State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDS 00003-16

AGENCY DKT. NO. 2016 23735

B.S. AND S.H. ON BEHALF OF H.S.,

Petitioners,

v.

WESTWOOD REGIONAL BOARD OF EDUCATION,

Respondent.

_____

Rosa Elfant Rickett, Esq., for petitioners

Eric Harrison, Esq. for respondent (Methfessel and Werbel, attorneys)

Record Closed: August 1, 2016 Decided: August 3, 2016

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The parents of H.S. have requested a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415. The petition seeks a change of classification to "specific learning disability," (SLD); alleges that an individualized educational program (IEP) dated October 16, 2015, fails to provide a free and appropriate public education (FAPE) for H.S.; and seeks an out-of-district placement. The relief sought by the petition is specific to the 2015-2016 school year.

The petition was filed at the Office of Special Education Programs (OSEP) on November 27, 2015, and transmitted to the Office of Administrative Law (OAL) as a contested case on December 31, 2015. A prehearing conference was conducted on January 19, 2016, and the matter was scheduled for hearing on April 26, 2016, and May 6, 2016. These dates were selected based on counsels' joint representation that "with some time," it was felt that the matter could amicably resolve. These dates were adjourned at counsels' request, again because a resolution was allegedly imminent. Hearing dates scheduled for May 20, 2016, and June 20, 2016, were likewise adjourned at counsels' request. The matter currently is scheduled for hearing on August 29, 2016.

On July 14, 2016, the Westwood Board of Education (the Board) filed a Motion for Summary Decision. Via letter dated August 1, 2016, counsel for H.S. advised that she would be filing no opposition to the pending motion, at which time the record closed. Notwithstanding the fact that she did not intend to oppose the motion, counsel indicated that she lacked authority to withdraw her petition.

FINDINGS OF FACT

The facts pertinent to the Board's motion are uncontroverted, and I **FIND**:

H.S. is a rising eleventh grade student who attends Westwood Regional High School. She was classified in 2005 under the category SLD; her classification was changed during the 2009-2010 school year to "other health impaired," (OHI), with the consent of her parents. On October 16, 2015, the IEP team met to conduct a reevaluation eligibility determination and IEP review meeting. It was agreed that H.S. would remain classified under the OHI category. At that meeting, her parents raised concerns about her progress in mathematics. It was recommended that H.S. attend a pull-out replacement resource class for English, science and social studies, and a Learning or Language Disabilities (LLD) class for mathematics. An extended school year program (ESY) in an LLD classroom for mathematics was likewise included in the IEP. Thereafter, this petition for due process was filed challenging the October 16, 2015, IEP.

The parties met as an IEP Team on January 25, 2016, without counsel present, and the parents renewed their concerns about H.S.'s progress in mathematics. It was agreed that H.S. would begin a trial of additional math support, two times a week for sixty minutes a session, after school. The parties met again without counsel on April 1, 2016, to discuss the change in classification requested by the petition for due process. The change sought by the petition, from OHI to SLD, was agreed upon and implemented.

On May 24, 2016, the parties met yet again without counsel, to assess H.S.'s math progress and discuss the supports needed for the 2016-2017 school year. A program was agreed upon, that included continued pull-out support for English, science and social studies, and the LLD classroom for math. ESY was continued for math. The after school math support that was implemented in January 2016 was formally added to the IEP. It was agreed that social skills programmatic options would be explored for 2016-2017. The parents advised that they no longer wished an out-of-district placement.

About three weeks later, on June 15, 2016, Supervisor of Special Services Ray Renshaw was surprised to receive an email rejecting the May 24, 2016, IEP. He promptly replied, expressing his surprise and offering to be of further assistance in addressing any lingering concerns. On June 20, 2016, the parents replied that they rejected the IEP "simply to make sure that document was not memorialized without including the current draft addendum being worked out by our respective counsels so that a final agreement is included in the IEP moving forward." They at no time express any dissatisfaction with the IEP's content or the program it proposes. As the Board correctly points out, the petition for due process sought a change in classification and an out-of-district placement. It is clear, and I **FIND,** that the change in classification has been implemented, and that the parents no longer seek out-of-district placement for their daughter. This latter point is confirmed both by reference to their email, and by their failure to oppose this motion.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, supra, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. Petitioners have chosen not to contest the facts shared by the Board; there are thus no facts in dispute, and I **CONCLUDE** that this matter is ripe for summary decision.

I agree with the Board that this matter must be dismissed as moot. The petition of appeal sought relief for the 2015-2016 school year in the form of a change in

classification and an out-of-district placement. The classification has been changed as the parents requested; they have abandoned their request for an out-of-district program; and the 2015-2016 year is now over.

An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint it is appropriate to refrain from decision-making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, Comm'r (May 3, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>; J.L. and K.D. o/b/o J.L. v. Harrison Twp. Bd. of Educ., EDS 13858-13, Final Decision (January 28, 2014) <http://lawlibrary.rutgers.edu/oal/search.html>. Notwithstanding the parents' inexplicable unwillingnesss to explicitly say so, the relief they sought has been granted in part, and they have abandoned their remaining claims. I **CONCLUDE** that the petition of appeal should be dismissed.

ORDER

Based on the foregoing, the due process petition is **DISMISSED** with prejudice.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2010) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2010). If the parent or adult student feels that this decision is not being fully implemented with respect to

program or services, this concern should be communicated in writing to the Director, Office of Special Education.

August 3, 2016

DATE **ELLEN S. BASS**, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____