

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREW M., et al. : CIVIL ACTION
: :
v. : :
: :
DELAWARE CO. OFFICE OF : :
MENTAL RETARDATION, et al. : NO. 05-4336

ORDER AND OPINION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

DATE: March 1, 2006

After the parties filed cross-motions for summary judgment in this case, Plaintiffs obtained recovery under the Individuals With Disabilities Act, 20 U.S.C. § 1400, *et seq.* (“IDEA”), and Section 504 of the Rehabilitation Code of 1973, 29 U.S.C. § 794 (“the Rehabilitation Act”). Defendants have filed a motion for reconsideration. For the reasons that follow, this motion will be denied.

I. Factual and Procedural Background

Although Plaintiffs were largely successful at the administrative level, they did not obtain from the Hearing Officer compensation for services they argued should have been – but were not – provided to the minor twin plaintiffs in their first five months at St. Faith’s preschool. The Hearing Officer appeared to find merit in the Plaintiffs’ claim in this regard. She wrote, in a separate opinion for each twin:

[The County] failed to prove that it took steps to provide Child with the supplemental services that Child needed to be successful in the regular preschool program at St. Faith’s. Months went by before [the County] even agreed to observe Child at St. Faith’s let alone provide services there although St. Faith’s was Child’s natural environment.

Exhibit 1 at 6-7; Exhibit 2 at 5. She did not, however, award compensation.

Plaintiffs subsequently filed this action in which, among other relief, they sought compensation for missing service hours at St. Faith's. As noted above, I decided in their favor on this portion of their claim, under both the IDEA and the Rehabilitation Act.

In their Motion for Reconsideration, Defendants argue that my decision was faulty because there was no evidence showing that the twins actually missed any prescribed service hours during those five months. They also maintain that the Plaintiffs were not entitled to recovery under the Rehabilitation Act because (a) they did not show that the minor plaintiffs were denied participation in a program that receives federal funds based on their disabilities; and (b) "courts have also required a showing of bad faith to establish a claim under this Act."

II. Legal Standards

The Court of Appeals for the Third Circuit has explained:

[A] judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [entered judgment]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.

Max's Seafood Café ex rel. Lou-Ann v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999), see, also Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Because of the interest in finality, courts should grant motions for reconsideration sparingly. Vintage Grapevine, Inc. v. Mara, Civ. A. No. 00-2828, 2001 WL 940422 at *1 (E.D. Pa. Aug. 6, 2001).

Since Defendants have not pointed to an intervening change in the controlling law, or the availability of any new evidence, their motion is best construed as one alleging a clear error of law or fact, or to prevent manifest injustice.

III. Discussion

A. The Evidence Regarding the Missing St. Faith's Service Hours

1. This Argument Is Not Properly Raised In a Motion For Reconsideration

In order to show clear error or manifest injustice, a party must base its motion on arguments that were previously raised but were overlooked by the Court. U.S. v. Jasin, 292 F. Supp.2d 670, 676 (E.D. Pa. 2003), aff'd 191 F. 3d 446 (3d Cir. 1999), (Table, No. 98-1641), cert. denied 528 U.S. 1139 (2000). A party is not free to relitigate issues that the Court has already decided. Id., citing Smith v. City of Chester 155 F.R.D. 95, 97 (E.D. Pa. 1994).

Defendants argued in their cross-motion for summary judgment that the factual record was insufficient to permit a finding that the minor plaintiffs were entitled to compensation for missing service hours for the first five months they attended St. Faith's preschool. I specifically rejected this argument in my decision on the cross-motions, writing:

Despite the County's argument that the factual record is insufficient in this regard, it is clear that, when the child plaintiffs' IFSPs were amended to permit them to attend CADES, they were prescribed speech therapy and special instruction to be provided in an out-of-home setting. It is undisputed that these services were not provided at St. Faith's between January and June, 2003. The fact that services *were* provided in June, 2003, and thereafter, shows that they *could* have been provided earlier.

Decision at p. 9.

Under U.S. v. Jasin, then, it is clear that this is not an issue properly raised in a motion for reconsideration. For this reason alone, this portion of Defendants' motion must be denied.

Nevertheless, I will discuss the merits of this issue, for the sake of clarification.

2. A Sufficient Evidentiary Basis Supports the Result Here

In evaluating the evidence supporting Plaintiffs' claim regarding the missing St. Faith's service hours, I was mindful of the standard applied by a trial court hearing an appeal of an IDEA decision, which the Court of Appeals for the Third Circuit has called "unusual":

Although the District Court must make its own findings by a preponderance of the evidence, 20 U.S.C. § 1415(1)(2)(B)(iii) [here, 20 U.S.C. § 1439], the District Court must also afford "due weight" to the ALJ's determination. Board of Educ. of Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 206 (1982); see also Holmes v. Millcreek Tp. School Dist., 205 F.3d 583, 591 (3d Cir. 2000). Under this standard, "[f]actual findings from the administrative proceedings are to be considered prima facie correct," and [i]f a reviewing court fails to adhere to them, it is obliged to explain why." S.H. v. State-Operated School Dist. of City of Newark, 336 F.2d 260, 271 (3d Cir. 2003).

Shore Regional High School Board of Education v. P.S., 381 F.3d 194, 199 (3d Cir. 2004), (explanatory material in brackets supplied).

As noted above, the Hearing Officer found that the children did not receive the "supplemental services the [children] needed to be successful in the regular preschool" for their first five months there. The fact that services were not provided at St. Faith's during these five months was not disputed, and it is not disputed here. As I pointed out in my decision, "in light of the fact that services were not delivered, it is immaterial that, as the County claims, no services were formally discontinued."

I suggested, in my decision, that the outcome might have been different if the County had argued "here, ... [or] before the Hearing Officer that the prescribed services were actually provided between January and June, 2003, such as if, for example, the children attended both CADES and St. Faith's at the same time." However, this has become something of a red herring. It is simply a posited defense to the Plaintiffs' position. It was never raised anywhere by the

Defendants. As such, the lack of evidence on this point does not undermine the Hearing Officer's factual determination, to which I adhered.

3. Defendants' Request to Reopen the Record

As to the missing St. Faith's hours, Defendants have argued that "they should be given the chance to develop a record as to what exactly occurred with each boy during that time frame." This is plainly an untenable claim in a motion for reconsideration, which is not a place to request a chance to relitigate issues upon which the movant did not prevail. U.S. v. Jasin, supra.

In any event, Defendants are wrong in suggesting that they were deprived of an opportunity to present evidence. As I pointed out in my decision, the St. Faith's issue was not raised for the first time in Plaintiffs' cross-motion for summary judgment. Instead, in the brief Plaintiffs filed before the Hearing Officer on May 24, 2005, they argued: "The parents also are entitled to compensatory education for the five months of missing special instruction that the twins should have received in the integrated setting." Exhibit 5 to Administrative Record at 8-9. Defendants did not file a brief on May 24, 2005, despite their stipulation to proceed on the briefs and on the past record. Exhibit 6 to Administrative Record, at 3-4. They did not attempt to respond to Plaintiffs' May 24, 2005 brief, nor did they ask the Hearing Officer to re-open the record to receive further evidence.

Moreover, Plaintiffs clearly raised the St. Faith's issue once again in their complaint in this matter. Complaint at ¶ 34. As before the Hearing Officer, Defendants agreed to proceed without the taking of testimony, this time by the filing of cross-motions for summary judgment. In responding to Plaintiffs' motion, the Defendants recognized the claim for missing hours for St. Faith's, arguing, as noted above, that there was an insufficient evidentiary basis to support the claim.

Nevertheless, Defendants did not at any time ask that I take live testimony or additional evidence on this issue or any other issue. In fact, as to whether the twins received services during those five months, they wrote: “This is a factual issue but one that is appropriate for summary judgment.” Defendants’ Response to Plaintiffs’ Motion, at 5-6. If, in Defendants’ view, the record is not adequately developed, this was their own doing.

B. The Rehabilitation Act

The Defendants are incorrect in arguing that the Plaintiffs were not entitled to recovery under the Rehabilitation Act. An action brought on behalf of minor plaintiffs who were denied some access to services by an EI provider is contemplated by the Rehabilitation Act, since an EI provider, such as the Delaware County Office of MH/MR, is a recipient of federal funds. See Roe ex rel. Preschooler II v. Nevada, 332 F. Supp.2d 1331, 1340 (D. Nev. 2004).

Further, the Third Circuit has not required a showing of bad faith in a Rehabilitation Act case. Even in B.D. v. DeBuono, 130 F. Supp. 2d 401 (S.D.N.Y. 2000), the case cited by Defendants, the District Court for the Southern District of New York required a finding of *either* bad faith or gross misjudgment, and pointed to two other Circuits – the Fourth and the Eighth – which took this position. 130 F. Supp. 2d at 43, citing Sellers v. School Board of Manassas, 141 F.3d 524, 529 (4th Cir. 1998), cert. denied 525 U.S. 529 (1998); Monahan v. State of Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982).

However, DeBuono is not binding here, and neither are Sellers or Monahan. Instead, the Third Circuit has taken the lenient view that there are few differences, if any, between the IDEA’s affirmative duty to educate a handicapped child and the Rehabilitation Act’s prohibition in § 504 of discrimination against a handicapped individual. Ridgewood Bd. of Education v.

N.E., 172 F.3d 238, 253 (3d Cir. 1999); W.B. v. Matula, 67 F.3d 484, 492 (3d Cir. 1995).

Indeed, in Matula, the Court of Appeals cited legislative history which suggested that Congress “specifically intended” that violation of the EHA (the predecessor to the IDEA) “could be redressed by § 504.” 67 F.3d at 494.

Ridgewood and Matula, unlike this case, were Section B cases relating to the obligation there to provide a free and appropriate education to students. However, I am aware of no reason why the Rehabilitation Act should be more strictly construed as regards pre-school children in a Section C case.

IV. Conclusion

For the reasons set forth above, I will now enter the following:

ORDER

AND NOW, this 1st day of March, 2006, upon consideration of Defendants’ Motion for Reconsideration, filed in this case as document 19, and Plaintiffs’ response thereto, it is hereby ORDERED that Defendants’ Motion for Reconsideration is DENIED.

BY THE COURT:

/s/Jacob P. Hart

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE