

FILED

NOT FOR PUBLICATION

APR 06 2012

UNITED STATES COURT OF APPEALS

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U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>Ka.D., a minor, by her mother, Ky.D., as her next friend; Ky.D. and B.D.,</p> <p style="text-align: center;">Plaintiffs-counter-defendants- Appellees/Appellants,</p> <p style="text-align: center;">v.</p> <p>MARY ELLEN NEST, Defendant,</p> <p>and</p> <p>SOLANA BEACH SCHOOL DISTRICT,</p> <p style="text-align: center;">Defendant- counter- claimants- Appellant/ Appellee.</p>
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Nos. 10-56320; 10-56373

D.C. No. 3:08-cv-0622-W-WVG

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Thomas J. Whelan, Senior District Judge

Argued and submitted February 17, 2012
Pasadena, California

Before: FARRIS and W. FLETCHER, Circuit Judges, and KORMAN,

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

Senior District Judge.**

The cross appeals in this case arise out of the district court's order affirming an administrative decision under the Individuals with Disabilities Education Act ("IDEA"). Because the history and facts of this case are familiar to the parties, we recount them only to the extent necessary to explain our decision.

The Solana Beach School District ("School District" or "District") offered Ka.D. ("Student"), who is autistic, a placement for the 2007-2008 school year after conducting a meeting to develop an individualized education program ("IEP") for her. After providing notice to the District, the Student's parents chose to place her at Hanna Fenichel, a private general education school serving typically developing children, and sought tuition reimbursement under the IDEA.

A due process hearing under the IDEA, 20 U.S.C. §1415(f), then ensued. The administrative law judge ("ALJ") determined that the School District had failed to provide the Student with a free and appropriate public education ("FAPE"), and that the Hanna Fenichel placement was appropriate. These two findings provided the necessary predicate for the parents to qualify for reimbursement of their unilateral

** The Honorable Edward R. Korman, Senior United States District Judge for the Eastern District of New York, sitting by designation.

placement. *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 15 (1993). The district court affirmed, and this appeal followed.

We review the district court's findings of fact for clear error even when they are based on the written record of administrative proceedings, and the issue of whether the School District's placement of the Student constituted a FAPE *de novo*. *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1127 (9th Cir. 2003), *superseded on other grounds by* 20 U.S.C. § 1414(d)(1)(B); *Amanda J. ex rel. Annette J. v. Clark Cnty Sch. Dist.*, 267 F.3d 877, 887 (9th Cir. 2001). Because the district court exercises "its discretion in fashioning appropriate relief" under the IDEA, we review for "abuse of discretion the district court's determination of appropriate equitable relief." *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1084-85 & n.7 (9th Cir. 2008).

Under the IDEA, a child receives a FAPE "if the program (1) addresses the child's unique needs, (2) provides adequate support services so the child can take advantage of the educational opportunities, and (3) is in accord with the [IEP]." *Capistrano Unified Sch. Dist. v. Wartenberg ex rel. Wartenberg*, 59 F.3d 884, 893 (9th Cir. 1995) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-89 (1982)). This case is close. Specifically, the principal issue in the formulation of the IEP was whether the Student should remain at Hanna Fenichel, where she had made substantial

and impressive progress or whether she should be placed in a special education classroom in the District.

Although Dr. Schreibman, the District's outside evaluator,¹ recommended special education, she "strongly believe[d] that if things continue to progress as they seem to be doing with" the Student, "she would be able to transition relatively quickly from the special education classroom to a more inclusive program." The problem, however, was that the District's more inclusive general education classroom did not meet the Student's unique needs because she required a program with a smaller number of children. (Dr. Schreibman testified that she did not "see [the Student] as anywhere near ready for the inclusive classroom at Solana Beach Schools because [she] do not think [the student was] ready to handle a classroom with a large number of peers.")

Indeed, although Dr. Schreibman assumed that the District's general education class contained 24 students, the District's placement required the Student to interact with about 42 children, counting the different core group of students that attended the general education class on different days (about 30) and the children from her special education class. Presumably, because the Student could not handle a class with a large number of peers, Dr. Schreibman observed that ideal program for her would be

¹ Dr. Schreibman is a professor at the University of California, San Diego, who is an autism specialist.

a combination of the District's special education class and a program like the Hanna Fenichel school, which was composed of only 6 to 8 children. Nevertheless, the District offered a bifurcated placement, which included a half-day placement in its general education class. We agree with the ALJ's determination that the District's general education class was an inappropriate education setting for the Student, and therefore, the District's offer substantively failed to provide a FAPE.

Turning to the parental placement, there is no question that Hanna Fenichel with the support of a 1:1 aide met the Student's unique needs, and she benefitted from her instruction. *C.B. ex rel. Baquerizo v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159-60 (9th Cir. 2011) ("To qualify for reimbursement under the IDEA, parents . . . need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.") (quoting *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 365 (2d Cir. 2006)) (emphasis omitted).

Finally, we agree with the district court that it was not an abuse of discretion to grant the District 30 days to provide a 1:1 aide to the Student at Hanna Fenichel. In sum, the record fully supports the ALJ's and district judge's conclusion and granting of equitable relief, and we find the parties' remaining contentions on appeal unpersuasive.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

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95 Seventh Street
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Information Regarding Judgment and Post-Judgment Proceedings (December 2009)

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

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* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk