

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
441 4th Street, NW, Suite 540-S
Washington, DC 20001-2714

M. F-G

Petitioner,

v.

DISTRICT OF COLUMBIA
DEPARTMENT ON DISABILITY
SERVICES, REHABILITATION
SERVICES ADMINISTRATION
Respondent

Case No.: DS-P-08-102477

FINAL ORDER

I. Introduction

On September 15, 2008, Petitioner M F-G, through counsel, filed a hearing request pursuant to 1 DCMR 2805 regarding Respondent District of Columbia Department on Disability Services' administration of the Rehabilitation Services Administration ("RSA") program. Specifically, Petitioner sought relief from RSA's alleged refusal to include paralegal training as an RSA - provided service in Petitioner's Individual Plan for Employment ("IPE"), and RSA's refusal to reimburse Petitioner for costs she incurred in attending Howard University's ("HU") continuing education program for paralegal training.

A. Procedural History

On November 10, 2008, RSA filed a Motion for Summary Judgment (the "Motion"). I denied the Motion without prejudice because it failed to comply with Super. Ct. Civ. R. 56 (c). On December 19, 2008, RSA renewed the Motion and on January 5, 2008, Petitioner filed its Response. I again denied Respondent's Motion finding that RSA had not met its burden of

showing that no genuine factual dispute existed on the issues presented in the Motion. I also found that RSA could not challenge Petitioner's eligibility in this proceeding because it had previously found her eligible and had not thereafter complied with the requisite procedures to establish her ineligibility. 29 DCMR 104.1(b).

The parties proceeded with an evidentiary hearing on January 8, 2009. At the hearing, Joseph Cooney, Esquire, appeared on Petitioner's behalf. Petitioner also appeared and testified. Shakira D. Pleasant, Assistant Attorney General and Turna R. Lewis, Deputy General Counsel, appeared on Respondent's behalf, along with Brenda C. Thompson, RSA Vocational Rehabilitation Specialist, Respondent's witness. Marlene Jones-Kinney, RSA Chief of Quality Assurance & Federal Compliance and John Esipeke, RSA Supervisory Vocation Rehabilitation Specialist, also attended but did not testify.

B. The Parties' Positions

Petitioner contends that in processing her request for services RSA committed the following errors: (1) it failed to timely determine eligibility; (2) it failed to assist Petitioner in exercising informed choice; (3) it did not provide accurate information and guidance regarding the RSA program, including its cost participation requirements; and (4) RSA did not timely develop an IPE. Petitioner thus became "a victim of [RSA's] failure to guide her choices as required by the [Act]."¹ According to Petitioner, the RSA counselor compounded these errors on May 19, 2008, when she determined not to support Petitioner's participation in an HU paralegal program without so advising Petitioner. As a result, on May 27, 2008, Petitioner enrolled at HU and paid for tuition and books based upon her assumption that RSA would

¹ Petitioner's Post Hearing Memorandum ("PPHM") p. 16.

reimburse these costs. RSA's alleged errors and representations underpin Petitioner's claim that RSA should pay for her paralegal training.

RSA argues that Petitioner's claim for services must be denied because she incurred educational costs before RSA developed her IPE. *Takahashi v. District of Columbia Dept. of Human Services*, 952 A.2d 869, 875 (D.C. 2008) (holding that the RSA program is not liable for educational costs incurred prior to the date that it develops an IPE).² RSA also asserts that due to Petitioner's income, the amount she is required to contribute to the cost of her training exceeds the total amount she expended for tuition and books, and therefore Petitioner is not entitled to any payment for training services. *Id.*

C. Summary Of Evidence

Before the hearing commenced, counsel for the parties stipulated that Respondent's Statement of Undisputed Facts filed on December 19, 2009, be admitted into the record as Joint Exhibit A ("JX A") and that its contents (excepting paragraph 13) be deemed stipulated facts in this proceeding. Based upon the parties' additional stipulation, I also admitted Petitioner's Exhibits ("PX") 101 through PX 108, and Respondent's Exhibits ("RX") 200 through RX 210. Petitioner withdrew PX 109 because it was duplicative of RX 200 and did not offer exhibit PX 100.

Much of the evidence presented concerned whether RSA or Petitioner was responsible for delays in both RSA's eligibility determination and its development of her IPE. The witnesses also differed on whether Petitioner's counselor failed to fully advise her regarding the RSA

² Respondent's Motion to Dismiss filed December 19, 2008 at p.11.

program, especially its cost participation requirements. Yet, the uncontested, critical fact in this case is that based upon Petitioner's income and household size, RSA's regulations mandate that she must contribute more money to the cost of her training than she spent on the HU paralegal course. Since these regulations preclude RSA from paying for Petitioner's training, I conclude that RSA's errors, even if proven, do not trigger an independent obligation to financially support Petitioner's training. Therefore, I need not resolve the credibility issues raised in the witnesses' conflicting testimony.

Based on the testimony of the witnesses and the exhibits admitted into evidence, I make the following findings of fact and conclusions of law.

II. Findings of Fact

1. RSA administers the District of Columbia Rehabilitation Services Administration Program pursuant to the Rehabilitation Act of 1973 (the "Rehabilitation Act" or the "Act") and Title 25 Chapter 1 of the District of Columbia Municipal Regulations ("DCMR"). JX A.
2. Petitioner first requested services from RSA in November 2008 and attended RSA orientation sessions on December 10, 2007, and December 11, 2007. Prior to contacting RSA, Petitioner worked as a paralegal for approximately ten years on a volunteer basis but did not have a degree or certificate in that field. JX A.
3. RSA initially scheduled Petitioner for an intake interview on December 17, 2007; however due to computer difficulties, RSA rescheduled the

interview for January 16, 2008. At that time, Petitioner met with her RSA counselor, Brenda C. Thompson, and signed a release of medical information form. JX A.

4. By letter dated February 28, 2008, Petitioner received notification from Howard University's ("HU") Continuing Education Program that she had been accepted into its paralegal certificate course. PX 102.
5. Petitioner advised Ms. Thompson that she had received the acceptance letter and that compared to paralegal programs offered at other colleges in the District, HU's course was less expensive and took less time to complete.
6. On March 24, 2008, Ms. Thompson advised Petitioner about paralegal courses offered at the University of the District of Columbia ("UDC"). JX A. Upon further investigation, Petitioner determined that the UDC course was intended for students pursuing a degree in business and did not offer certification.
7. On April 5, 2008, Petitioner wrote a letter to Ms. Thompson, specifically requesting RSA sponsorship to attend the HU paralegal course. JX A. With the letter, Petitioner enclosed her acceptance notice including the cost of tuition and other fees. PX 104.
8. On April 15, 2008, RSA issued Petitioner a Certificate of Eligibility. PX 105.

9. On April 23, 2008, Petitioner sent a letter to Ms. Thompson to inquire into the status of her request for training at HU. She also advised that “the next session begins on May 27, 2008,” and enclosed another copy of the acceptance letter with a cost analysis. PX 106.
10. On or about May 1, 2008, Ms. Thompson advised Petitioner that RSA required copies of her tax returns to verify information in the Client Financial Form that Ms. Thompson had previously completed based upon other information Petitioner had provided. RX 205. Petitioner’s husband, with whom she files a joint return, refused to permit Petitioner to submit the return due to identity theft concerns.
11. On May 19, 2008, Ms. Thompson drafted a letter to Petitioner advising that she intended to transfer Petitioner’s case to the inactive files because she had failed to provide her tax returns; however, Ms. Thompson did not mail the letter to Petitioner. RX 210.
12. Ms. Thompson’s failure to mail the letter resulted from her desire to exploring the possibility of providing non-financial services, such as counseling, to Petitioner. Ms. Thompson believed such services could be made available without Petitioner submitting her tax returns.
13. On May 27, 2008, Petitioner enrolled in the paralegal course at HU and paid \$1,089 for tuition and \$444 for books. PX 107. At that time she assumed that RSA would reimburse these expenses.

14. On July 17, 2008, Ms. Thompson provided an IPE to Petitioner for signature. RX 200. The IPE did not provide for training and as a result, Petitioner refused to sign it.

15. Subject to certain exceptions not applicable in this case, in determining a client's financial participation in the program's services, RSA considers the client's financial need based in part upon the client's "annual adjusted gross income as reported on the most recent federal and state tax return." RX 207.

16. In November 2008, in response to RSA's discovery request filed in this proceeding, Petitioner submitted her 2007 federal tax return (the "tax return"). The annual adjusted gross income of Petitioner and her husband reflected in the tax return was \$69,508. Based upon this income and Petitioner's household consisting of two people, Petitioner's required financial participation in any RSA supported training was \$3,006. RX 207.

III. Conclusions of Law

A. OAH's Authority To Provide Relief Under The Rehabilitation Act And Its Implementing Regulations Is Limited

The Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, authorizes grants to states to provide vocational rehabilitation to individuals with disabilities. *Buchanan v. Ives*, 793 F. Supp. 361, 363 (D.Me.1991). State participation is voluntary, but states choosing to participate must comply with federal regulations. *Id.* In the District of Columbia, RSA is the agency charged with

implementing the Rehabilitation Act. *See* 34 C.F.R. § 361.57(b)(2); D.C. Official Code 32-331; Mayor's Order 2002-173; and 29 DCMR 100 et seq.

The Office of Administrative Hearings (“OAH”) is vested with jurisdiction over DDS/RSA “adjudicated cases” arising under 29 DCMR 145.1 which grants a fair hearing to any person aggrieved by an RSA decision.³ This right to a hearing is mandated under controlling Federal Regulations, which require state agencies administering the Rehabilitation Act to provide due process hearings conducted by impartial hearing officers. 34 CFR 361.57(e). The Federal Regulations further provide in part:

The impartial hearing officer must -(i) Make a decision based on the provisions of the approved State plan, the Act, Federal vocational rehabilitation regulations, and State regulations and policies that are consistent with Federal requirements;

34 CFR 361.57(E)(3).

In this case, Petitioner does not contend that the State plan, the Rehabilitation Act or any regulations mandate RSA's funding of her paralegal training. Moreover, Petitioner does not dispute that the annual adjusted gross income reflected in her joint tax return was \$69,508. Based upon this income level and Petitioner's household size of two people, Petitioner was

³ The subject matter jurisdiction of OAH extends to “all cases to which [the OAH Establishment Act of 2001] applies.” D.C. Official Code § 2-1831.02(a). The cases to which the OAH Act applies are enumerated in § 2-1831.03. That list includes adjudicated cases arising under the jurisdiction of the Department of Human Services (“DHS”). The Developmental Services Management Reform Act of 2006, D.C. Official Code §§ 7-761.01 *et seq.*, established Respondent District of Columbia Department of Disability Services (“DDS”) as a new agency of District government. Section § 7-761.08(b), transferred management authority over the RSA program from DHS to DDS, effective June 30, 2007. As of September 5, 2007, DDS indicated its intent to have OAH continue conducting hearings regarding the RSA program, and OAH's Chief Administrative Law Judge approved this request pursuant to D.C. Official Code § 2-1831.03(c).

required to contribute \$3,006 to the annual cost of her training. 29 DCMR 124.1,⁴ and 124.12;⁵ RSA's Program Instruction, P.I. 07-03 (RX 207). This exceeds the entire \$1,533 cost for Petitioner's paralegal training. Therefore, RSA's payment of Petitioner's HU education costs would violate RSA's financial contribution requirements. 29 DCMR 124.1 *et. seq.*

The question squarely posed is this - If Petitioner is not entitled to financial support, may OAH, because of RSA's procedural errors and omissions, nonetheless require it to develop an IPE requiring payment of her training costs?

B. Must RSA Provide Petitioner With Financial Support, If It Committed Errors In Processing Her Request For Services?

As previously noted, RSA relies upon *Takahashi*, 952 A.2d at 875, to contend that the RSA program is not liable for educational costs incurred prior to the date that it develops an IPE. Yet, *Takahashi* did not consider the impact of RSA errors on an eligible participant's right to receive training costs. In fact, in *Takahashi*, RSA conceded that it erred by not timely determining the applicant's eligibility for the RSA program and as a result, granted retroactive tuition benefits.

Petitioner relies upon *J. M. v. DDS*, Case No. HS-P-07-101751, 2008 D.C. Off. Adj. Hear. LEXIS 71,*38 (December 11, 2007) as precedent for the remedy it seeks in this

⁴ 29 DCMR 124.1 provides in part:

The Rehabilitation Services Administration shall consider the financial need of an eligible individual through uniform application of a financial need test.

⁵ 29 DCMR 124.12 provides in part:

Each eligible individual shall participate in the cost of rehabilitation services that are subject to the financial needs test pursuant to §§ 124.5 and 124.6

proceeding. In *J.M.*, the Court ordered RSA to enter into an IPE with Petitioner to provide funding for his educational program, due in part to RSA's procedural errors. Significantly, the Court also found that at the hearing the Agency failed to justify its grounds for denying the Petitioner financial support. For this reason, the Court held that Petitioner was entitled to tuition reimbursement. Here, however, Petitioner contends that she is entitled to reimbursement solely due to RSA errors and representations. Unlike the Petitioner in *J.M.*, she does not assert that she is otherwise entitled to RSA's financial support for her training.

More directly applicable to Petitioner's tuition reimbursement request are cases construing the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482 in the context of claims for tuition reimbursement.⁶ In *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985) the Court found that schools could be required to reimburse parents for private school expenditures; however, courts may grant reimbursement under IDEA only when a school district fails to provide a free appropriate public education ("FAPE") and the private placement is appropriate. "The latter requirement is essential to ensuring that reimbursement awards are granted only when such relief furthers the purpose of the Act." *Forest Grove School District v. T.A.*, No. 08-305, 2009 United States Supreme Court, LEXIS 4645, *22 n.9 (June 22, 2009).

Similarly, in *Blackman v. District of Columbia*, 277 F. Supp. 2d 71, 81-82 (D.D.C 2003) the court determined that parents who unilaterally placed their learning disabled children with

⁶ See *Baumeister, et al. v. New Mexico Comm'n for the Blind*, 425 F.Supp.2d 1250, 1260 (D.N.M. 2006), (holding that in analyzing a case under the Act it was appropriate to "find guidance in cases interpreting the [IDEA], because 'the text and the structure of the statutes are virtually identical.'" (quoting *Reaves v. Missouri Dep't of Elementary & Secondary Educ.*, 422 F.3d 675, 680 (8th Cir. 2005)).

private providers should receive retroactive reimbursement of monies they paid to the providers. But this remedy was premised on the Court's finding that the local authority's delays denied the children the FAPE they were entitled to receive under IDEA. In *District of Columbia v. Abramson*, 493 F. Supp. 2d 80 (D.D.C. 2007) the Court refused to award tuition reimbursement until the agency made an eligibility determination. In so doing, it found that parents who place their children in private schools without the consent of the school are entitled to reimbursement only if the school violated IDEA and if private school placement is an appropriate placement. See also *Fagan v. District of Columbia*, 817 F. Supp. 161 (D.D.C. 1993) (barring tuition reimbursement under IDEA because parents had placed child in an "unauthorized" school); *Justin G. v. Bd. of Educ.*, 148 F. Supp. 2d 576 (D. Md. 2001) (denying summary judgment for school district, holding that if the parents of IDEA-eligible student could show their educational placement was appropriate under the Act, they may be entitled to tuition reimbursement).

Thus, a parent enrolling a child in a private school, based upon the belief that IDEA requires the local school district to reimburse this expense, does so at his or her own peril. A court will mandate tuition reimbursement only if the disabled student is ultimately found to be entitled to a private school education because the public school does not provide a FAPE. This is true even when a parent unilaterally pursues private enrollment due to Governmental delay or error. *Blackman*, 277 F. Supp. 2d at 80. In contrast, Petitioner does not suggest that she is entitled *under the Act* to financial support for her paralegal training. In fact, the implementing regulations preclude this support. Thus, Petitioner's claim rests on her assertion that because RSA failed to provide information, she was unable "to recognize that the regulations would be a bar to her obtaining the tuition sponsorship she sought." PPHM p. 15.

Unlike IDEA cases, Petitioner does not claim that RSA errors delayed or negated services that she is entitled to receive. Rather, Petitioner contends that financial support she was *not* entitled to receive must now be provided because of RSA errors and representations. This claim must be viewed not only in light of analogous IDEA cases but also against the backdrop of OAH's limited authority prescribed in the applicable Federal Regulation. 34 CFR 361.57(E)(3). I find no basis in the Act, its implementing regulations, or case precedent to hold that RSA errors impose an independent obligation upon it to provide financial support.⁷ Petitioner's request that RSA be required to provide tuition reimbursement through an amendment to her IPE must therefore be denied.

IV ORDER

Therefore, based upon the entire record in this matter, it is this _____ day of _____, 2009:

ORDERED, that, Respondent's Denial of Petitioner's request to amend her IPE is affirmed; and it is further

⁷ Although Petitioner did not establish entitlement to relief under the Rehabilitation Act, the allegation that she detrimentally relied upon RSA's representations suggests a claim grounded in the doctrine of promissory estoppel. *Moss v. Stockard*, 580 A.2d 1011, 1035 (D.C. 1990) (holding that promissory estoppel "allows a court to enforce a promise absent a binding contract only when to do so would prevent an injustice.") Under this doctrine, compensatory damages may be awarded for an injured party's actual losses. *Moss* at 1035. Other than in limited circumstances not applicable here, no statute vests OAH with the authority to award damages and OAH therefore may not impose this remedy. *Mendota Apartments v. District of Columbia Comm'n on Human Rights*, 315 A.2d 832, 836 (D.C. 1974). However, the denial of Petitioner's claims in this administrative appeal shall be without prejudice to her right to pursue such alternative claims as she may deem appropriate in a court of general jurisdiction.

ORDERED, that the denial of the claims Petitioner asserted against RSA in this administrative appeal shall be **WITHOUT PREJUDICE** to any alternative claims that Petitioner may wish to pursue in a court of general jurisdiction; and it is further

ORDERED, that the appeal rights of any person aggrieved by this Order are set forth below.

/s/

Louis J. Burnett
Administrative Law Judge