

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF: M.S., A MINOR

IN THE SUPERIOR COURT OF
PENNSYLVANIA

APPEAL OF: DEPARTMENT OF HUMAN
SERVICES

No. 2702 EDA 2012

Appeal from the Order entered September 18, 2012,
in the Court of Common Pleas of Philadelphia County,
Juvenile Division, at No(s): CP-51-DP-0095990-2008

BEFORE: BOWES, OTT, and JENKINS, JJ.

MEMORANDUM BY JENKINS, J.:

FILED JUNE 20, 2014

The Philadelphia Department of Human Services ("DHS") appeals from the order in the Court of Common Pleas of Philadelphia County that directed DHS to provide a laptop computer and related assistive technologies to M.S., a "dependent child" pursuant to section 6302 of the Juvenile Act ("Act"), 42 Pa.C.S.A. § 6301, *et seq.*¹ We affirm the order in part and vacate in part.

The record reveals the relevant facts and procedural history. The juvenile court adjudicated M.S. dependent on March 28, 2011, when he was sixteen years old, and placed him in the legal custody of DHS. The court established a placement goal of Another Planned Permanent Living Arrangement ("APPLA"). M.S. resided in the supervised independent living

¹ M.S. is a male who was born in June of 1994. At the time of the subject proceedings, he was eighteen years old.

program through Children's Services, Inc. The juvenile court held regular permanency review hearings pursuant to section 6351 of the Act. The permanency orders indicate that M.S. graduated from 12th grade and was compliant with his permanency plan.

By the time of the permanency hearing on September 10, 2012, M.S. had recently started attending the Community College of Philadelphia ("CCP"). In addition, he was attending the Achieving Independence Center ("AIC") program. M.S. testified at the hearing that he is required to have a laptop computer for his English 098 and 108 classes at CCP. N.T., 9/10/12, at 7, 9-10. Upon inquiry by the court, M.S. testified as follows:

THE COURT: What documentation do you have that your classes require this laptop . . . ?

[M.S.]: Basically, because I still have my [Individualized Education Program ("IEP")] and I still have my attention deficit and my frontal lobe disorder^[2], basically all my books are electronically and I can listen to them. My Special Ed Department at my old high school, she actually bought me a Kindle and that was cool, but I need Microsoft Word and like just being able to have Internet access in my apartment.

Id. at 11. The court subsequently directed M.S. to obtain documentation establishing that he is required to have a laptop computer, as follows:

² The record reveals that M.S. has a history of a traumatic brain injury resulting in cognitive problems. M.S. is also diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD").

THE COURT: So, I need you to make sure that [the laptop] is not something that is just recommended for you but something that is required of you. If it is required for your, you know, special learning needs, then I will look into having that ordered for you. All right?

[M.S.]: Yes.

THE COURT: But I need for you to provide documentation to DHS. Provided that the documentation – provided that he has documentation showing that it is a requirement for his learning capabilities. Then, I will order DHS to assist in getting a computer.

Id. at 15. By written order dated September 10, 2012, the court directed, in part, that “child [is] to provide DHS with documentation that a laptop computer is (required) for his learning capabilities[.] DHS to assist with a laptop computer within 10 days. . . .” Order, 9/10/12.

The court held the next hearing on September 18, 2012, during which it inquired whether M.S. obtained the documentation. N.T., 9/18/12, at 9. M.S. responded that he obtained a letter, dated September 14, 2012, from Theresa Tsai, Ph.D., CRC, Associate Professor, Counseling Department, Center of Disability, at CCP (hereinafter, “the letter”). M.S. presented the letter to the court.

At trial, following the presentation of Dr. Tsai’s letter, DHS stated:

[DHS]: Your Honor, I would like to take some brief testimony with regards to this issue. Please note our objection for the record. I just need to take some brief testimony with regards to this issue.

THE COURT: From whom?

[DHS]: [M.S].

N.T. 9/18/2012 at 11.

During M.S.'s testimony, the following exchange occurred:

THE COURT: And, Mr. Braxton, for clarification, [M.S.] isn't saying this. Dr. [Tsai] is making this recommendation.

[DHS]: But, Doctor [Tsai] is not present, Your Honor.

THE COURT: I have a letter from her.

[DHS]: I can't question a letter.

Id. at 13.

DHS also stated: "Your Honor, I heard no testimony qualifying Doctor [Tsai] as an expert and furthermore, she's not here for me to question with regards to this issue. So, I have a piece of paper in front of me signed by someone." *Id.* at 16.

The court admitted the letter from Dr. Tsai. In the letter, Dr. Tsai stated that M.S. is a first year, first semester student at CCP, and he is enrolled in English reading and writing courses. Dr. Tsai stated that M.S. needs accommodations based on his traumatic brain injury and ADHD, including, but not limited to, the use of assistive technologies, as follows:

Laptop computer (with Microsoft Windows and Office), flash-drive;

Tape recorder;

Dragon Naturally Speaking (software program);

Graphic organizer, such as Inspiration (software program);

[Membership to Learning Ally or Access Technology recommended but not required].

Tsai Letter, 9/14/12. Dr. Tsai stated in the letter that, “[n]o access to technology will surely limit [M.S.’s] achievement.” *Id.*

By order dated September 18, 2012, the court directed, in relevant part:

DHS is to assist child in obtaining the following items within 10 days: Laptop computer (with Microsoft Windows and Office), flash-drive[,] Tape recorder, Dragon [N]aturally Speaking (software program), Graphic organizer, such as Inspiration (software program) per letter of Theresa Tsai, PhD, CRC-Center on Disability, Community College of Philadelphia. The court finds these items are required to assist educational progress due to learning disabilities.

Order, 9/18/12. DHS’s counsel stated on the record in open court as follows:

Your Honor, based on the testimony and evidence presented here today, I would have to object to the Court’s Order to provide [M.S.] with a laptop computer, based on the fact that there are readily available alternatives to providing him with a laptop computer, which are available at no cost to him. You heard CCP does have three computer labs and a library. He also uses a computer provided to him by his worker at the Center, as well.

So, on that basis, Your Honor, I will have to object to your Order, and I would ask you to reconsider your Order that DHS provide him with assistance in

obtaining a laptop computer, as there are – although they are required, there are readily available alternatives to him at no cost.

N.T., 9/18/12, at 15.

On September 28, 2012, DHS timely filed a notice of appeal and a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b).³ On October 31, 2012, the juvenile court issued its Pa.R.A.P. 1925(a) opinion.

On appeal, DHS presents the following issues for our review:

1. Did the trial court err or abuse its discretion in ordering that [DHS] assist M.S., a dependent child [], in obtaining a laptop computer (with Microsoft Windows and Office), flash-drive Tape recorder, Dragon [N]aturally speaking (software program), Graphic organizer, such as Inspiration (software program) (together, the Electronic Components), where the exact nature and extent of any educational services required by [M.S.] had not yet been determined?
2. Did the trial court err or abuse its discretion in rendering its order, where there was insufficient evidence for it to find that it was in the best interests of [M.S.] to order DHS to assist [M.S.] with obtaining the Electronic Components?

³ We note this is a fast track case and DHS filed its notice of appeal on September 28, 2012. The Prothonotary of this Court recently discovered that it inadvertently omitted listing this case for oral argument following receipt of DHS's request for the same. Upon learning of this omission, the case was immediately listed before the next available merits panel. We further observe that DHS subsequently opted not to participate in oral argument.

3. Did the trial court err or abuse its discretion in relying on improper hearsay evidence in rendering its order?

4. Did the trial court err or abuse its discretion in designating Theresa Tsai, Ph.D., an expert and relying on a letter sent from her as an expert opinion where the parties were unable to cross[-]examine Theresa Tsai, where [] DHS objected to her qualifications as an expert, and where the letter written by Theresa Tsai lacked specificity concerning [M.S.'s] needs and best interests?

5. Did the trial court err[] as a matter of law and abuse[] its discretion by prematurely entering its order without considering other, equally effective, less costly alternatives to meet [M.S.'s] educational needs?

DHS's brief at 4.

We review an order requiring a child welfare agency to fund a particular service under an abuse of discretion standard. **See *In re J.R.***, 875 A.2d 1111, 1114 (Pa. Super. 2005). "An abuse of discretion is not merely an error of judgment, but is, *inter alia*, a manifestly unreasonable judgment or a misapplication of law." ***Id.*** (citation omitted).

We have explained:

The juvenile court exercises continuing, independent discretion with regard to the interest of a dependent child. [***In re Tameka M.***, [], 525 Pa. [348], 354, 580 A.2d [750], 753 [(1990)]. This authority derives from section 6351 of the Juvenile Act, which grants the court power to issue "orders of disposition best suited to the safety, protection and physical, mental, and moral welfare of the [dependent] child." 42 Pa.C.S.A. § 6351(a). In its disposition orders, the court also has the express authority to impose

“conditions and limitations.” 42 Pa.C.S.A. § 6351(a)(1), (a)(2), (a)(2.1). As explained by our Supreme Court, “in ordering a disposition under Section 6351 of the Juvenile Act, the court acts not in the role of adjudicator reviewing the action of an administrative agency, ... rather the court acts pursuant to a separate discretionary role with the purpose of meeting the child’s best interests.” **Tameka M., supra**, 525 Pa. at 354, 580 A.2d at 753 (quoting **In re Lowry**, 506 Pa. 121, 127, 484 A.2d 383, 386 (1984)).

In construing the Juvenile Act, both the juvenile courts and the appellate courts must also be guided by a fundamental purpose of the Act, which is “to provide for the care, protection, safety and wholesome mental and physical development of children coming within the provisions of this chapter.” 42 Pa.C.S.A. § 6301(b)(1.1); **Lowry, supra** at 130-31, 484 A.2d at 388. This purpose imposes on a child welfare agency the legal duty to provide financial support for the care and treatment of a dependent child. **Tameka M., supra**, 525 Pa. at 357, 580 A.2d at 755.

In re J.R., 875 A.2d at 1114-1115.

Further,

the Act establishes that upon turning eighteen years of age a dependent child may, under certain circumstances, remain under the care afforded by the Act until turning twenty-one years of age. Specifically, the Act requires that such a person has been

adjudicated dependent before reaching the age of 18 years and who, *while engaged in a course of instruction* or treatment, requests the court to retain jurisdiction until the course has been completed, but in no event shall a child remain in a course of instruction or treatment past the age of 21 years.

In the Interest of S.J., 906 A.2d 547, 550 (Pa. Super. 2006) (citing 42 Pa.C.S.A. § 6302) (emphasis in original). In ***In the Interest of S.J.***, we agreed with the trial court that attending college constitutes engagement in a “course of instruction” pursuant to section 6302. This Court then concluded,

This construction [of the phrase “course of instruction”] dovetails with one of the express purposes of the Act which is “[t]o provide for the care, protection, safety and wholesome mental . . . development of children coming within the provisions of this chapter.” 42 [Pa.C.S.A.] § 6301(b)(1.1). Without doubt, attendance at college, in pursuit of a bachelor’s degree, is an activity that provides for the “wholesome mental development” of a child under the Act. Furthermore, numerous studies have documented the economic benefits of attaining a bachelor’s degree.

Id. at 551.

DHS’s first three arguments claim the evidence was insufficient to support the court’s order. DHS claims the court abused its discretion by relying on improper hearsay evidence, *i.e.*, the letter from Dr. Tsai, without affording DHS the opportunity to cross-examine Dr. Tsai. Specifically, DHS argues it was improper to admit the letter into evidence without cross-examination of Dr. Tsai regarding (1) M.S.’s needs based on his disabilities; (2) whether computer labs at CCP or any other resources could equally meet M.S.’s needs; and (3) whether CCP had an obligation to provide M.S. with reasonable accommodations, including assistive technology, pursuant to the

Americans with Disabilities Act ("ADA"), 42 U.S.C.S. § 12101 *et seq.*, and CCP's policies regarding reasonable accommodations.

Absent an abuse of discretion, the admission or exclusion of evidence is within the purview of the trial court. **Conroy v. Rosenwald**, 940 A.2d 409, 417 (Pa. Super. 2007). Hearsay is a statement that the declarant does not make at the current trial or hearing and that is offered "in evidence to prove the truth of the matter asserted in the statement." Pa.R.Evid. at 801. Hearsay is inadmissible "except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute." **Id.**, at 802. With respect to permanency hearings, Pa.R.J.C.P. 1608 provides that "[a]ny evidence helpful in determining the appropriate course of action, including evidence that was not admissible at the adjudicatory hearing, shall be presented to the court." Pa.R.J.C.P. 1608(C)(1).

During the hearing on September 18, 2012, M.S. presented the letter from Dr. Tsai to the juvenile court judge, who then read into the record the list of assistive technologies that Dr. Tsai stated were necessary for M.S.'s academic achievement. Thereafter, counsel for DHS objected, stating:

[DHS COUNSEL]: Your Honor, I would like to take some brief testimony with regards to this issue. Please note our objection for the record. I just need to take some brief testimony with regards to this issue.

THE COURT: From whom?

[DHS COUNSEL]: [M.S.]

N.T., 9/18/12, at 11. Counsel for DHS also noted Dr. Tsai was not present, he could not question a letter, and all he had was “a piece of paper in front of me signed by someone.” *Id.* at 13, 16. Accordingly, DHS objected to the introduction of the letter and preserved its objection throughout the proceedings.

The court abused its discretion by admitting the letter. The letter is hearsay and was admitted without an opportunity to cross-examine its author on the contents of the letter and on the author’s qualifications. Pa.R.Evid. 801-802; **see also Commonwealth v. Smith**, 681 A.2d 1288 (Pa.1996) (noting a hearsay statement’s most telling deficiency is that it cannot be cross-examined); **Woodard v. Chatterjee**, 827 A.2d 433, 445 (Pa.Super.2003) (finding error where defendant not afforded opportunity to cross-examine two experts, whose opinions were admitted as hearsay through a third expert); **Paxos v. Jarka Corporation**, 171 A. 468, 471 (Pa.1934) (discussing the admissibility of hospital records and noting “to deny a defendant the opportunity to test the correctness of the diagnosis and ascertain the qualifications of the asserter, particularly where the records were not made by the physician in charge of the case, is to deny it a substantial right.”). Further, although a court may consider all helpful evidence at a permanency hearing, an unsupported letter from an unknown

author, who is unavailable for cross examination, cannot be deemed helpful to the determination of the case.⁴

The admission of the letter, however, constitutes harmless error as to the requirement that DHS provide M.S. with a laptop, with Microsoft Word and Office, and a tape recorder. M.S. himself explained his need for the laptop and tape recorder. He testified: "I have a problem . . . remembering a lot of things, or I feel as though my class is moving too fast for me. Or, copying notes, and so far my papers is [sic] having grammatical and vocabulary issues." N.T., 9/18/12, at 12. He stated: "I have been really taking my papers all the way back to my high school to get them edited by my teachers and then typing them over there." *Id.* M.S. acknowledged that CCP has three computer labs and a library. *Id.* at 13-14. He testified with respect to whether he has taken advantage of the computer labs and library:

A. Partially. Basically, I am there (inaudible), I participated in a program over the summer and I am still participating in, and I use my support coach at times and he lets me use his computer. But I feel as though it would be more convenient if I could do it at home, and not be like spending time on campus too long, because I tend to get distracted with females and other things that are going on around campus. It is really hard to work.

⁴ The language of Rule 1608 is similar to the language of 42 Pa.C.S. § 6341(d), which indicates that in disposition hearings the court may rely on all helpful evidence but mandates that the parties be provided an opportunity to cross-examine the authors of written reports.

Id. at 14. M.S. also testified that he “work[s] and do[es] an [i]nternship” at his school and “time is really precious.” *Id.* In addition, at the September 10, 2012 hearing, M.S. testified he still had an IEP and suffered from an attention deficit disorder and frontal lobe disorder. N.T., 9/10/12, at 11. He stated his books were electronic and he listened to them, but he needed Microsoft Word and Internet access in his apartment. *Id.*

M.S.’s testimony alone supports the Court’s determination that M.S. required a laptop, with Microsoft Word and Office, and a tape recorder for his disability, and that the laptop and tape recorder were in his best interests. M.S.’s testimony by itself, therefore, supported the Court’s order requiring that DHS provide a laptop, with Microsoft Word and Office, and a tape recorder.

The recommendation for additional assistive technologies, i.e. Dragon Naturally Speaking Software and a graphic organizer, was contained only in the letter, which the Court read into the record. Without additional information, we are unable to determine whether M.S. needs these technologies. Accordingly, the court’s order is vacated to the extent it requires DHS to provide the following assistive technologies: “Dragon [N]aturally Speaking (software program), Graphic organizer, such as Inspiration (software program).”

DHS also argues the court erred in qualifying Dr. Tsai as an expert on the basis of the letter, which was unsworn, and which did not contain “information concerning [Dr. Tsai’s] training or experience beyond the mere fact that she signed the letter as an Associate Professor, Counseling Department, Center on Disability.” DHS’s brief at 24. It is unclear whether the court qualified Dr. Tsai as an expert, as it stated “I described [Dr. Tsai] as an expert. So, that may have been a mischaracterization, however, she is with Community College of Philadelphia, she’s in their Counseling Department Center on Disabilities.” N.T. 9/18/12, at 16. If the court did qualify Dr. Tsai as an expert, this would be error as no testimony or evidence established her qualifications. ***See Bennett v. Graham***, 714 A.2d 393, 395-96 (Pa.Super.1998) (finding witness not qualified as expert where he was not present at trial, no foundation established he would have been qualified as an expert, the trial court never considered whether he possessed sufficient specialized knowledge). Regardless, we excluded the letter because it was hearsay.

Finally, DHS argues the court failed to consider equally effective, less costly alternatives to meeting M.S.’s educational needs other than those contained in its order. This Court has addressed the financial constraints of child welfare agencies such as DHS. It found a juvenile court presented with two equally effective alternatives for satisfying a dependent child’s need under the Act must:

[C]onsider the alternatives presented to address the needs of a dependent child; then, if two equally effective alternatives are available, the court must [choose] the one that is less costly to the child welfare agency.

In re J.R., 875 A.2d at 1115. A court may, however, order a welfare agency to provide a laptop computer to a dependent student if provision of the laptop computer is in the best interests of the child and no equally effective alternatives are available. ***See In re A.T.***, 81 A.3d 933, 940 (Pa.Super.2013) (finding court acted within its discretion in ordering DHS to provide laptop to community college student where the evidence supported the court's finding the laptop was in the child's best interest and the court considered no-cost alternatives and found they were not equally effective).

As for the laptop (with Microsoft Word and Office) and the tape recorder, we find the court correctly found DHS failed to establish that equally effective, less costly alternatives were available to meet M.S.'s educational needs. The juvenile court reasoned:

DHS asserts M.S. has access to comparable services, as [CCP] has computer labs and a library with computers. However, DHS failed to present evidence that available computers employ the software and hardware M.S. requires to succeed in school. As such, it is unconfirmed that the computers at the school are viable alternatives to meet the child's needs.

Testimony revealed that M.S. also works part time and participates in an internship while attending school, limiting M.S.'s time to study on campus and

further necessitating his ability to study at home. . .

N.T., 9/18/12, at 8-9. M.S. testified he had an IEP and suffered from attention deficit disorder and frontal lobe disorder. N.T. 9/10/12 at 15. He listened to his books, and Microsoft Word and Internet access would assist him. *Id.* M.S. also testified that he had trouble remembering things and felt class was moving too fast for him. His notes and papers had grammatical and vocabulary errors. Therefore, he took his papers to his high school, where he typed his papers and his high school teachers edited them. N.T. 9/18/12 at 12. M.S. further testified he worked and he was easily distracted in the public computer labs. *Id.* at 14. The court found "the environment conducive to M.S.'s success is incompatible with public computer labs, given his special needs." Trial N.T. 9/18/2012 at 8-9.

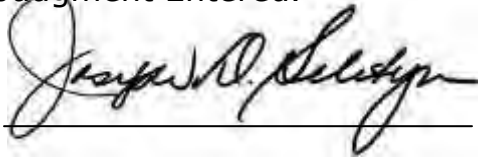
We agree with the court that DHS did not present equally effective, less costly alternatives for it to consider. M.S.'s testimony supports the court's decision that, given M.S.'s special needs, public computer labs are not conducive to his achievement of academic success. Therefore, the court acted within its discretion when it ordered DHS to provide M.S. with a laptop

J-A09045-14

computer, with Microsoft Word and Office, and a tape recorder.⁵ **See In re A.T.**, 81 A.3d at 940.

Order affirmed in part and vacated in part. We remand for further proceedings to determine whether the provision of additional assistive technologies would be in M.S.'s best interest. Jurisdiction is relinquished.

Judgment Entered.

A handwritten signature in black ink, reading "Joseph D. Seletyn", is written over a horizontal line. The signature is cursive and somewhat stylized.

Joseph D. Seletyn, Esq.

Prothonotary

Date: 6/20/2014

⁵ DHS argues the ADA required CCP to provide reasonable accommodations to M.S., including the laptop and assistive technologies. DHS, however, presented no testimony or argument regarding this requirement at the hearing.