



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION

OAL DKT. NO. EDS 01339-23

AGENCY DKT. NO. 2023-35426

D.M. AND J.M. ON BEHALF OF N.M.,

Petitioners,

v.

HOPEWELL VALLEY REGIONAL

BOARD OF EDUCATION,

Respondent.

Michael I. Inzelbuch, Esq., for petitioners D.M. and J.M. on behalf of N.M.

Eric Harrison, Esq., for respondent, Hopewell Valley Regional Board of Education
(Methfessel & Werber, P.C., attorneys)

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

STATEMENT OF THE CASE

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401 to 1484(a), and 34 C.F.R. §§ 300.500 et seq. (2022). Petitioners D.M. and J.M. on behalf of minor child N.M. seek: all educational records of N.M.; a change in N.M.'s classification to multiply disabled; an Individualized Education Plan (IEP) that recognizes and meets N.M.'s individualized needs and provides him with an appropriate program and placement out-of-district at the Cambridge School, Pennington, New Jersey;

reimbursement for all costs associated with N.M.'s unilateral placement at the Cambridge School, for the 2022–2023 school year; extended school year at the Cambridge School with appropriate related services and transportation; continued transportation; and reimbursement for all out-of-pocket costs incurred by petitioners in connection with this matter, including but not limited to attorney's fees, evaluations, private therapies and/or tutoring; and other appropriate relief.

PROCEDURAL HISTORY

On February 1, 2023, D.M. and J.M. on behalf of minor child N.M. filed a complaint for a due process hearing with the New Jersey Department of Education (DOE), Office of Special Education Programs. D.M. and J.M. waived mediation and on February 14, 2023, this matter was transmitted to the Office of Administrative Law (OAL) as a contested case.

On July 12, 2023, the parties appeared for hearing by Zoom Communications, Inc., a remote audio-video platform licensed by the OAL. On July 12 and 28, 2023, petitioners raised objections to the introduction of documents by respondent which had not been provided to petitioners five business days before the hearing. While respondent's first two witnesses, Catherine Kulp (Kulp) and Anne Fishman (Fishman), who maintained these documents, had forwarded them to their supervisor, counsel for respondent had not been supplied with these documents in a timely manner. While petitioners also objected to any testimony from these witnesses, both were permitted to testify with limitations, as described below.

At the close of Kulp's testimony, petitioners renewed their objection to her testimony; this motion was denied. On July 28, 2023, following Fishman's testimony, petitioners moved to strike her testimony and all exhibits not supplied five business days before the hearing began. By letter brief dated August 4, respondent objected to petitioners' motion and requested reconsideration of the earlier limits imposed on Fishman's testimony. Petitioners did not reply, and the oral motion is now ripe for determination.

MOTION TO STRIKE TESTIMONY

Petitioners move to strike all testimony of Fishman, N.M.'s reading instructor during school years 2019-2020, 2020-2021, and 2021-2022, and all documents not supplied by respondents to petitioners five business days before the first day of the hearing. Respondent requests reconsideration of the order issued during the hearing limiting testimony of Fishman.

FACTUAL DISCUSSION AND FINDINGS

The following **FACTS** are not in dispute, and I therefore **FIND**:

1. In the petition, petitioners described the “nature of the problem” in part as “the IEP dated May 12, 2022, . . . **fails** to offer [N.M.] a Free Appropriate Public Education (FAPE)[.]” Petition at 4 (emphasis in original). Petitioners supplemented their claims with additional facts, including a summary of an independent educational evaluation of N.M., which states in part: “The program offered to [N.M.] for the fifth grade has less intensity than the Reading program which was previously provided to him. Mrs. Fishman, [N/M/S] fourth grade reading teacher . . . taught through a multimodal approach to learning [and] instructed through a multisensory, systematic and sequential mode of instruction [but there] is no mention of a systematic multi-sensory approach to reading indicated for the fifth grade[.]”
2. In a demand for documents dated January 31, 2023, petitioners asked respondent to provide from N.M.'s student file, in part: “assessments, records of any and all observations and evaluations, notes, monitoring, progress reporting, report cards, protocols, or other information created or received by the District with respect to N.M.” P-1 at P43, ¶ 2 and P44, ¶ 5. Further, petitioners asked for copies of “documents that demonstrated the credentials for any . . . teachers who work with and/or who are proposed to work with N.M.” Id. at P44, ¶ 7.
3. With respect to each expert witness proposed by respondent, petitioners requested “curriculum vitae/resumes, licenses, certifications, notes, e-mail

transmissions, reports, testing protocols, articles and documents of whatsoever nature regarding [N.M.] maintained, prepared, and/or relied upon [by any such] expert[.]” Id. at P47, ¶ 24.

4. On the first day of the hearing, July 12, 2023, petitioners notified counsel for respondent and me that there were specific documents in respondent’s possession which are responsive to the above document demand which were not provided to petitioners. Petitioners knew of this lapse because during the school year, Kulp sent N.M.’s written work home for review and petitioners had retained some of those documents. Documents retained by petitioners were pre-marked as exhibits P-226 and P-227.
5. Counsel for respondent had not previously seen these documents or other documents from the file kept by Kulp. Kulp stated that she had given her entire file on N.M. to her supervisor in response to the above document demand.
6. On petitioners’ motion, respondent was not permitted to examine Kulp regarding the documents not provided to petitioners. Petitioners, however, used some of those documents to cross-examine Kulp.
7. Fishman is a reading specialist; her title is District Reading Interventionist. Her resume was provided to petitioners by respondent in discovery. Fishman has not updated her resume since being hired full-time by the District and not all her certifications were provided to petitioners. R-46.
8. On July 12, 2023, Fishman sent documents from her files regarding N.M. to her supervisor. The documents Fishman provided covering school years 2020-2021, and 2021-2022, were sent by counsel to petitioners on July 14, 2023, fourteen days before Fishman was scheduled to testify. A third set of documents, covering school year 2019-2020, were sent to counsel via an email address not used by counsel, and therefore, were not provided to petitioners until after Fishman testified.

9. On petitioners' motion, respondent was not permitted to examine Fishman regarding documents not provided to petitioners five business days prior to the hearing.

LEGAL ANALYSIS AND CONCLUSION

The applicable regulation, N.J.A.C. 1:6A-10.1(a-c), the "five-day rule," provides:

- (a) All discovery shall be completed no later than five business days before the date of the hearing.
- (b) Each party shall disclose to the other party any documentary evidence and summaries of testimony intended to be introduced at the hearing.
- (c) Upon application of a party, the judge shall exclude any evidence at hearing that has not been disclosed to that party at least five business days before the hearing, unless the judge determines that the evidence could not reasonably have been disclosed within that time.

There is little caselaw to guide judicial imposition of the five-day rule; neither party cited to any in support of their position. The above regulation is consistent with federal regulations promulgated under the IDEA which provide that "[a]ny parent involved in an administrative proceeding has the right to . . . [p]rohibit the introduction of any evidence at the proceeding that has not been disclosed to the parent at least five days before the proceeding." 34 C.F.R. § 303.422(b)(3).

In L.J. v. Audubon Bd. of Education, the Honorable Joseph F. Martone, ALJ, barred respondent from introducing any testimony or documentary evidence at the hearing because the respondent school district had not provided discovery to petitioner prior to the hearing in violation of N.J.A.C. 1:6A-10.1(c).¹ OAL DKT. NO. EDS 6203-06, Initial Decision, 2006 N.J. AGEN LEXIS 833 (October 23, 2006). Respondent conceded that it

¹ Though the date of the petition is not included in the procedural history, this matter was transmitted to the OAL on August 9, 2006, the hearing began on August 18, 2006, the motion to exclude evidence was heard on August 29, 2006, and the hearing was concluded on September 18, 2006.

made an unsuccessful attempt to provide discovery to petitioner but failed to do so. Judge Martone expressed his reservations as to whether a decision “based solely on the testimony and evidence provided by petitioners [would result] in a decision based on the merits,” but issued the decision, nonetheless. 2006 N.J. AGEN LEXIS, *31.

On review, the U.S. District Court stated that the “categorical, unambiguous nature” of the five-day rule promotes its purposes, those being:

[Preventing] parents from having to defend against undisclosed evidence produced at the last minute; prompt resolution of disputes over the appropriate program and placement of the disabled child “by providing unambiguous requirements and strong incentives for pre-hearing disclosures”; and reducing the risk that a hearing would have to be delayed or adjourned on account of disputes or confusion over a party's disclosure obligations.

[L.J. v. Audubon Bd. of Educ., 2008 U.S. Dist. LEXIS 71122, *11-13, 14-15 (D.N.J. September 10, 2008) (citations omitted).]

Noting that “courts faced with challenges to decisions by ALJs excluding evidence under the [five-day] rule have consistently upheld the ALJ determinations,” the district court found no basis to reverse Judge Martone. 2008 U.S. Distr. LEXIS 71122, *15.

In this matter, petitioners had advance notice that Fishman would be called to testify. Her resume is outdated, and petitioners reasonably complained that relying on the resume, they assumed she was an independent contractor, not a full-time District employee.² Even so, petitioners were well acquainted with Fishman, who worked with N.M. on a daily basis for the three years preceding his parents’ decision to remove him from the District. Any confusion regarding Fishman’s credentials can be cured by permitting the related inquiry for which petitioners were not prepared at a future hearing (three more dates are scheduled).

² Fishman explained that she had not updated her resume since she was hired by the District.

Fishman is a reading specialist; N.M.'s failure to—as his parents allege— make meaningful progress in reading and related subjects was grounds for their decision to place him unilaterally at the Cambridge School. Without her testimony, it would be difficult for any reviewing judge to determine whether N.M. was provided a FAPE in the least restrictive environment in the District. Most of the testimony she gave focused on the IEPs and progress reports, all of which petitioners had in advance (and also marked as exhibits).

Through no fault of Fishman and, it appears, of counsel, respondent did not produce documents from Fishman's files as requested five business days prior to the hearing. While it may seem unfair to ask Fishman to defend her teaching methods and the progress she believes N.M. achieved under her tutelage without her files,³ I **CONCLUDE** that respondent has not provided any grounds for me to determine that the documents could not reasonably have been disclosed prior to July 14, 2023. Respondent was not permitted to introduce any of those documents and Fishman was not permitted to testify with respect to the matters found in such documents.

Petitioners did not have the benefit of Fishman's files prior to July 14, 2023, two days after the hearing began, but petitioners had those documents for fourteen days before Fishman took the witness stand and more than one month before petitioners would begin to present their case.⁴ Had this matter proceeded to hearing on an expedited schedule, having Fishman testify without providing petitioners any time to review her records may have resulted in prejudice, but that is not the case here. I therefore **CONCLUDE** that no prejudice to petitioners will result from my consideration of Fishman's testimony with the limitations described above. Further, should petitioners wish to recall Fishman later, they will be permitted to do so.

³ Note that Fishman wrote large portions of N.M.'s IEPs and progress reports, all of which were provided in advance, and as to which her testimony was permitted.

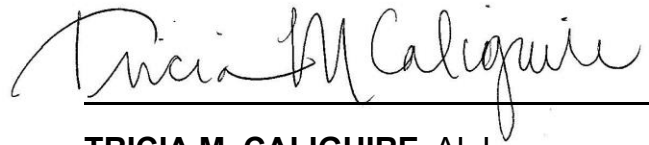
⁴ Offers to adjourn and/or to reschedule Fishman's testimony have, to date, been declined by petitioners.

ORDER

For the foregoing reasons and those reasons stated on the record on July 28, 2023, I **ORDER** that petitioners' motion to strike the testimony of respondent's witness Anne Fishman is **DENIED**. Further, I **ORDER** that respondent's request for reconsideration of my in-hearing decision to limit the introduction of evidence regarding the documents not provided to petitioners five days before the hearing is **DENIED**.

August 11, 2023 _____

DATE



TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/kl/mph

c: Clerk OAL-T