

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 02063-17

AGENCY DKT. NO. 2017-25599

B.R. ON BEHALF OF V.R.,

Petitioners,

v.

EDISON TOWNSHIP

BOARD OF EDUCATION,

Respondent.

B.R., pro se, petitioner

Douglas M. Silvestro, Esq., for respondent (The Busch Law Group, attorneys)

Record Closed: October 18, 2017

Decided: November 8, 2017

BEFORE **KELLY J. KIRK**, ALJ:

Petitioner, B.R., (“parent” or “petitioner”) on behalf of her daughter, V.R., filed for a due-process hearing against respondent, Edison Township Board of Education (“District”), seeking a 1:1 aide for the entire school day and whole-school cameras due to safety concerns because V.R. is blind and was being bullied, or, alternatively, an out-of-district placement.

PROCEDURAL HISTORY

On December 6, 2016, a request for mediation only was filed with the Office of Special Education. A mediation conference was held on January 5, 2017. At the request of the parent, the Office of Special Education subsequently converted the request for mediation to a request for a due-process hearing and transmitted it to the Office of Administrative Law, where it was filed on February 10, 2017.

On May 31, 2017, the District filed a motion for summary decision, accompanied by a certification of counsel and brief. Petitioner did not file opposition, and several extensions of time were granted at petitioner's request. Petitioner ultimately requested to oppose the motion orally, which request was granted due to petitioner's visual impairment. Petitioner's opposition and the parties' oral argument on the motion was heard via telephone, at the request of petitioner, on October 18, 2017.

LEGAL ANALYSIS AND CONCLUSIONS

The description of the nature of the problem and any facts related thereto in the due-process petition is as follows:

Since the beginning of the school year, especially at lunch the child has been bullied, called "elephant," pushed down, laughed at. She is blind. She can't complain because [she] does not know who pushed her. Pushed from desk. Pushed down steps. Talked to case manager and principal. Brought to doctor. Contacted CBVI. Permission to use elevator. Teachers complain. None of teachers' business. Before Thanksgiving pushed in hallway and fell down, injured. Reported it. Told [District] would review on camera. Camera in area did not capture. Interviewed students. No witness or evidence. Have not gotten any answer. Student is not safe in the school. Parent meeting with principal, need cameras. Someone is harming her daughter. What if someone brought weapon. Her doctor can't give prescription for orthopedic doctor. Injury in school, school's responsibility. Could not bend knee, refused ice from school nurse.

Too much going on, not happy in Edison School. They have to have a whole school camera. If cameras there will not harass each other in hallway.

Additionally, the due-process petition's description of how the problem could be resolved is as follows:

Having 1:1 assistant for the entire school day
Whole school cameras
If district does not agree, need out-of-district placement

The District argues that the due-process petition fails to assert any special-education dispute and therefore there exists no jurisdiction pursuant to the Individuals with Disabilities Education Act (IDEA).¹ The petitioner stated for the record several incidents of alleged bullying and/or harassment that had occurred in school involving V.R. and expressed her dissatisfaction with the District's response to those incidents.

The IDEA, 20 U.S.C.A. §§ 1400–1487, ensures that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and ensures that the rights of children with disabilities and parents of such children are protected. 20 U.S.C.A. § 1400(d)(1)(A), (B); N.J.A.C. 6A:14-1.1. A “child with a disability” means a child with intellectual disabilities, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who, by reason thereof, needs special education and related services. 20 U.S.C.A. § 1401(3)(A). There is no dispute that V.R. is blind.

States qualifying for federal funds under the IDEA must assure all children with disabilities the right to a “free appropriate public education.” 20 U.S.C.A. § 1412(a)(1); Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). Each

¹ The District also argued that the petition is moot because V.R. is no longer in the same school. Petitioner acknowledged that V.R. is no longer in the same school and stated that no incidents of bullying or harassment have occurred in V.R.'s current school. However, because the issue of mootness was not in the moving papers, it is not addressed herein.

district board of education is responsible for providing a system of free appropriate special education and related services. N.J.A.C. 6A:14-1.1(d). A “free appropriate public education” (FAPE) means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under 20 U.S.C.A. § 1414(d). 20 U.S.C.A. § 1401(9); Rowley, supra, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690.

An individualized education program (IEP) is a written statement for each child with a disability that is developed, reviewed, and revised in accordance with 20 U.S.C.A. § 1414(d). 20 U.S.C.A. § 1401(14); 20 U.S.C.A. § 1412(a)(4). When a student is determined to be eligible for special education, an IEP must be developed to establish the rationale for the student’s educational placement and to serve as a basis for program implementation. N.J.A.C. 6A:14-1.3, -3.7. An IEP must be “reasonably calculated to enable the child to receive meaningful educational benefits in light of the student’s intellectual potential.” D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010) (citations omitted). The education offered to the child must be sufficient to “confer some educational benefit upon the handicapped child,” but it does not require that the school district maximize the potential of disabled students commensurate with the opportunity provided to non-disabled students. Rowley, supra, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708. Hence, a satisfactory IEP must provide “significant learning” and confer “meaningful benefit.” T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 578 (2000).

Additionally, in accordance with the IDEA, children with disabilities are to be educated in the least-restrictive environment. 20 U.S.C.A. § 1412(a)(5); N.J.A.C. 6A:14-1.1(b)(5). To that end, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability of a child is

such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C.A. § 1412(a)(5)(A); N.J.A.C. 6A:14-4.2. The Third Circuit has interpreted this to require that a disabled child be placed in the least-restrictive environment that will provide the child with a “meaningful educational benefit.” T.R., supra, 205 F.3d at 578.

Although V.R. is a “child with a disability” entitled to a FAPE, the petition does not allege, and petitioner did not argue, that V.R. was denied a FAPE or that V.R. has not made meaningful educational progress in the District. Further, pursuant to N.J.A.C. 6A:14-2.7(a), a due-process hearing may be requested when there is a disagreement regarding identification, evaluation, reevaluation, classification, educational placement, the provision of a free appropriate public education, or disciplinary action. However, the petition does not reflect, and petitioner did not state on the record, any disagreement relative to any area specified by N.J.A.C. 6A:14-2.7(a). Rather, the petition references bullying and harassment alleged to have occurred in school, which sounds instead in N.J.S.A. 18A:37-13 et seq., known as the Anti-Bullying Bill of Rights Act. N.J.S.A. 18A:37-13.2. Per the Anti-Bullying Bill of Rights Act, each school district adopts a policy prohibiting harassment, intimidation, or bullying (HIB), which HIB policy contains, inter alia, a procedure for reporting an act of harassment, intimidation, or bullying. N.J.S.A. 18A:37-15(a) and (b). Further, the Department of Education, in consultation with the Division on Civil Rights in the Department of Law and Public Safety, develops a guidance document for use by parents or guardians, students, and school districts to assist in resolving complaints concerning student HIB behaviors and the implementation of the Anti-Bullying Bill of Rights Act by school districts, which is available on the Department of Education’s and the Division on Civil Rights’ Internet sites and each district’s Internet site. N.J.S.A. 18A:37-24(a) and (b).

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision may 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.” Further, “[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an

evidentiary proceeding.” Ibid. This standard is substantially similar to that governing a civil motion under R. 4:46-2 for summary judgment. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010); Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106 (App. Div. 1995).

In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court set forth the standard governing a motion for summary judgment:

[A] determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion 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 alleged disputed issue in favor of the non-moving party. The judge’s function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

The petition alleges harassment and bullying, but does not allege any disagreement relative to any area specified by N.J.A.C. 6A:14-2.7(a). Accordingly, even accepting every allegation in the petition, the allegations fail to state a special-education claim under the IDEA and are therefore insufficient to permit resolution of a special education hearing in favor of petitioner. I therefore **CONCLUDE** that this matter is appropriate for summary decision and further **CONCLUDE** that the due-process petition should be dismissed.

ORDER

It is hereby **ORDERED** that respondent’s motion for summary decision is **GRANTED**, and petitioner’s due-process petition is **DISMISSED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2017) 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 (2017). 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 Programs.

11/8/2017

DATE

KELLY J. KIRK, ALJ

Date Received at Agency

11/8/2017

Date Mailed to Parties:

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