State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER ON THE MOTION

OAL DKT. NO. EDS 06022-15

AGENCY DKT. NO. 2015 22555

F.P. ON BEHALF OF N.P.,

Petitioners,

v.

TABERNACLE

BOARD OF EDUCATION,

Respondent.

Jamie Epstein, Esq., on behalf of F.P., petitioner

Cameron R. Morgan, Esq., original and former counsel for respondent (Parker McCay P.A., attorneys)

Michael Pattanite, Jr., Esq., conflict and substitute counsel for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang and Casey, LLC, attorneys)

BEFORE **JOHN R. FUTEY**, ALJ t/a:

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§1400 to 1482. The matter was listed for a first hearing date for May 14, 2015 before this tribunal. This tribunal was assigned this matter due to a scheduling conflict with the originally assigned administrative law judge, Hon. Lisa James-Beavers. On that date, Jamie Epstein, attorney for F.P. appeared with his client, but no one appeared on behalf of the respondent Tabernacle Board of Education (hereinafter "Tabernacle" or "the District"). Cameron R. Morgan, Esq., was listed on the transmittal service list as the attorney of record for Tabernacle. After waiting approximately one hour and fifteen minutes and without any word from anyone on behalf of Tabernacle, petitioner and petitioner's counsel were excused and the special education matter was

thereafter reassigned to a hearing judge (Patricia Kerins, ALJ) for further disposition pursuant to standard Office of Administrative Law (hereinafter "OAL") procedures and protocol.

After that date, counsel for petitioner made an application/motion for the reimbursement of and for costs expended for having attended the first hearing date of May 14, 2015 as well as for having spent considerable time in preparing his motion and travel, (as well as, subsequently, attendance at the oral argument and reviewing and responding to the written post oral argument submission by Mr. Morgan). After receiving a written reply from Mr. Morgan, the content of which was vague, unclear, and generally unresponsive to all of the issues raised by Mr. Epstein, this tribunal afforded him an opportunity to be heard by way of oral argument, which hearing for that purpose was ultimately set for September 16, 2015, at 9:00 a.m., after several prior efforts to schedule it sooner. Notice of that hearing was prepared in July of 2015.

On the date set for oral argument, counsel for petitioner and petitioner appeared timely at 9:00 a.m. along with Michael Pattanite, Esq., whose firm had been substituted in as attorney for Tabernacle after Parker McCay (Morgan's law firm) determined there to be, as Mr. Morgan described it, a "non-waivable" conflict of interest involving a related residency challenge between Tabernacle and another school district. Although both Mr. Epstein and Mr. Pattanite appeared on time and as indicated, Mr. Morgan failed to appear timely at 9:00 a.m. Instead, at approximately 9:45 a.m. he advised this tribunal's judicial assistant by telephone that he would not be able to arrive for another half-hour. He arrived at approximately 10:20 a.m. at which time oral argument commenced on the motion. Upon arrival, he contended that he did not feel that he was required to appear at the oral argument. The hearing ended at approximately 12:15 p.m. at which time all sides were given the opportunity to supplement the record with written submissions that had been identified at the hearing. Mr. Epstein submitted his by way of fax on September 17, 2015 and Mr. Morgan submitted his by way of fax on September 18, 2015.

Based upon all of the foregoing and after having considered the arguments raised by all sides I **FIND** the following to be the relevant considerations to be attached to the motion herein.

Although the motion was brought against both the attorney for the school district and the district itself for failure to appear at the first hearing, I **FIND** that the burden to appear at the first hearing date rested with the attorney since a notice of the hearing was sent to him from the Office of Special Education Programs (hereinafter "OSEP"). It was Mr. Morgan's responsibility to communicate notification of that hearing to his client accordingly. Mr. Morgan admits that the e-mail notice of the hearing was "received, viewed, and forwarded on for filing/calendaring" within his office. (See his letter to this tribunal dated September 17, 2015, at page 11.) He further concedes that the notice "was missed as a result of an honest internal mistake, both by counsel and his staff," for which he has accepted complete responsibility at all times. (Once again, on page 11 of the same letter.) As a result, it is understandable that the District would not have appeared since the attorney was in total charge of properly logging in notice of the hearing and advising his client. Since his office failed to schedule it in, the District presumptively failed to get notice to appear. Accordingly, I cannot assess any penalty to the school district under the circumstances. As a result, the request for costs against the District is **DENIED** and the motion against it is **DISMISSED WITH PREJUDICE.**

However, it is evident that their attorney is responsible for the error in failing to respond to the notice of hearing since, as a result of his nonappearance on May 14, 2015, he wasted the time of both petitioner and her attorney, who were required to remain at the OAL until excused by this tribunal. Mr. Morgan was listed as the attorney of record since his firm was the solicitor of record for the respondent Board. His contention that his firm should not be assessed for the wasted time due to his "honest internal mistake" is disingenuous at best in as much as he attempts to fault the efforts of a temporary employee with no prior law firm experience for the effort. Someone must be held accountable under the circumstances, which is not a penalty but recognition that a form of reimbursement is warranted to compensate the opposing side for its waste of time.

His argument that his firm was wrestling with a "non-waivable conflict of interest" further demonstrates and reinforces the concern that his firm knew or should have known that there was a potential significant issue attached to any involvement with this school district at the time of this matter, whether it was in the education or special education setting. Yet, for whatever reason or reasons, no apparent safeguards were in place by his office to anticipate problems in that regard so as to have advised the OAL, OSEP, or opposing counsel of it prior to the scheduled hearing before this tribunal. The question here is when did Mr. Morgan act on curing his non-waivable conflict of interest? According to Mr. Morgan, it was not until May 19, 2015 (it being noted that Mr. Pattanite maintains it was May 18 but that was presumably only based upon the contact call from Judge Kerins's assistant who was attempting to set-up the conference call for the next day to discuss hearing procedures) or, by counsel's further "recollection," May 20 or 21, 2015, that he ultimately conferred with Tabernacle as well as the partners in his law firm to assess and determine the conflict.

However, and despite that time frame for action on the conflict, the actual involvement of Mr. Morgan and his firm was well before that time. Mr. Morgan concedes that, on March 30, 2015, he had received an e-mail correspondence from Mr. Epstein who entered his appearance in the residency case at the time and that Mr. Epstein attached the petition which he had filed with OSEP on March 27, 2015. The petition was enclosed within that e-mailed letter. Mr. Morgan further admits that the petition itself asserted among other things that Tabernacle had "violated N.P.'s [special education rights under the IDEA] by contesting his domicile and rights to attend school in Tabernacle" and that Mr. Epstein also sought a claim for compensatory education. In the process, he argued that, (1) given the manner in which the petition was attached as an enclosure in the residency case (which had been assigned to ALJ John Kennedy) and that it also bore the docket number of that case, (2) was not independently furnished, and (3) attempted to allege common questions of fact and law, it was entirely "unclear whether this was the attempt by Mr. Epstein to amend the pleadings in the residency case or establishing a new case altogether." He further contends that this ambiguity could not be cured until he held his meeting with his law firm and his client on either May 20 or 21, 2015. It is also noted that OSEP had sent a direct notice to F.P., petitioner, dated April 1, 2015, with a copy to Mr. Morgan and Mr. Epstein which

indicated receipt of the filing of special education due process by Mr. Epstein. Then, on April 20, 2015, Mr. Morgan sent a letter to Judge Kennedy regarding the pending education residency case involving Tabernacle. Clearly, under those facts alone counsel knew or should have known by then that a conflict existed between a pending education residency case and a newly-filed special education case, but waited until the latter part of May before the firm even acted on the conflict. Instead, counsel should have immediately reached out to intercept and cure the conflict but failed to do so. His contention that there was overt confusion regarding the status and existence of an independent special education case at the time is lame at best. Mr. Morgan is an experienced special education attorney and practitioner before the OAL who well knows how to read special education petitions, of which this was one. Yet he and his staff apparently did nothing on a timely basis to address the issue. This was carelessness and inexcusable error at a minimum.

Based upon all the foregoing, I **FIND** that the failure on the part of Mr. Morgan to appear was not harmless or excusable. Rather he placed an unnecessary burden upon opposing counsel and his client who did properly appear as ordered by the OAL. Thus, it is quite understandable why Mr. Epstein would have bought his application for reimbursement regarding his wasted time, as well as that of his client. The OAL rules speak to failures to appear. Under N.J.A.C.1:1-14.4(a), "If after appropriate notice, neither a party nor representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. [Emphasis added.] If the judge does not receive an explanation for the nonappearance by the end of the next business day, the judge shall . . . direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c)." It is noted this procedure applies in virtually all matters that are scheduled at the OAL, except for special educational cases because, in those types of matters the first hearing judge is required to immediately assign the matter for a full hearing before another judge in order to dispose of the merits of the underlying issues in the matter. This was done in this case. It is noted that the underlying matter was ultimately settled between the parties in this matter. However, the fact that the matter was so eventually settled does not alleviate Mr. Morgan of his responsibility with reference to his failure appear at the initially scheduled matter before this tribunal.

Further, at subsection (c) 2. of the same rule it states;

> "If the judge concludes that there was no good cause for the failure to appear, the judge may . . . at his or her discretion, order any of the following:
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> i. The payment by the delinquent representative or party of costs in such amount as the judge shall fix, to the state of New Jersey or the aggrieved person;
>
> ii. The payment by the delinquent representative or party of reasonable expenses, including attorney's fees to an aggrieved representative or party; or
>
> iii. Such other case-related action as the judge deems appropriate."

As a result, since it is determined that there was no good cause for the failure of Mr. Morgan or another attorney from his office to appear on May 14, 2015, under the circumstances, the assessment of costs and reimbursement of reasonable expenses, as indicated here and above, is appropriate. He and his office, as the attorneys of record at the time, assumed full responsibility as the authorized representative of Tabernacle to make all contacts and inquiries on behalf of their client. The determination regarding the quantum of such costs for that failure to appear shall be discussed hereinafter.

The second request from Mr. Epstein with reference to the assessment of costs is based upon the time spent conducting the oral argument hearing, which was ultimately held on September 16, 2015. As stated hereinabove, it is noted that the opportunity for Mr. Morgan to be heard at that time was predicated upon the answer which was filed by Mr. Morgan on July 11, 2015, the content of which was sorely inadequate and insufficient to address the issues relative to his nonappearance at the first hearing date. As a result, in accordance with the opportunity for counsel to be heard, this tribunal afforded him the courtesy of presenting oral argument at a hearing that the OAL scheduled for July 28, 2015. However, prior thereto, on July 24, 2015, Mr. Morgan sent a letter request to this tribunal in which he requested an adjournment of

the scheduled oral argument due to the fact that he had a pre-planned vacation for the week of July 27-31, 2015. Parenthetically, it is also noted that the matter for oral argument had originally been scheduled for July 21, 2015 but was modified at that time when Mr. Morgan advised the OAL that there was now another attorney involved in this matter, who had been substituted in to conduct the actual due process hearing. The matter was rescheduled to July 28, 2015, accordingly. Curiously, in the communication from Mr. Morgan, dated July 24, 2015, he made reference to the fact that the matter had been rescheduled to July 29, 2015, which was inaccurate since the notice of the modified hearing date, which had been sent on July 17, 2015, scheduled it for July 28, 2015. Thus, this was another example of Mr. Morgan's apparent failure to properly manage his file since he did not even get the rescheduled hearing date correctly identified in his correspondence.

In any event, his request for the adjournment from the July 28, 2015, oral argument was granted and the matter was rescheduled for oral argument for September 16, 2015 at 9:00 a.m. at the OAL, Mercerville, New Jersey, pursuant to a notice that was prepared on August 11, 2015. As indicated hereinabove, on that date, Mr. Epstein, his client, and Mr. Pattanite appeared pursuant to the notice. In order for the record to be complete in that regard, although he was a couple of minutes late in arriving, Mr. Pattanite had timely notified the OAL of his traffic delays prior to thereto. This represented professional courtesy on his part. However, Mr. Morgan was not present at 9:00 a.m. and did not appear until approximately until 10:20 a.m. after having contacted the OAL and advising the OAL staff sometime before 10:00 a.m. that he would be approximately one-half hour late. It is not known how he became aware of or what triggered his determination to appear at that time. But upon his arrival, and most astonishingly, his excuse in arriving so late was that he did not think that he had to appear at all. Thereafter, the bulk of the approximately two hours that the oral argument took was spent in Mr. Morgan providing his explanation and clarification regarding his failure to appear in both May as well in a timely fashion at the September session. Very little input was received from either Mr. Epstein or Mr. Pattanite at that time. The matter concluded at approximately 12:20 p.m. At that time, the tribunal afforded both sides the opportunity to provide documentation that has been identified during the course of the oral argument. The last submission was sent by fax from Mr. Morgan and received at

the OAL on September 18, 2015, with a hard copy and all attachments being received by way of hard copy on September 21, 2015. In his file submission, Mr. Morgan also once again reiterated a large part of his oral presentation. The hearing record closed at that time.

I have considered both his extensive oral argument and the written submission of Mr. Morgan as well as the application and arguments of Mr. Epstein in this matter. In the process I am mindful of the strains and the stresses that attach to the practice of law, especially in the area of special education. The demands upon counsel in this arena are enormous and they reflect the high stakes attached to finding free and appropriate educational benefits for affected children. Skilled practitioners on both sides of the aisle are a necessity and any delays in processing appropriate solutions on their behalf can be detrimental and most devastating. Therefore, extreme care must be taken at all times in order to insure that the due process rights of children are protected in as timely a fashion as possible.

Attendance at each hearing date is therefore critical for the process. Any failure to appear without good cause flies in the face of maximizing those best efforts. Thus, when Mr. Morgan failed to properly appear without good cause on May 14, 2015, his action flew in the face of those best efforts. Part of his explanation was that his firm had not been involved in the special education case. That assertion is totally incorrect in as much that he was the attorney of record listed at the outset of the special education case, his firm was initially involved in the residency case and the special education cases involving the same child, he had received timely and appropriately notices regarding the matter, he was noticed by Mr. Epstein about the status of a pending special education matter, and he failed to properly act to extricate himself or his firm from the matter until the end of May, which was after his required appearance in May. His explanation was that the notice of hearing was either “misplaced or passed over in error, without the settlement conference date being calendared.” (See his letter dated September 17, 2015.) However, as having been found this matter hereinabove, it is determined that his explanation regarding that failed calendaring is not excusable neglect under the circumstances. Further, his explanation regarding his failure to timely appear at the oral argument that was rescheduled for September 16, 2015, is equally

disturbing. Mr. Morgan contends that he did not think that he had to show up at that oral argument, even though it was expressly set-up to give him the opportunity to explain his nonappearance. It was not the responsibility of any substitute counsel such as Mr. Pattanite, to appear on his behalf to explain away that prior nonappearance. His confusion or lack of understanding in August of 2015 relative to the role he was to play at the September 16, 2015 hearing is baffling and disturbing at best since the matter had already been rescheduled at his request from July due to his vacation plans. Had he had any confusion at any time he should have immediately communicated those concerns to OAL. He failed to do this. As a result, his failure to timely appear on September 16, 2015, is similarly inexcusable and without good cause. If anything, it merely exacerbates the lack of due diligence attached to the overall management of this matter by him and it warrants the assessment of costs for additional consumption and waste of time. And I so further **FIND**.

Based upon on all the foregoing, I **FIND** and **CONCLUDE** that Mr. Morgan has failed to demonstrate good cause either for his failure to appear on May 14, 2015, or his lack of a timely appearance at the oral argument September 16, 2015. Counsel for petitioner is entitled to compensation and reimbursement accordingly.

The issue regarding the quantum of compensation, however, is a separate matter and is dealt with as follows. Mr. Epstein has presented his affidavit and several professional attachments which reflects his request for the payment of $500 per hour for his services and he has included an itemized listing of all of the time he has spent in traveling to and from and appearing at the OAL for the ESP and as well as the oral argument, as well his time spent preparing his application for compensation, reviewing various documentations, and responding to the various responses by both Mr. Morgan and Mr. Pattanite. In that regard, I am particularly mindful of the accompanying affidavits by his fellow practitioners, who support his request for the $500 per hour attorney's fee request. In the light of the fact that Mr. Epstein provides his professional services on a contingent basis, the $500 per hour appears to be reasonable under the circumstances. His experience and expertise in the area also reflect that assessment.

At the same time, however, while I am mindful of the caliber of awarding such a significant hourly rate, is also predicated upon the fact that one's appearance in a proceeding involves something more than merely sitting around and waiting for opposing counsel to appear and/or providing some perfunctory commentary at the hearing once opposing counsel arrives. In this matter, Mr. Epstein was not called upon to address any matters relative to any particularized expertise at the May 14, 2015 conference in as much as opposing counsel was not yet there and it would have been contrary to the OAL and Court Rules to permit any ex parte exchanges in any case. Similarly, at the oral argument on September 16, 2015, and through no fault of his own, Mr. Epstein's participation was highly reduced at best, in as much as Mr. Morgan presented the bulk of the argument and commentary at that time. Thus, although I have closely scrutinized the itemized billings by Mr. Epstein in support of all the work that he has done in this matter, I cannot ascribe a full measure of reimbursement to him for all that time spent in light of the above. Rather, while it is appropriate to assess reimbursement costs to him, it is more equitable and fair to embrace all of his work and time under the timeframe attached to his appearance time at the OAL on both May 14 and September 16, 2015. As indicated here and above, Mr. Epstein and his client remained at the OAL for 1.25 hours on May 14, 2015, at which time they were excused due to the failure to appear by Mr. Morgan. Similarly, on September 16, 2015, he and his client were at the OAL for 3.50 hours (including the wasted time awaiting the late arrival of Mr. Morgan), for a total time between both sessions consisting of 4.75 hours. When combined and assessed at $500 per hour, this amounts to a total time allocation of $2,375, which is most reasonable and responsive under the circumstances. In addition, Mr. Epstein has requested travel costs in the amount of $0.50 per mile for two round trips of sixty-four miles each. Although the $0.50 per mile seems generally reasonable for private purposes, I will nonetheless ascribe the State mandated government rate of $0.31 per mile for the total mileage reimbursement in amount of $51.68. When added to the attorney's fee assessment the total amount due for reimbursement purposes is $2,426.68.

Based on all the foregoing, and considering the interests of the respective parties it is **ORDERED** that respondent's counsel Cameron Morgan, Esq., on behalf of his law firm, shall reimburse Jamie Epstein, attorney for petitioner, in the total amount of

$2,426.68, which the reimbursement shall be made directly to counsel within thirty days of the date of this order.

December 21, 2015
DATE

JOHN R. FUTEY, ALJ t/a

Date Mailed to Parties: December 21, 2015

/mel/mph