

**Matter of Board of Educ. of the Bay Shore Union
Free School Dist. v Kain**

2008 NY Slip Op 33601(U)

February 1, 2008

Supreme Court, Suffolk County

Docket Number: 21703/07

Judge: Denise F. Molia

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SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. **DENISE F. MOLIA**,
 Justice

In the Matter of the Application of the BOARD OF
 EDUCATION of the BAY SHORE UNION FREE
 SCHOOL DISTRICT,

Petitioner,

- against -

THOMAS KAIN, individually and as parent and natural
 guardian of RYAN KAIN, a minor under the age of
 fourteen years,

Respondent.

CASE DISPOSED: YES
 MOTION R/D: 8/10/07
 SUBMISSION DATE: 12/21/07
 MOTION SEQUENCE No.: 001 MD

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Upon the following papers filed and considered relative to this matter:

Notice of Petition and Petition dated July 20, 2007; Affirmation in Support dated December 3, 2007; Exhibits A through G annexed thereto; Petitioner's Memorandum of Law; Affirmation in Opposition dated September 6, 2007; Exhibit A annexed thereto; and upon due deliberation; it is

ORDERED, that the Petition, pursuant to CPLR 403, for a judgment vacating, annulling and setting aside a determination of Paul F. Kelly, as State Review Officer, is denied.

The infant respondent, Ryan Kain, is a ten year old fifth grade student at St. Patrick's, a nonpublic school located in Bay Shore, New York. In November 2003, the infant's teacher at St. Patrick's submitted a referral to the petitioner District's Committee on Special Education (hereinafter "CSE") based upon Ryan's inability to remain focused and to stay on task. On January 7, 2004 Ryan underwent a psychiatric evaluation which resulted in a diagnosis of ADHD. On June 3, 2004 the CSE met and classified Ryan as "other health impaired" based on the diagnosis of ADHD. As part of Ryan's Individual Education Program, the CSE recommended forty minutes of resource room once per day along with three hours of assistance from a one-on-one aide for three hours per day. All parties agreed with the CSE

recommendations, but disagreed as to the location where the one-on-one aide assistance would be provided. The CSE refused the request of Ryan's parents to provide the one-on-one services at the St. Patrick's campus, and held that such services would be provided only if Ryan attended public school or was bussed to the public school facility.

Based upon the District's refusal to provide one-on-one services for Ryan at the St. Patrick's campus, an impartial hearing was held on August 9, 2004. In a decision dated September 3, 2004, the impartial hearing officer (hereinafter "IHO") determined that the District bore the legal obligation to provide Ryan Kain with a one-on-one aide on site at St. Patrick's. The IHO found that the individual aide would keep Ryan focused on instruction during academic classes, was necessary to assist Ryan in learning, and was determined to be an appropriate classroom service by the CSE. The IHO further determined that "if the student would be deprived of the 1:1 aide, he would clearly have his services disrupted and his learning experience adversely impacted" and concluded that failure to provide an individual aide at St. Patrick's would deny Ryan a free appropriate public education.

Petitioner appealed the decision of the IHO to the New York State Education Department. In a decision dated November 22, 2004, the State Review Officer (hereinafter "SRO") also held that the District has an obligation to provide Ryan Kain with a one-on-one aide on site at St. Patrick's. The SRO determined that as a dually enrolled student, Ryan was entitled to a special education program, that the individual aide service as identified on the IEP was appropriate to meet his needs and fell within the category of related services "as that term is broadly defined" by Education Law §3602-c. The SRO also held that in order to provide such service "effectively and appropriately" the record showed that it was necessary to provide such service in the student's classroom. Said decision concluded that as "[s]pecial education programs and services must be tailored to meet a students's individual needs and aligned to address those needs", the District's failure to provide a 1:1 aide to Ryan Kain at the St. Patrick's premises has denied him a free appropriate education.

On or about March 10, 2005 the petitioner filed an appeal with the United States District Court for the Eastern District of New York. In a decision entered December 19, 2005, the decision of the SRO was sustained "dubitante". However, the Court expressed doubt as to its interpretation of New York Education Law §3602-c and suggested an appeal to the United States Court of Appeals for the Second Circuit. An appeal was then taken to said court and by decision dated May 10, 2007 the Second Circuit Court of Appeals vacated the lower court decision, finding that the District Court did not have subject matter jurisdiction. The Court of Appeals essentially found that jurisdiction over this particular issue rests in the State Court.

Accordingly, the petitioner commenced the instant action in which it seeks to vacate the decision of the SRO, maintaining that it is contrary to the Federal Individuals with Disabilities Education Act and New York State Education Law as it relates to the requirements to provide the assistance of a one-on-one aide to a classified student at a nonpublic school.

The board of education of a school district is charged with the responsibility of providing

a free appropriate public education to each student with a disability who resides in the district and who requires special education services or programs. 20 U.S.C. §1412(a)(1)(A); New York Education Law §§ 4402(2)(a) and (b)(2). Such services are to be provided in a manner which enables the children with disabilities to participate in regular education services to the maximum extent appropriate. New York Education Law § 4402(2)(a). “The paramount principle that guides State law is concern for a handicapped child’s educational needs, whether in public or private school” and such children “are to be afforded suitable educational opportunities according to their individual needs.” Board of Education v. Wieder, 72 N.Y.2d 174, 186.

In determining that the infant respondent receive the 1:1 aide service at his non-public school, the State Review Officer discussed the provisions of Education Law §3602-c, commonly referred to as the “dual enrollment statute”, which provides the authority for the instant individual aide services provided to Ryan Kain. The SRO found that there was nothing in the record to indicate that the individual aide service could be offered at a separate location from the child’s academic classes and still meet his individual needs. The District has failed to demonstrate otherwise or attempted to show that providing 1:1 aide services at the local public school rather than St. Patrick’s constitutes an appropriate educational program for Ryan.

In failing to provide the necessary and approved services to address the disabilities of Ryan Kain as provided for in his Individual Education Program, the petitioner has failed to provide the identified and practical resources necessary to allow Ryan to achieve the maximum successful education available to a student with his special needs. The determination of the SRO in the instant matter is not contrary to either the Federal Individuals With Disabilities Education Act or New York State Education Law and must therefore be adhered to by the petitioner.

The Court notes that the educational accommodations sought by the respondents in this matter have been thoroughly reviewed and deemed appropriate by two separate hearing officers, each of which has determined that the special educational needs of Ryan Kain would best be met by daily 1:1 aide service provided at St. Patrick’s. The Court upholds these findings, which are in the best educational interests of the infant respondent, Ryan Kain.

The foregoing constitutes the Order of this Court.

Dated: February 1, 2008

DENISE F. MOLIA

HON. DENISE F. MOLIA J.S.C.