8-6-2007

A.B., PETITONER, vs. DOCKET NO. 07.03-096048DEPARTMENT OF ED. NO 7-23WILLIAMSON COUNTY SCHOOLS, RESPONDENT,

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN RE:

A.B.,

PETITONER,

V. **DOCKET NO. 07.03-096048**
DEPARTMENT OF ED. NO 7-23

WILLIAMSON COUNTY SCHOOLS,
RESPONDENT,

FINAL ORDER

WILLIAM JAY REYNOLDS
ADMINISTRATIVE JUDGE
Administrative Prcedures Division
312 8th Avenue North, 8th Floor
William R. Snodgrass Tower
Nashville, Tennessee 37243

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TO PROTECT the confidentiality of the minor petitioner, they are referred to as "AB" and the parents of AB are referred to in like kind.

PROCEDURAL

BE IT REMEMBERED this contested due process hearing came to be heard on the 6th day of August, 2007, at the Williamson County Board of Education Building, on West Main Street, Franklin, Williamson County, Tennessee; before William Jay Reynolds, Administrative Judge, Office of the Secretary of State, Administrative Procedures Division, sitting for the Commissioner of Education. Marcella Derryberry, Esq. represented the Petitoners, parents of A.B. Jason Bergeron, Esq. represented the Respondent, the Williamson County Board of Education. The Technical Record was admitted without objection. The Hearing was "closed" and the rule called. The Hearing room was cleared. As a preliminary matter, the Local Education Agency (LEA) presented a *Motion to Enforce Settlement Agreement*. The Court took same under advisement. Whereupon, the matter came on to be fully and finally heard. Emmett Dozier, M.D., appeared as the treating expert witness for the Petitioner. Additionally, Carol Hendlmyer and AB's Parents testified on behalf of the Petitioner. [1]

RULING ON MOTION TO ENFORCE SETTELMENT AGREEMENT

A *Resolution Meeting* was held between the parties on June 11, 2007. Therein, the parties reached an agreement. The oral dictation of the agreement was later transcribed, but was never signed by the parties. The Attorney for the LEA drafted a document styled

[1] The LEA did not call any proof at hearing, preferring to rely upon documents filed.

"Settlement Statement." The parents refused to sign the "Settlement Statement" and repudiated the agreement.

The requirements for a valid contract are well-established: A contract can be either expressed or implied, or written or oral. It must result from a meeting of the minds of the parties, in mutual assent to the terms; must be based on sufficient consideration, free from fraud or undue influence, not against public policy, and sufficiently definite to be enforced. *Johnson v Central Nat'l. Ins. Co. of Omaha, 356 S.W.2d 277, 281 (Tenn.1962).* Our courts "retain the inherent power to enforce agreements entered into in settlement of litigation pending before them," and this power exists "even if the parties' agreement has not been reduced to writing." *Anglo-Danish Fibre Inds., Ltd. v Columbian Rope Co., No. 01-2133 GV, 2002 WL 1784490 at *3 (W.D. Tenn. filed June 21, 2002); see also Wallace & Wallace, Inc. v Rosengreen, 1987 WL 5336 at *2 (Tenn.Ct.App. E.S. filed Jan. 16, 1987).* Generally, agreements need not be in writing to be enforceable. *Bill Walker & Assocs., Inc. v Parrish, 770 S.W.2d 764, 771 (Tenn.Ct.App.1989).* It appears the parties did reach an agreement on June 11, 2007 to settle all claims.

The issue is, whether an agreement between the parties, that has not been reduced to a signed writing, and that has been repudiated by one of the parties, prior to presentment to the Administrative Judge, is enforceable. In mediation cases, the *Tennessee Supreme Court Rules* provide that evidence of statements made in the course of mediation are inadmissible. *Tenn. R. Sup.Ct.* 31(7.1) (2008). Further, the *Tennessee Rules of Evidence, Rule 408*, provides evidence of conduct or statements made in compromise negotiations is not admissible.

The purpose of the resolution meeting is for the parties to be able to discuss the issues, facts, and basis of the Due Process request. The *IDEA 2004, § 615 (f) (1) (B)* requires that within 15 days of receipt of a parent request for a due process hearing, the LEA must convene a meeting including the parents, a representative of the LEA with "decision making authority," and relevant member(s) of the IEP team who have "specific knowledge of the facts identified in the complaint." Pursuant, to *§ 615 (e) (2) (G)* there is no confidentiality protection for discussions taking place during a resolution session, begging the question as to whether Congress intended the settlement talks to be unprotected.

The primary purpose for *Tennessee Rule of Evidence 408* is the "promotion of the public policy favoring the compromise and settlement of disputes." Advisory Note to *Federal Rule 408, 56 F.R.D. 227 (1973).* A Secondary policy is that such offers may not reflect an admission of responsibility as much as a desire for peace. An Older Tennessee case stated; "It is against the policy of the law that parties should be prejudiced by their "bids for peace," or overtures, or agreements, made with a view to stop litigation. These overtures of pacification are protected in the law as confidential and privileged matter, which are to be encouraged and promoted. . . It must be permitted to men . . . to buy their peace without prejudice to them, if the offer should not succeed; and such offers are made to stop litigation without regard to the question whether anything is due or not. *Neil P. Cohen, Sarah Y. Sheppeard, and Donald F. Paine, Tennessee Law of Evidence, 3rd Edition, 216, The Michie Company, 1995) (1974), (citing Strong v Sewart & Bros. , 56 Tenn. 137, 143 (1872)).*

The facts in *Ledbetter v. Ledbetter, 163 S.W. 3d 681* are similar. In a domestic action, the parties were attempting Mediation as an alternative to dispute resolution. The parties met and reached an agreement on all matters in controversy. However, they were not able to present the agreement to the court for entry of judgment, so the Mediator audio-taped the terms and conditions under the supervision of the parties and their counsel.[2] The parties and their counsel approved the agreement as dictated. The Mediator had to file a report with the Clerk and the attorneys were required to file, within seventy-two (72) hours of the mediation, an order reflecting the agreement. However, one party repudiated the agreement before the deadline. A Motion to Enforce the Agreement was filed and, on appeal, the issue was whether the Agreement should be enforced. The Supreme Court of Tennessee looked to *the Rule* dealing with Mediation, then to the *Tennessee Rule of Evidence 408,* and held the agreement, which was made during mediation and not reduced to a signed writing, was not an enforceable contract.

Additionally, a portion of the rationale in *Ledbetter* was based on an analysis of *Harbour v Brown for Ulrich, 732 S.W.2d 598 (Tenn.1987).* Therein, in a contract action, on the day of trial, the Parties announced to the court they had reached an agreement, the terms of which were not announced to the Court. Prior to the entry of judgment, one party repudiated the terms of the agreement. Holding the agreement was not enforceable, the Supreme Court stated that the resolutions of disputes by agreement is encouraged, "a valid consent judgment can not be entered by a court when one party withdraws consent and this fact is communicated to the court prior to entry of the judgment." *Id. at 599-600 (citing Van Donselaar v. Van Donsellaar, 249 Iowa 504, 87 N.W.2d 311 (1958)).* The

[2] The oral dictation of the agreement was later transcribed but was never signed by the parties.

Court in *Harbour* further held that "consent must exist at the very moment the court undertakes to make the agreement the judgment of the court." *Harbour, 732 S.W.2d at 599 (quoting Burnaman v. Heaton, 150 Tex. 333, 240 S.W.2d 288 (1951)).* Thus, "until entered by the court, the matter being the question of an agreement between the parties, either party may repudiate the agreement because of an actual or supposed defense to the agreement." *Harbour, 731 S.W.2d at 600.* The Supreme Court expressly states the holding in *Harbour* is applicable to agreements reached as a result of Mediation. Applying the principles of *Harbour,* the intermediate Court held an agreement was not enforceable because it had not been reduced to writing or stipulated in open court. *Environmental Abatement, Inc. v. Astrum R.E. Corp., 27 S.W.3d 530, 541-42 (Tenn.Ct.App.2000).*

The Court of Appeals distinguished *Environmental Abatement* noting an exception to the general rule that consent must exist at the time of judgment. The exception provides that when the terms of an agreement are announced or stipulated in open court, a judge may later enter a consent judgment based on that agreement regardless of a party's repudiation between the time of the announcement and the judgment. *Id*. at 539. This exception is rooted in the language in *Harbour,* which states that " '[t]he power of the court to render a *685 judgment by consent is dependent on the existence of the consent of the parties at the time the agreement receives the sanction of the court or is rendered and promulgated as a judgment.' " *Harbour, 731 S.W.2d at 599 (quoting 49 C.J.S. Judgments § 174 (b)).*

In the present case, the "settlement agreement" did not receive the sanction of the Administrative Court and the Motion to Enforce is DENIED.

FINDINGS OF FACT

1. AB was a fifteen year old student properly served by the LEA.
2. AB has been diagnosed with Attention Deficit Hyperactive Disorder.
3. On May 8, 2007 AB was found consuming alcohol on campus.
4. AB was suspended for a period of one year for violation of LEA rules.
5. AB was placed in the Alternative Learning Center for the year.
6. On May 30, 2007, Petitioners filed an appeal claiming AB's actions on May 8, 2007 were a manifestation of his disability; a diagnosis of Attention Deficit Hyperactive Disorder, and in addition, anxiety and depression.
7. The LEA position was that AB's actions were not a manifestation of the disability.
8. The treating psychologist testified AB's actions were an equal result of AB's Attention Deficit Hyperactive Disorder, anxiety, and depression.
9. AB, in a written statement describing the incident May 8, 2007, indicated he drank because he "was depressed."
10. On June 11, 2007 the LEA properly convened a Resolution Meeting with the appropriate members present. A settlement agreement was reached on all issues at dispute, except for attorney fees.
11. For no other apparent reason, the Parents repudiated the June 11, 2007 Agreement.
12. The LEA stipulated to the terms of the June 11, 2007 agreement and offered no further proof in its case in chief.

13. AB's actions were not a manifestation of the diagnosed Attention Deficit Hyperactive Disorder.

14. The June 11, 2007 agreement provided: 1) AB would return to Ravenwood High School beginning with the Fall 2007 semester. The 10- day period where he attended the Alternative Learning Center (ALC) during May, 2007 would be considered as the total of his suspension; and 2) The Individualized Education Program (IEP) team meeting would be convened shortly after the beginning of the fall semester to evaluate AB; and 3) The Petitioners would be reimbursed for transportation costs during AB's attendance at the ALC, in the amount of Two Hundred Seventy One and 60/100 ($271.60)Dollars; and 4) AB would be allowed to return to his extracurricular activities immediately.

15. Petitioners verbally agreed with the foregoing terms and conditions except they desired for the LEA to pay their attorney fees.

CONCLUSIONS OF LAW

The Court has considered the following legal authorities and precedents in making a determination and ruling in this cause:

1. The requirement to provide a Free Appropriate Public Education (FAPE) is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Board of Education of the Hendrick Hudson Cent. Sch. Dist. v Rowley, 458 U.S. 176 (1982).*

2. Fundamental to the *Individuals with Disabilities Education Act (IDEA)§ 1415 et seq.,* are the procedural safeguards that have been provided to protect parents and their children from being denied the opportunity to participate in the Individualized Education Program (IEP) process and receive FAPE. *20 U. S. C. A. §1425 (d) (1) (A).*

3. Procedural violations that deprive an eligible student of an Individualized Education Program (IEP) or result in the loss of an educational opportunity also will constitute a denial of FAPE under the *IDEA. see Babb v. Knox County Sch. Sys. 965 F.2d 104, 109 (6th Cir. 1992).*

4. The burden of proof in an administrative hearing, under the *Individuals with Disabilities Education Act (IDEA),* is placed upon the party seeking the relief. *Schaffer v Weast, 546 U. S. 49 (2005).* Accordingly, AB has the burden of proof.

5. The *IDEA* requires that before a disciplinary action may be taken, the school must determine whether the action of the disabled student, that was the basis of the discipline, was a manifestation of the child's disability. *20 U. S. C. §1415 (k) (1) (E).*

6. Congress, in their report regarding the adoption of the *2004 IDEIA* provisions, clearly stated its intent that for an action to be considered a manifestation of a student's disability, there must be a correlation: "The Conferees intend that in order to determine that the conduct in question was a manifestation of the child's disability . . . must determine the conduct in question be the direct result of the child's disability. It is the intention of the

Conferees that the conduct in question was caused by, or has a direct and substantial relationship to, the child's disability; and is not an attenuated association, such as low self esteem, to the child's disability." *H. R. Conf. Rep. No. 108-799 at 225 (2004).*

7. The Federal District Court is granted the sole authority to award reasonable attorneys fees to prevailing party. *20 U. S. C. § 1415 (i) (3) (B) (i) (I).* Attorneys' fees for time actually spent at a resolution session pursuant to *20 U. S. C. 1415(f) (1) (B) (i)* generally are not compensable under the *Individuals with Disabilities Education Improvement Act of 2004 (IDEIA).* Nevertheless, if a settlement Offer is rejected at the resolution session and the matter goes forward, a parent is still entitled to attorney's fees under the statute for time spent on behalf of the client, before and after the resolution session, if the parent is ultimately the prevailing party. *See 20 U. S. C. 1415(i) (3)(B); see also 20 U. S. C. 1415 (i) (3)(E).*

8. The *Individuals with Disabilities Education Improvement Act of 2004 (IDEIA)* added a new procedure by subsection 1415. The relevant part provides for a: "(B) Resolution session. (i) Preliminary meeting. Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the Individualized Education Program (IEP) Team who have specific knowledge of the facts identified in the complaint- - (I) within 15 days of receiving notice of the parents

complaint; . . . (IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint. . .”

9. The underlying intent of a resolution meeting is to allow the parties an opportunity to resolve the dispute that is the basis for the due process complaint. *20 U. S. C. § 1415 (f) (1) (B) (i) (IV).*

The Petitioner contends the LEA caused substantive harm by denying AB’s parents the opportunity to participate in the “Individualized Education Program (IEP)” process on May 10, 2007. Particularly there is an issue of defining AB’s disability solely as Attention Deficit Hyperactive Disorder (ADHD). The IDEA requires that before disciplinary action can be taken, the LEA must determine whether the action of the disabled student that was the basis of the discipline was a manifestation of the child’s disability. The Petitioner has failed to carry the burden of proving that the actions of the student were a manifestation of the child’s disability or that the definition of the disability should be expanded to include, factually, the diagnosis of “anxiety and depression.”

Additionally, it appears the concerns of the Parents were addressed at the Resolution Session of June 11, 2007. There, the remaining issue not resolved appeared to be the attorney fees and legal costs accruing to the onset of the meeting. The Resolution Session is designed for the parent and child to discuss the due process complaint, and the facts that form the basis of the due process complaint; so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint. It appears from review of the entire record, the substantive issues giving rise to the complaint were resolved in favor of the Petitioner. This case seems to focus on the

inadequacies and procedural failures of the LEA that led to the filing of the complaint rather than AB's basis of harm.

Therefore, the Court finds, by a preponderance of the credible evidence: (1) AB's actions were not a manifestation of his disability; and (2) the June 11, 2007 meeting resolved all the issues between the parties until that point in time; and (3) the agreement to: A.) return AB to Ravenwood High School. The 10- day period where he attended the Alternative Learning Center (ALC) during May, 2007 would be considered as the total of his suspension; and B.) The Individualized Education Program (IEP) team meeting would be convened shortly after the beginning of the fall semester to evaluate AB; and C.) The Petitioners would be reimbursed for transportation costs during AB's attendance at the ALC, in the amount of Two Hundred Seventy One and 60/100 ($271.60) Dollars; and D.) AB would be allowed to return to his extracurricular activities immediately; and E.) Declare AB the prevailing party, was fair, equitable, appropriate, reasonable, and in the best interest of AB. Accordingly, same is made the order of this court and those outstanding issues, not made moot, should be resolved between the parties consistent therewith; accordingly

DECISION

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that AB shall attend Ravenwood High School, or placement where the Individualized Education Program (IEP) team deems appropriate; and The 10- day period where he attended the Alternative Learning Center (ALC) during May, 2007 is the total of his suspension; and The Individualized Education Program (IEP) team meeting shall convene to evaluate AB

for appropriate placement at the beginning of the 2008 Fall semester; and The Petitioners shall be reimbursed for transportation costs, during AB's attendance at the ALC, in the amount of Two Hundred Seventy One and 60/100 ($271.60) Dollars; and AB shall be allowed to participate in extracurricular activities; and

The Petitioners are the prevailing party.

ORDERED AND ENTERED this 11th Day of August 2008

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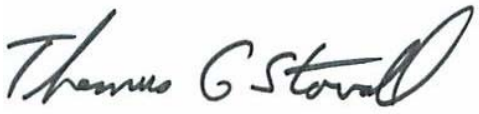
WILLIAM JAY REYNOLDS
ADMINISTRATIVE JUDGE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 11th day of August 20098.



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THOMAS G. STOVALL, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION