

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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NIKITA PETTIES, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 95-0148 (PLF)
)	
THE DISTRICT OF COLUMBIA, <u>et al.</u> ,)	Melanie Davis
)	Hearing Proceeding.
Defendants.)	
_____)	

REPORT AND RECOMMENDATION OF THE SPECIAL MASTER
IN THE MATTER OF MELANIE DAVIS

This report is filed pursuant to the November 8, 2004 Petties Payment Order (“Petties Payment Order”).

This is the second dispute filed by complainant Melanie Davis under the Petties Payment Order. The first dispute was filed with the Special Master in September 2008 for invoices submitted to DCPS for services in June and July 2008. Following a teleconference between the parties, the matter was settled and memorialized in a report to the Court dated October 28, 2008.

The current dispute concerns certain services that were provided to student A.J.P after August 1, 2008. As discussed in more detail below, District of Columbia Public Schools (“DCPS”) disputed the invoice submitted by Ms. Davis. Ms. Davis filed a request for a dispute resolution proceeding under the Petties Payment Order on December 5, 2008.

A teleconference was convened on December 17, 2008. The participants were the complainant, Ms. Davis, the parent of A.J.P, Ms. Jackson, Assistant Attorney General assigned

to DCPS, Quinne Harris-Lindsey, Esq., and counsel for the Petties class, Steven Ney, Esq.¹ The parties articulated their positions and arguments. The complainant was asked to submit further information, which she did on December 19, 2008.

Statement of Facts

In August 2004, an IEP was developed for A.J.P by his teachers and mother. At that time he had just turned three years old. The IEP called for the following services to be provided to A.J.P: a) 24.25 hours of specialized instruction a week; b) 1 hour of occupational therapy a week; and c) 2.25 hours of speech therapy a week. As a supplementary aid and service, the IEP called for 27.5 hours of a dedicated aide. With respect to the A.J.P's needs for specialized instruction and related services, the IEP identified deficits in reading, mathematics, social emotional, and speech/language. Finally, participants in developing the 2004 program concluded that A.J.P needed "intensive specialized/individualized instruction out of a regular education classroom." The record does not indicate whether any goals and objectives were developed at the August 2004 IEP meeting. However, at an IEP meeting the following spring, goals and objectives were developed for A.J.P's summer program. With respect to objectives related to progress in cognitive areas, the following objectives for A.J.P were listed: to be able to find a matching toy from a group of two or three toys upon request; to be able to identify basic shapes by giving or touching with eighty percent accuracy; to be able to match two to three animals to their corresponding sounds or noises with eighty percent accuracy. With respect to related services, the occupational therapy objective was to be able to trace and form letters in various

¹ Both before the teleconference and during there was discussion of a DCPS policy that allegedly prevents parents from participating in Petties invoice dispute proceedings. To the extent that that is a "policy" that DCPS has articulated, it is not supported by the Petties Payment Order. So long as parents and providers do not both bill DCPS, or both present disputes regarding the same matter, there is no reason why they can not work together to resolve a dispute with DCPS. In any event, both the parent and provider have been welcome participants in this proceeding.

textures and mediums with minimum assistance and redirection; one of the speech and language objectives was to attend to an activity for five minutes.

In an order² dated September 30, 2005, United States District Court Judge Ricardo Urbina ordered that

Defendant shall fund all related services and supplemental aids on the plaintiff A.J.P.'s April 9, 2004 Transition Plan and August 12, 2004 IEP including speech therapy, occupational therapy, assistive technology, sign language instruction, behavioral management services, and a full-time, one-on-one dedicated aide, until the plaintiff's administrative due process complaint is decided and any appeal therefrom is concluded. Those services shall be provided by service providers identified by plaintiff Leslie Jackson, provided to him at the pre-school of Mrs. Jackson's choice, and paid for by the defendant. The defendant shall pay the identified aides at the rate of \$20.00 per hour, to be paid weekly by the defendants.³

The record is not clear regarding the program that A.J.P. was attending at the time of the September 30, 2005 Order. However, by 2006 A.J.P. had established a routine that involved the assistance of Ms. Davis for 42.5 hours a week. A representative weekly schedule for A.J.P. and Ms. Davis' is provided in Attachment A.

According to documents in the record, DCPS has disputed invoices since July 2007. The invoices disputed appear to follow the same pattern: Ms. Davis works as an "aide" from 8:30am to 3:00pm and then as a "special instructor" from 3:00pm to 6:00pm. Thus, she bills for 32.5 hours a week as an aide and fifteen hours a week for instruction. It is the position of DCPS that a one-on-one aide is a service intended to supplement specialized instruction or the delivery of related services. DCPS contends that as there is no documentation regarding any specialized

² Laster v. District of Columbia, 05 cv 1875 (D.C. Dist. Memorandum Opinion Order entered September 28, 2005). (Dkt. 9).

³ The Order also required defendants to pay invoices with fifteen days of receipt. At the request of defendants, this section of the Order was amended in October 2006 to allow thirty days for payment consistent with the Petties Payment Order. 05-1875 (RMU) Dkt 46. In the Order, the Court noted that "Judge Friedman issued the Petties order on November 8, 2004 and this court issued its order regarding payment for A.J.P.'s services providers on September 30, 2005. That is, although the defendants were aware of the Petties order before this court issued its September 30, 2005 order, the defendants waited almost a year to move for modifications of this court's order.

instruction or related service delivered, DCPS can not be liable for 32.5 hours of a supplemental service. Moreover, DCPS contends that Ms. Davis does not have the qualifications to bill as instructor as she does for fifteen hours a week. Ms. Davis and Ms. Jackson contend that Judge Urbina's Order of September 30, 2005, requires payment of the invoice irrespective of the delivery or absence of any special education during the week.

Upon review of the documents submitted by Ms. Davis, it appears that DCPS is only partially correct in its contention. According to the schedule, A.J.P receives occupational therapy for forty-five minutes twice a week from the Dolly Madison School in McLean Virginia and special instruction for ninety minutes four times a week from Language Experience in Montgomery County. The remainder of the week is spent with Ms. Davis and her mother.

However, by any stretch, A.J.P spends **not more than 7.5 hours in special education and related services** a week instead of the 27.50 hours of special education and related services to which he is entitled each week.

It is clear that A.J.P is spending time in a supportive and loving environment, surrounded by a family that cares for him. His daily activities include time spent with children without disabilities, time spent outdoors and time spent in "field trips." The discussion here is not meant to suggest that A.J.P can only receive special education instruction in a traditional "bricks and mortar" setting. Indeed, one of the reasons it is referred to as "special" education is the recognition that different students will succeed in different environments. A small and intimate setting that A.J.P enjoys is not necessarily inconsistent with the delivery of special education.

The other hallmark of special education, however, is the establishment of measurable objectives that are adjusted as the student makes progress, or in some cases, stalls. This aspect of

A.J.P's educational program appears to be missing entirely. Other than an occasional note between the OT and language instructor regarding progress there is no indication of an educational program that the IDEA requires for students with disabilities. In pleadings in the case before Judge Urbina, the defendants maintain that A.J.P's parent has resisted efforts to revise the 2004 IEP.

When the Court issued its September 30, 2005 Order, the Court intended the Order to remain in place until "the plaintiff's administrative due process complaint is decided and any appeal therefrom is concluded." The court did not anticipate that that action would not occur. Moreover, the Court certainly did not foresee that four years later, A.J.P. would not have an updated IEP, and would be receiving the same services he received when he was three years old. Nevertheless, that is what has occurred because Plaintiff's position is that the 2004 IEP "must stand," and they are refusing to cooperate and attend a MDT meeting to review and revise his IEP, if necessary. As long as the Court's September 30, 2005 Order remains in effect, Plaintiffs will prevent A.J.P. from obtaining an updated IEP. Indeed, A.J.P. may continue to receive service based upon the 2004 IEP will into his teens.

(Defendants' Motion for Relief From Judgment or Order, entered September 23, 2008) . (Dkt. 60).

In sum, the provider here has been retained by a parent to implement an IEP that is clearly out of date. When the local education agency and the parent have met to determine whether current assessments are necessary and have developed an IEP in accordance with the IDEA, and when that IEP is executed, DCPS will again be required to provide free, appropriate services to A.J.P for 27.5 hours a week, as well as whatever supplemental aids and services have been agreed upon.

The remaining issue is the contention of the complainant that DCPS is estopped from denying payment now since payments have been made for the same services during 2006 and

2007. The question of DCPS' ability to "change" its policy regarding payments has arisen in other cases arising under the Petties Payment Orders.⁴

With respect to the individual invoices here, however, Ms. Davis argues that DCPS has somehow waived its right to object to any invoice for a particular service because it has paid others. Whether DCPS had a good reason to pay the earlier invoices, or no good reason at all, the fact remains that prior payments do not automatically guarantee the right to permanent ongoing payments for that service. The fact that for years DCPS paid for services that did not supplement special education does not mean that it must continue to do so for years. What is important is the adequacy of notice by DCPS that it intends to discontinue that practice. In this regard, the record shows that Ms. Davis (and presumably Ms. Jackson) have been on notice for at least a year that DCPS intended to change its policy regarding the reimbursement of all of Ms. Davis' hours.⁵ Nevertheless, in an attempt to allow a period for transition, a recommendation⁶ was made to the parties to continue the current arrangement through the end of the fall semester of the school year, but that DCPS would not be obligated to continue the same arrangement. It is my understanding that DCPS agreed to this proposal and has processed the pending request for payment. Ms. Davis, however, only "agreed to disagree" with the second half of the recommendation, i.e., to discontinue full payments after the end of the semester.

⁴ See, for example, Report and Recommendation of Special Master in the case of Interdynamics, Inc. [Petties v. District of Columbia, 95 cv 0148 : D.C. Dist. Report and Recommendation of the Special Master in the Case of Interdynamics, Inc. entered September 25, 2008) . (Dkt. 1538).

⁵ The record includes DCPS dispute letters dated January 5, 2007, November 26, 2007, March 25, 2008, and September 4, 2008. However, only the last of these disputes were brought before the Special Master. The resolution of the earlier disputes is unclear.

⁶ Email from Elise Baach, Special Master, Federal District Court of D.C., to Quinne Harris-Lindsey, Esq. (DCPS, OGC) et al. (December 22, 2008, 07:31:00 EST) (On file with author).

The parent of A.J.P has many options for securing an appropriate education for her son. Some of these options include continuing Ms. Davis' relationship with her son. At the very least, Ms. Davis is entitled to reimbursement either when she is physically with A.J.P as a one-on-one aide as he receives specialized instruction or related services, or for a commensurate amount of time after those services. Ms. Davis may also be able to demonstrate specialized training in treatment, therapy, technique or pedagogy that would qualify her to provide specialized instruction. Finally, DCPS is responsible for transportation to and from special education and related services; if DCPS transportation is not appropriate or available, the parent may arrange transportation and receive reimbursement at the standard mileage rate set by the IRS. What DCPS will not be responsible for after January 16, 2009, is : 1) for aide hours in excess of actual time spent by A.J.P in special education or related services; and 2) for hours billed by Ms. Davis as a special instructor.

A proposed Order is attached.

Respectfully submitted,

Elise T. Baach
Special Master

Date : January 16, 2009.