctly noted that the residuum rule is “consistent with the principle that, like judicial proceedings, administrative adjudication must include procedural safeguards, including notice and an opportunity to be heard and opportunity for cross-examination, defense and rebuttal—essential for reliable fact finding.” (ID6) (citing In re Plainfield Water Co., 11 N.J. 382, 392-93 (1953)). Thus, the issue confronting the ALJ was whether the hearsay was supported by “legally competent evidence . . . sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.” N.J.A.C. 1:1-15.5(b). ALJ Pelios found that it was not. After a careful review of the record and post-hearing submissions, the Director finds no reasonable grounds to set aside or modify that finding.

Complainant argues that the ALJ did not address a document admitted into evidence entitled, “Initial Psychiatric Evaluation,” dated January 22, 2015. (Ex. P-4). That document

identifies “school related trauma” as one of C.W.’s stressors, and states that C.W. “had negative events from bullying & has PTSD; dad has to drive around the school.” (Ibid.) Complainant argues that the document is medical evidence that C.W.’s “injuries were caused by school related trauma.” (CE). Although Complainant is correct that the evaluation links his daughter’s condition to bullying, the ALJ dismissed the verified complaint because Complainant did not present any eyewitness testimony or any other first-hand evidence of the allegations that formed the basis of the complaint. The statements in the evaluation regarding the bullying of C.W. are hearsay because the medical professional who wrote the evaluation did not witness any of the bullying. Therefore, even accepting the evaluation for any medical evidence it may provide, it is merely additional hearsay evidence as it relates to specific allegations of bullying.²

Complainant argues that Moore lied at the hearing, which reveals Respondent’s intent to “ultimately cover the truth.” (CE). Complainant first contends that Moore lied when she testified that she did not recall telling Complainant that another student punched C.W. in the stomach. In support of that assertion, Complainant states that on cross-examination “Moore admitted . . . that the student did punch [C.W.]” (Ibid.)

Complainant’s characterization of Moore’s testimony was not supported by the hearing transcript. There is no indication that Moore ever testified that another student punched C.W. The only portion of cross-examination that addresses the punching incident is as follows:

Complainant:	Okay. Did C. punch her in the stomach?
Moore:	I can’t recall.
Complainant:	When I met you that day you told me that C. punched her in the stomach. You don’t recall that?
Moore:	No, I do not.
Complainant:	Okay. That’s all I have. Thank you.

[T2: 96: 15-20].

That said, Complainant and his wife presented testimony that contradicted Moore, and the ALJ found them to be credible. However, even if Complainant’s evidence refuted Moore’s

² Neither the person who created this medical evaluation nor the person who created another medical evaluation report presented by Respondent (Ex. R-4) testified at the hearing. As the ALJ noted, for that reason, neither of those reports are enough to prove the truth of anything written in them. (T2:153:9-15).

testimony, it would not change the outcome of this case because the complaint was dismissed based on a lack of first-hand evidence of the incidents of bullying, and Complainant does not allege that Moore observed the punching incident or any other specific incident of bullying.

Complainant also contends that Moore lied when she testified that she did not recall ever receiving the May 19, 2011 letter from Complainant. However, even assuming that Moore received the May 19, 2011 letter, it would not override the need for eyewitness testimony or other legally competent evidence describing the actual incidents of disability-based bullying of C.W.

Based on the above and specific circumstances in this case, and accepting the ALJ's finding that Complainant and M.W. testified credibly, the Director finds no basis to reject or modify the ALJ's conclusion that that Complainant did not present sufficient legally competent evidence to support a determination that Respondent acted illegally. Accordingly, the Director adopts the ALJ's decision to dismiss the verified complaint based on Complainant's failure to meet the evidentiary burden required by the Uniform Administrative Procedure Rules.

This decision should not be read to hold that an alleged victim must testify in every case in which a complainant asserts that a school district violated the LAD in addressing bias-based bullying. The evidence needed for a complainant to prevail will vary based on the circumstances of each case. For example, in some cases the parties may stipulate to the factual allegations of bullying, or other eyewitnesses who observed the bullying may testify. Upon a showing of good cause, the OAL rules also permit testimony by telephone or video conference, and permit narrative testimony in lieu of questioning. N.J.A.C. 1:1-15.8.

DATE:

3-21-16



Craig Sashihara, Director
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