State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 16796-16

AGENCY DKT. NO. 2017 25238

L.B. ON BEHALF OF J.B.,

Petitioner,

v.

ROSELLE BOROUGH BOARD OF EDUCATION,

Respondent.

_____

Esther Canty-Barnes, Esq., for petitioner (Rutgers Education and Health Law Clinic)

Margaret A. Miller, Esq., for respondent (Weiner Law Group, attorney)

Record Closed: July 30, 2018 Decided: August 7, 2018

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

In accordance with the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415, L.B. has requested a due-process hearing on behalf of her son, J.B., who is classified as eligible for Special Education and Related Services. The petition seeks L.B.'s continued placement at the New Roads School, a school setting that had been ordered via a prior due process petition (EDS 05079-16).

Additionally, L.B. alleges that the Individualized Educational Programs (IEPs) offered to her son from March 2016 until November 2017 did not provide him with a Free and Appropriate Public Education (FAPE); she seeks compensatory education. She also seeks compensation for expenses incurred at the Stepping Forward Counseling Center (Stepping Forward); and reimbursement for transportation expenses incurred during J.B.'s enrollment from September 2015 until April 2016 at the Union County Vocational Technical School (UCVT). And petitioner, who is also an employee of the Board, seeks a declaration that the Board subjected her to workplace harassment, citing Section 504 of the Rehabilitation Act of 1973 (Section 504). 29 U.S.C. §701 et. seq.

PROCEDURAL HISTORY AND THE ISSUES PRESENTED

Petitioner filed for due process on September 30, 2016. The matter was transmitted to the Office of Administrative Law (OAL) on November 3, 2016, and was originally assigned to Judge Richard McGill, A.L.J.

The Earlier Due Process Petition (EDS 05079-16)

At the time this petition was filed, a previously filed petition for due process involving the same parties, and the same nexus of facts, was pending before Judge McGill. (Docket No. EDS 05079-16). The earlier petition had been filed on February 26, 2016; and challenged the educational programs offered to J.B. during the 2012-2013, 2013-2014, 2014-2015 and 2015-2016 school years. After twenty-five days of hearing, Judge McGill issued a decision on April 13, 2018. He determined that Roselle had denied FAPE to J.B. during the 2014-2015 and 2015-2016 school years, including and until February 26, 2016, the date upon which the petition then before him had been filed. The claims for the earlier school years were dismissed as untimely. See: N.J.AC. 6A:14-2.7(a)(1).

During the pendency of EDS 05079-16, Judge McGill ruled on two Motions for Emergent Relief. Home Instruction at the Stepping Forward Counseling Center was granted by Order dated October 21, 2016. J.B. was placed at the New Roads School

by Order dated September 20, 2017. Judge McGill's April 2018 Final Decision directed that J.B. remain at the New Roads School.

This Due Process Petition (EDS 16796-16)

Judge McGill rendered his decision in EDS 05079-16 having never consolidated that case with EDS 16796-16. He retired in or about April 2018, at which time EDS 16796-16 remained pending, having been adjourned numerous times at the request of the parties. It was reassigned to me. The dispute between these parties thus has been pending, in some fashion, before the OAL, for some two and a half years. And indeed, in part due to the passage of time, the petition in EDS 16796-16, has been twice amended. A second amended petition was filed with Judge McGill on February 27, 2018.

I conferred with the parties via telephone on May 4, 2018 and observed that their dispute essentially had been fully litigated; indeed, Judge McGill's April 2018 decision left little in contention. And, only a limited period is at issue before me; the time that post-dated the filing of EDS 05079-16 on February 26, 2016, until J.B. was placed at New Roads, in early November 2017.

In that vein, via Letter Order dated May 4, 2018, I directed the filing of Cross-Motions for Summary Decision. I asked that petitioner's Motion address the issue of the denial of FAPE during the period from March 2016 until November 2017.[1] I asked that the Board's Motion address the claim for expenses at Stepping Forward; my jurisdiction to hear petitioner's work-related harassment claims; and the claimed entitlement to transportation costs for J.B.'s attendance at UCVT. The Motions were filed on June 18, 2018, and replies were filed on June 25, 2018. Oral argument took place on July 30, 2018, at which time the record closed.[2]

[1] My Order incorrectly stated that the relevant time period commenced in April 2016.

[2] My May 4, 2018, Order directed that petitioner promptly supply J.B.'s complete records from Stepping Forward. Thereafter, I was advised by counsel for petitioner that those records could not be obtained within the time frame specified by my Order. I extended the time for production to June 1, 2018, via letter Order dated May 21, 2018, but indicated that if these records went unproduced by that date, their use in this proceeding would be barred. To date, petitioner has not produced the Stepping Forward records.

FINDINGS OF FACT

The factual background is as was found by Judge McGill in EDS 05079-16. I **FIND**:

J.B. has been receiving Special Education and related services since first grade. When this dispute initially arose, J.B. had been classified as eligible for Special Education and related services under the category Communication Impaired (CI). During the 2012-2013 school year, J.B. was an eighth grader, and attended an in-district in-class resource program for math and language arts, with speech-language therapy as a related service. During the 2013-2014 school year, J.B. repeated the eighth grade at L.B.'s request, with substantially the same program and placement. During the 2014-2015 school year, J.B. advanced to ninth grade at Abraham Clark High School. J.B.'s program continued to include in-class resource for English, math, science and social studies and speech-language therapy as a related service. In February 2015, social work consultation was added to J.B.'s program.

On May 20, 2015, an IEP meeting was conducted to discuss J.B.'s tenth grade program. J.B. had been accepted into UCVT for a half-day program, and the IEP proposed that he continue to attend Abraham Clark High School for the other half of his school day. J.B.'s program also was to include speech-language therapy and individual counseling services as related services. But, on May 29, 2015, J.B. was admitted to the Adolescent Psychiatric Partial Care Program at High Focus Centers with diagnoses of a major depressive disorder, post-traumatic stress disorder and a seizure disorder. Believing that J.B.'s illness was a reaction to bullying in school, on June 8, 2015, his mother requested an out-of-district placement. J.B. remained at High Focus until August 19, 2015, when he transitioned to outpatient treatment including both medication management and psychotherapy at Central Jersey Behavioral Health. After an IEP meeting on September 8, 2015, the District denied L.B.'s request for an out-of-district placement for J.B.

During the 2015-2016 school year, J.B. attended UCVT in the morning, but he did not attend Abraham Clark High School. Another IEP meeting was held on January

5, 2016. His program for the part of the day he was to attend Abraham Clark High School was changed to a mild/moderate learning or language disabilities ("LLD") class for all his core subjects, together with individual and group speech language therapy and counseling services. An IEP meeting on January 12, 2016, produced a similar IEP. But, on April 18, 2016, J.B. entered a program at Stepping Forward Counseling Center, where he remained until August 25, 2017.

Judge McGill found that the IEPs offered for the 2014-2015 and 2015-2016 school years did not offer FAPE to J.B., because these IEPs incorrectly classified J.B., who he determined should have been classified as Multiply Disabled (MD). Relative to the programming appropriate for J.B., Judge McGill found as follows:

> J.B. needs a program that would give him consistent emotional support throughout the school day. The program should meet J.B.'s needs for security, safety, social relatedness, and sense of well-being so that he becomes more emotionally available for learning. The placement should have a sufficiently small student-to-teacher ratio that he feels that he is accepted and has a sense of belonging. The program should be therapeutic in nature and in one school setting with a smaller class size. The program should have counseling and teachers who are trained to deal with students with multiple disabilities, especially anxiety and depression. There should be close monitoring and supervision.

In so finding, Judge McGill specifically rejected the notion that J.B. could continue to appropriately receive his education in the setting of a comprehensive public high school. I **FIND** for the reasons expressed by Judge McGill, that <u>from February 27, 2016, until J.B. entered the Stepping Forward program on April 18, 2016</u>, he did not receive an appropriate small and therapeutic educational program in a setting that would address his emotional needs. Indeed, Judge McGill specifically noted that IEP meetings as late as January 2016 continued to result in proposed IEPs that misclassified J.B., and placed him at the local high school, albeit in a self-contained classroom.

The Board urges that Stepping Forward is a medical setting, and indeed, Judge McGill so found as well. He stated in his October 21, 2016, Order that "Stepping

Forward Counseling Center is primarily a medical facility." As noted earlier, complete records from Stepping Forward were never produced. But documents shared by petitioner in support of her Motion readily support the Board's contention that Stepping Forward primarily provided medical care for J.B. An August 25, 2016, memorandum on "Stepping Forward Counseling Center" letterhead states that

> [J.B.] had been under our care at Stepping Forward Counseling Center since 4/18/16. He is diagnosed with (F43.10) Post Traumatic Stress Disorder, (F32.2) Major Depressive Disorder single episode, severe, Attention Deficit Disorder by history, Specific Learning Disability by history, Partial Complex Seizure Disorder. Currently, [J.B.] is attending SFCC's Intensive Summer Therapeutic Program and is being treated with psychotropic medication and intensive therapy to address his anxiety, panic attacks and depression.

The purpose of the memorandum was to underscore the Counseling Center's belief that an intake visit at Middlesex County Vocational School was medically contraindicated. The memorandum offers that opinion, "as [J.B.'s] treating psychiatrist and clinical team." And the memorandum at no time discusses his educational program, except to urge that he needs an academic environment that can meet his emotional and academic needs. Importantly, the memorandum at no time characterizes Stepping Forward as an academic environment. If it were one, query why would its personnel recommend securing educational services elsewhere.

A letter from J.B.'s psychiatrist dated October 5, 2016, similarly supports a finding that Stepping Forward is a medical setting. Nothing about this doctor's update resonates as educational. Dr. Nataliya Osmanova writes:

> This letter is to confirm that [J.B.] <u>has been under our care</u> at Stepping Forward Counseling Center (SFCC) since 4/18/16/…[c]urrently [J.B.] was recently readmitted to SFCC's Partial Care Program (PCP) and once he is placed in an appropriate school setting he will be transitioned to our Intensive Outpatient Afterschool Program <u>to continue his treatment</u> which includes psychiatric and medication monitoring…and intensive therapy.

[Emphasis supplied]

Finally, I asked at oral argument what specific relief petitioner sought relative to the Stepping Forward program. The placement had been covered by medical insurance but for the policy's deductible. Counsel advised that her client thus sought unreimbursed medical expenses. This is further proof that this was a medical placement, and not an educational one. Why else would J.B.'s placement there be covered by health insurance? I **FIND** that Stepping Forward is a day psychiatric placement.

While at Stepping Forward, J.B. received Homebound Instruction funded by the Board. He did not do so via a Homebound IEP, but rather, in accordance with the requirements of N.J.A.C. 6A:16-10.1. That regulation requires the Board to provide Homebound for both general and Special Education students when the "student is confined to home or another out-of-school setting due to a temporary or chronic health condition." I **FIND** that this was precisely the situation that J.B. found himself in; his mental health had deteriorated to the point that he needed intensive psychiatric interventions; and was thus medically unable to attend school.

J.B. ended his time at Stepping Forward on or about August 25, 2017. He was placed via Order dated September 20, 2017, at New Roads, where he remains to date. Importantly, the Board represented at oral argument that it has no intention of removing J.B. from his New Roads placement. He will turn twenty-one years old on October 13, 2019, and I **FIND** that the Board will continue his schooling there at least until the conclusion of the 2019-2020 school year. And the district may be obliged to continue that program even longer. Judge McGill's Order granted petitioner "one school year plus six months of compensatory education." When the parties appeared before me they could not agree how to interpret that Order. Counsel for petitioner was firm that it meant schooling past the year J.B. turned twenty-one; counsel for the Board equally firmly disagreed, urging that New Roads has a plan in place that will transition J.B. to adulthood and meet all graduation requirements by June 2020. The question of what Judge McGill's Order meant is not before me, but it is clear, and I **FIND** that a remedy for the denial of FAPE is contained in his decision. And, I further **FIND** that part of that

remedy, perhaps the most important part, was the ordered placement of J.B. at New Roads.

J.B. did not formally begin his enrollment at New Roads until November 3, 2017. During the period from August 25, 2017 through November 3, 2017, I **FIND** that J.B. did not receive an educational program. A June 2017 IEP proposed placement in an LLD class and a continuation of classification as CI. I **FIND** that this placement is inconsistent with Judge McGill's ruling. The Board urges that after J.B. was discharged from Stepping Forward he could have been a very different student; indeed, he was now a young man who had undergone over a year of intensive psychiatric treatment. The Board thus asserts that Judge McGill's view of his needs was not necessarily valid; that a factual issue exists relative to J.B.'s educational needs during this two-month period in 2017.

But this argument ignores the fact that Judge McGill ordered placement of J.B. at New Roads on an emergent basis after the Stepping Forward program had ended. In doing so, Judge McGill was required to consider the needs of a J.B. who had completed psychiatric treatment. Due to the protracted way in which the matter was adjudicated, the reality is that Judge McGill considered more than J.B. and his educational status and functionality from September 2012 through February 26, 2016. He made rulings that addressed J.B.'s needs in 2017. And indeed, Judge McGill's Final Decision reiterated his view that J.B. belonged at New Roads. Accordingly, I am compelled to **FIND,** for the reasons expressed by Judge McGill, that the Board did not offer J.B. an appropriate small and therapeutic educational program in a setting that would address his needs from August 25, 2017 through November 3, 2017.

Finally, petitioner alleges that she was the victim of retaliation in the aftermath of the due process petitions she has filed on her son's behalf. As petitioner was an employee of the school district, she asserts that, in retaliation, she was demoted, and subjected to a hostile work environment.

CONCLUSIONS OF LAW

The parties seek relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c) which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 251-2, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

I **CONCLUDE** that this matter is ripe for summary decision.

Placement at New Roads

The petition seeks J.B.'s continued placement at New Roads. The Board has confirmed that it intends to continue that placement; this issue thus is moot. An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint it is appropriate to refrain from decision-making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976). J.B. will be remaining at New Roads in September 2018, leaving nothing left to adjudicate relative to this demand in the petition. Accordingly, the claim for continued placement at New Roads is **DISMISSED**.

The Denial of FAPE

Collateral estoppel is an equitable principle that bars relitigation "when an issue of fact or law is actually litigated and determined by a valid and final judgment." Winters v. N. Hudson Reg'l Fire and Rescue, 212 N.J. 67, 85 (2010) (citing Restatement (Second) of Judgments §27 (1982)). As our Supreme Court has stated:

> [Collateral estoppel] serves the important policy goals of finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness . . . . If an issue between the parties was fairly litigated and determined, it should not be relitigated.
>
> [First Union Nat'l Bank v. Penn Salem Marina, 190 N.J. 342, 352 (2007)]

Our courts have recognized that the "question to be decided is whether a party has had his day in court on an issue …" McAndrew v. Mularchuk, 38 N.J. 156, 161 (1962). Thus, collateral estoppel bars relitigation of an issue if

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding

> issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.
>
> [Winters, 212 N.J. at 85.]

As a recipient of Federal funds under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. § 1400 et seq., the State of New Jersey must have a policy that assures all children with disabilities the right to a free appropriate public education. 20 U.S.C. §1412(a)(1). The United States Supreme Court stated, "The IDEA . . . requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988, 197 L. Ed. 2d 335, 352 (2017). I **CONCLUDE** that the Board denied FAPE to J.B. from March 1, 2016 to April 18, 2016, and again from August 25, 2017 until November 1, 2017. This conclusion is compelled by collateral estoppel. Notwithstanding his failure to consolidate these two petitions, Judge McGill's decision clearly encompassed the time frames at issue in EDS 16796-16 relative to the FAPE issue.[3]

I thus **CONCLUDE** that here, there was a denial of FAPE for approximately three and one-half months. I have so concluded because I am bound by Judge McGill's decision. And while his decision ostensibly dealt only with the time up to and until the filing of the petition before him on February 26, 2016, nothing about J.B. or his profile was different from February 27, 2016, until April 18, 2016, when he entered Stepping Forward. To the extent that J.B. may have presented differently when he was discharged from his psychiatric placement in August 2017, Judge McGill ruled in

[3] The petition before me should have been consolidated with the earlier petition before Judge McGill, and the parties should have insisted upon it. The piecemeal way that this dispute is now being considered is at odds with the intent of the IDEA, and a disservice to the process, to the parties, and most especially to J.B. himself. N.J.A.C. 1:1-17.3 provides that in deciding whether to consolidate the judge should consider "the extent that common questions of fact and law are involved, the savings in time, expense, duplication and inconsistency which will be realized from hearing the matters together and whether such issues can be thoroughly, competently, and fully tried and adjudicated together with and as a constituent part of all other issues in the two cases." These petitions cried out for consolidation.

September 2017, that J.B. was a student who could only receive FAPE in a program like that offered by New Roads.[4]

Stepping Forward

But, while J.B. attended Stepping Forward, from April 18, 2016, through August 25, 2017, I **CONCLUDE** that there was no denial of FAPE. J.B.'s mother unilaterally withdrew him from his public-school program and placed him in a psychiatric facility. While reimbursement for a unilateral placement is a remedy available to parents, Florence County School Dist. v Carter, 510 U.S. 7 (1985), the statutory scheme is clear that school districts are not responsible for medical placements. 20 U.S.C. §1401(26)(A) provides that while "related services" can mean transportation and other supportive services such as medical services, "such medical services shall be for diagnostic and evaluation purposes only…" See also: Irvington Independent Sch. Dist. v. Tatro, 468 U.S. 883 (1984), where the Supreme Court analyzed the type of medical care that falls within the ambit of the IDEA. The Court recognized that the services of a medical doctor were not the responsibility of the public schools, and that Congress intended "to spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." Irving Independent Sch. Dist. v. Tatro, 468 U.S. at 892. Our courts have uniformly denied requests for reimbursement of expenses incurred at psychiatric facilities. See: Mary T. v School Dist. of Philadelphia, 575 F. 3d 235 (3d Cir 2009); Munir v. Pottsville Area Sch. Dist., 723 F. 3d 423 (3d Cir. 2013); Clovis Unified Sch. Dist. v California, 903 F. 2d 635 (9th Cir. 1990).

The record readily demonstrates that Stepping Forward is a medical facility. Judge McGill so found as well, noting in his October 21, 2016, Order that a request for transportation to Stepping Forward was denied, insofar, as "it would be unreasonable to require [the Board] to pay for transportation for medical care." While counsel appeared to argue otherwise, she could not supply any documentation to buttress her argument

[4] In September 2017, Judge McGill was called upon only to determine if J.B. was "likely to succeed on the merits of his claim" to placement at New Roads; in April 2018, he issued a Final Decision via which J.B., in fact, succeeded on the merits of that claim. See: N.J.A.C. 1:6A-12.1.

that Stepping Forward functioned as a school. Accordingly, the demand for payment for unreimbursed medical expenses at Stepping Forward is **DISMISSED**.

The contention that there was a denial of FAPE while J.B. was at Stepping Forward because inappropriate homebound instruction was provided likewise is without merit. The Board was providing homebound, and although this service was ordered by Judge McGill on October 21, 2016, he acknowledged that district personnel represented that this service was already in place. Petitioner does not allege otherwise, rather urging that the homebound should have taken some other form, akin to what might be provided to a child under N.J.A.C. 6A:14-4.8. This regulation addresses an IEP Team determination that a student must have his or her IEP implemented via one-to-one instruction at home, because "all other less restrictive program options have been considered and have been determined inappropriate." N.J.A.C. 6A:14-4.8(a).

But here, J.B. was not placed on homebound via a Team determination that this was an appropriate Special Education setting. Rather, his medical needs necessitated that he leave school to receive psychiatric treatment. The Board thus correctly asserts that J.B.'s homebound services were governed by N.J.A.C. 6A: 16-10.1, which provides that

> [t]he district board of education shall provide instructional services to an enrolled student, whether a general education student in kindergarten through grade 12 or special education student age three to 21, when the student is confined to the home or another out-of-school setting due to a temporary or chronic health condition or a need for treatment that precludes participation in their usual education setting, whether general education or special education.

The homebound instruction contemplated by this latter regulation was provided to J.B. The claim that there was a denial of FAPE during his hospitalization at Stepping Forward because there was no homebound IEP is thus meritless and is **DISMISSED**. To the extent that L.B. seeks reimbursement for any other expenses related to the

Stepping Forward placement, including but not limited to transportation, these claims likewise are **DISMISSED**.[5]

Transportation at UCVT

L.B. seeks reimbursement for expenses she incurred in transporting her son to UCVT. This is a program he attended during the 2015-2016 school year; the issue of whether J.B. received FAPE during that year was squarely before Judge McGill in EDS 05097-16. Any claim pertaining to services during that school year should have been adjudicated as part of the earlier matter. Accordingly, the request for transportation reimbursement should be **DISMISSED** as barred by application of the Entire Controversy Doctrine.

The Entire Controversy Doctrine "seeks to further the judicial goals of fairness and efficiency by requiring, whenever possible, 'that the adjudication of a legal controversy should occur in one litigation in only one court.'" Circle Chevrolet Co. v. Giordano, Halleran and Ciesla, 142 N.J. 280, 289 (1995) (quoting Cogdell v Hosp. Ctr. at Orange, 116 N.J. 7, 15 (1989). The Doctrine emphasizes the need for a complete and final disposition of legal matters through the avoidance of piecemeal decisions, recognizing that such completeness promotes fairness to the parties and efficiency. Requiring that a petitioner bring all claims in one proceeding promotes the judicial goals of "efficiency…the avoidance of waste and the reduction of delay." DiTrolio v. Antiles, 142 N.J. 253, 267 (1995).

Clearly, the claim that L.B. was entitled to transportation reimbursement should have and could have been litigated fully in the hearing before Judge McGill. It is incomprehensible that in twenty-five days of hearing petitioner was not given ample opportunity to present proofs on this claim. Both parties agree that Judge McGill never issued a ruling on the transportation issue even though it was before him; this is a

[5] Indeed, as noted above, Judge McGill ruled in October 2016 on the issue of transportation to Stepping Forward and denied petitioner's request for such transportation. This claim is thus moreover barred by collateral estoppel. And the nature of the claims pertaining to Stepping Forward have been a bit of a moving target; I have been told they entail a relatively small medical insurance deductible; transportation costs, and an unclarified sum of $60,000. In any event, all these claims are **DISMISSED** because Stepping Forward is a medical facility not a school.

matter to take up on appeal of his decision if petitioner is aggrieved. Attempting to relitigate these claims before me is not an option. And indeed, this litigation exemplifies the wisdom behind the Doctrine and its goal of minimizing inefficiency and delay. This petitioner seeks another opportunity to litigate a claim that has already been the subject of protracted litigation; this is inefficient and will only cause further delay in finalizing the due process petition now before me.

The contention that the transportation issue had been reserved for the second due process proceeding is a nonstarter. The parties shared a transcript of the colloquy before Judge McGill, and somewhat inexplicably, counsel for petitioner asked as follows:

> So what I'm asking is that we not deal with the issue of the cost of the transportation in the case and that we would just transfer that to the second case…only the issue of the cost of the transportation and not… the issue of whether or not she was entitled to it, but if there's an issue of what the cost would be and we're asking that that be transferred to the next due process petition.
>
> [Canty-Barnes reply brief Exhibit A, pages 59-60]

Judge McGill indicated that he was confused by this request, as did Ms. Miller. After additional back and forth, counsel for petitioner stated that "we're asking the issue of the cost only be allowed to be heard in the second part." (Canty-Barnes reply brief Exhibit A, page 61). Acceding to her request, Judge McGill agreed that "all costs of the transportation will be considered in the second case." (Canty-Barnes reply brief Exhibit A, page 62).

Like Judge McGill, I too am perplexed by this request. Perhaps counsel was not ready with her proofs. No matter. She should have been. And in any event, the issue of liability for transportation clearly and unequivocally was not reserved for "the second case." Nor should it have been, as it concerned a claimed denial of FAPE for the school year that was in issue before Judge McGill. The claim for transportation to UCVT is barred by the Entire Controversy Doctrine and is **DISMISSED**.

The Retaliation Claims

J.B.'s mother is also an employee of the school district. She contends that she was subjected to a hostile work environment in retaliation for her advocacy on behalf of her son. Her petition asks that I "make findings of fact and conclusions of law regarding issues of whether the District's conduct amounted to harassment and/or retaliation." She asks for no relief regarding these claims. Petitioner so asks, apparently, because she believes that under the Supreme Court decision in Fry v. Napolean Cmty. School, 137 S. Ct. 743 (2017), she must exhaust her administrative remedies before bringing these claims elsewhere. Petitioner misapprehends the import of the Fry decision and misunderstands the nature of this forum's jurisdiction. This claim is **DISMISSED**.

Under Fry, a petitioner must exhaust the IDEA's procedures before filing a claim under Section 504 of the Rehabilitation Act, or similar laws, only when a suit "seeks relief that is also available under the IDEA." Fry 137 S. Ct. at 752. The IDEA affords no remedy for workplace retaliation; exhaustion is thus not required under Fry's holding. Nor does the OAL have jurisdiction over workplace retaliation claims in the context of a Special Education matter; transmitted by the New Jersey Department of Education for an impartial hearing before an Administrative Law Judge exclusively to adjudicate claims pertaining to the delivery of educational services to a school-age child.

Compensatory Education

Finally, petitioner seeks compensatory education for the period that J.B. did not receive FAPE. Our courts recognize compensatory education as a remedy under the IDEA, which should be awarded "for the time period during which the school district knew or should have known of the inappropriateness of the IEP, allowing a reasonable time for the district to rectify the problem." M.C. o/b/o J.C. v. Cent. Reg'l Sch. Dist., 81 F. 3d 389, 392 (3d Cir. 1996). Compensatory education requires school districts to "belatedly pay expenses that [they] should have paid all along." Id. at 395.

I **CONCLUDE** that compensation for the denial of FAPE to this student has been thoroughly addressed by Judge McGill; no further relief is required or appropriate. As

stressed throughout this opinion, while the petition before Judge McGill only raised claims pertaining to J.B.'s educational program from September 2012 until February 26, 2016, by the time he issued his Final Decision in April 2018, even the time frame now at issue before me, March 2016 through November 1, 2017, had well passed. In the interim, J.B. had changed and evolved, as had his needs. This forced Judge McGill to address J.B.'s educational status in September 2017, when he placed him at New Roads, and in April 2018 when he ultimately ruled that New Roads was the appropriate placement and should continue. Simply put, on the issue of a denial of FAPE, and notwithstanding everyone's apparent unwillingness to consolidate these two petitions, in the end Judge McGill decided them both. And this observation extends not only to his factual and legal findings, but likewise to the measure of relief Judge McGill afforded J.B. Consideration of additional relief is thus barred by collateral estoppel.

But, I also so **CONCLUDE,** in part, because compensatory education is an equitable remedy, and one that requires a fact sensitive case-by-case analysis. Some courts rotely award a block of compensatory education equal to time lost by a denial of FAPE, sometime referred to as a "cookie cutter approach." See: Cent. Sch. Dist. v. K.C., 2013 U.S. Dist. LEXIS 94065, *32 (E.D. Pa. 2013), citing Reid v. D.C., 401 F. 3d 516, 523 (D.C. Cir. 2005). Here, Judge McGill awarded one school year and six months of compensatory education, and my decision thus arguably adds about three more months to that tally. But in my view, "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." Parents of Student W. v. Puyallup Sch. Dist. No 3, 31 F. 3d 1489, 1497 (9th Cir. 1994). As the Ninth Circuit held, "["t]here is no obligation to provide a day-for-day compensation for time missed." Ibid. See also: Neena S. v. Sch. Dist., 2008 U.S. Dist. LEXIS 102841 (E.D. Pa., 2008). My task is "to weigh the interests on both sides and determine the equitable outcome. This is not an easy task, [and I must] balance the interests of finality, efficiency, and use of the School District's resources with the compelling needs [of the student]." Ferren C. v. Sch. Dist. of Phila., 595 F. Supp. 2d 566, 577 (E.D. Pa. 2009), aff'd 612 F. 3d 712 (3rd Cir. 2010).

The most important aspect of Judge McGill's remedy for the denial of FAPE here was his placement of J.B. at New Roads. Judge McGill ended years of what he

determined to be less than appropriate in-district placements. And he ordered a year and a half of compensatory education, an award that I hope will be interpreted thoughtfully by petitioner; not just as an extension of J.B.'s current placement, but rather as requiring services that will support J.B.'s successful transition to adult life. I am optimistic that, if interpreted in this fashion, the apparent disagreement between the parties about what Judge McGill's Order meant will resolve itself amicably, and this litigation, at long last, will conclude. But in any event, Judge McGill more than adequately remedied the IDEA violations he found, including the denials of FAPE during 2016 and 2017 that are at issue before me. No one here will be served, most especially not J.B., by an additional "cookie cutter" award of compensatory education. Accordingly, the request for additional compensatory education is **DENIED**.

ORDER

Based on the foregoing, it is **ORDERED** as follows:

1. Petitioner's Motion for Summary Decision is **GRANTED** on the issue of denial of FAPE during the period from March 1, 2016, until April 2016, when J.B. was admitted to Stepping Forward; and for the time period after his discharge from Stepping Forward, until he commenced his program at New Roads in November 2017.
2. The Board's Motion is **GRANTED** on the issue of denial of FAPE during J.B.'s treatment at Stepping Forward.
3. The request for compensatory education is **DENIED**.
4. The Board's Motion for Summary Decision is **GRANTED** as to all other claims in the petition.

This decision having thus resolved all pending claims in this matter, the telephonic hearing scheduled for **August 28, 2018**, is **ADJOURNED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2017) 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. § 1415(i)(2); 34 C.F.R. § 300.516 (2017). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

August 7, 2018

DATE

ELLEN S. BASS, ALJ

Date Received at Agency August 7, 2018

Date Mailed to Parties: August 7, 2018

sej