State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

CONSOLIDATED

Z.R. ON BEHALF OF E.R.,
Petitioners,
v.
NEWARK BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 02868-16
AGENCY DKT. NO. 2016/23906

NEWARK BOARD OF EDUCATION,
Petitioner,
v.
Z.R. ON BEHALF OF E.R.,
Respondents.

OAL DKT. NO. EDS 09187-16
AGENCY DKT. NO. 2016/24693

Norma Francullo, Esq., and **Denise Rekem**, Esq., appearing for Petitioners/Respondents Z.R. on behalf of E.R. (Parles Rekem, attorneys)

Arsen Zartarian, Esq., and **Sabrina Styza**, appearing for Respondent/Petitioner Newark Board of Education

Record Closed: January 5, 2017

Decided: January 27, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

New Jersey is an Equal Opportunity Employer

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a request for a due process petition (Complaint) with the Office of Special Education Programs, New Jersey Department of Education (NJDOE) on January 6, 2016.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL) on February 25, 2016.

The Newark Board of Education filed its own due process petition on June 13, 2016. The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL) on June 22, 2016.

A prehearing conference was held on July 1, 2016, and a prehearing order was entered on the same date.

A Consolidation Order was entered by the undersigned on July 1, 2016.

Petitioners then filed an Amended Complaint with the OAL on November 22, 2016.

A status conference was held on November 30, 2016, and an order of same date was entered.

Respondent filed its Answer to the Amended Complaint, dated December 2, 2016, with the OAL.

Respondent filed a notice of motion to dismiss the Amended Complaint on December 9, 2016. Petitioners filed their opposition to the summary decision motion,

and a cross motion, on December 28, 2016. Respondent filed its response thereto on January 5, 2017.

As these are two consolidated actions, one with Z.R. as Petitioner, and one with the Newark Board of Education as Petitioner, for purposes of this decision, Z.R. shall be referred to as Petitioner; the minor student shall be referred to as E.R.; and, the Newark Board of Education shall be referred to as Respondent.

FINDINGS OF FACT

1. When E.R. was aging out of his early intervention program, and residing in Newark, he was referred to the Bruce Street School for the Deaf. Petitioner rejected the Bruce Street School as it did not have an "auditory-oral" program. (Amended Complaint ¶13.)
2. E.R. is hearing impaired and has two cochlear implants, one in each ear. (Amended Complaint ¶11.)
3. Petitioners then moved to Bloomfield. The Bloomfield School District placed E.R. in an out-of-district placement at the Lake Drive School. (Amended Complaint ¶18.)
4. E.R. attended the Lake Drive School from June 2014 through January 2016. (Amended Complaint ¶19.)
5. Petitioners moved back to Newark after November 24, 2015. (Amended Complaint ¶22.)
6. The Newark School District determined the appropriate placement for E.R. was at the Bruce Street School for the Deaf. (Amended Complaint ¶28.)
7. Petitioners filed for due process challenging this placement on or about January 6, 2016. (Amended Complaint ¶27.)
8. From January 4, 2016, to March 16, 2016, Petitioners did not enroll E.R. at the Bruce Street School. (Amended Complaint ¶29.)
9. On or about March 17, 2016, Petitioners completed E.R.'s enrollment at the Bruce Street School for the Deaf. (Amended Complaint ¶30.)
10. Respondent school district conducted evaluations of E.R., as follows: a psychological and educational along with a speech and language evaluation,

Occupational Therapy evaluation, Educational Audiology Assessment. The psychological assessment on April 26, 2016; the educational assessment on April 21, 2016; the speech and language evaluation on May 3, 2016; the educational audiology assessment was conducted on April 13, 2016. (Amended Complaint ¶31, ¶32, ¶33, ¶35 and ¶36.)

11. Respondent school district conducted an IEP meeting on May 23, 2016, the Newark Child Stud Team. Petitioner and her attorney were present. (Amended Complaint ¶38.)

12. The Child Study Team determined that the Bruce Street School for the Deaf, the Respondent school district's in-district program, and not the Lake Drive School, would be an appropriate placement. This was over Petitioner's objection. (Amended Complaint ¶39.)

13. Petitioner requested an Independent Educational Evaluation (IEE) at the IEP meeting of May 23, 2016, and in writing via email on May 26, 2016. (Amended Complaint ¶40.)

14. The request for an IEE was rejected. (Amended Complaint ¶41.)

15. Respondent school district timely filed for due process on June 13, 2016, for a hearing on its objection to the IEE. (Amended Complaint ¶42.)

16. Petitioner obtained its own IEE on August 18, 2016. (Amended Complaint ¶44.)

17. Petitioner initially rejected the placement of E.R. at the Bruce Street School for the Deaf as it does not have an "auditory-oral" program. (Amended Complaint ¶13.)

18. Petitioner again rejected the placement of E.R. at the Bruce Street School for the Deaf as it does not have "an appropriate auditory program." (Amended Complaint ¶29.)

19. The Bruce Street School for the Deaf offers the Total Communication methodology.

20. Petitioners reference of "appropriate auditory" program and "auditory-oral" program include the Auditory Verbal Therapy (AVT).

21. Both programs are methodologies. To refer to one as therapy and the other as a philosophy is to engage in semantics.

LEGAL ANALYSIS AND CONCLUSION

In the instant matter Respondent raises three issues in its motion for summary decision: 1) Petitioner's request for an out-of-district placement should be denied, as petitioner has no legal right to dictate methodology; 2) Petitioners' request for reimbursement for an IEE regarding a specific methodology is improper and should be denied; and 3) Stay put is inoperative in the present situation.

Petitioner, in its cross-motion argues: 1) Petitioners' request for out-of-district placement should be granted as the request has nothing to do with methodology, but rather a deprivation of FAPE; 2) Petitioners' request for reimbursement for the IEE is proper and should be granted; and, 3) Stay put is operative in the present situation and E.R. should be immediately transferred to Lake Drive School during the remaining pendency of the within matter.

The District's obligation is to provide children with disabilities a free and appropriate public education pursuant to the Individuals' with Disabilities Education Act (IDEA) 20 U.S.C.A. § 1401 to 1485. In doing so the law expresses a strong preference that the educational opportunity be provided in the least restrictive environment commensurate with the child's disability and educational needs. Oberti v. Bd. of Educ., 992 3 F.2d 1204 (3rd Cir. 1993); N.J.A.C. 6A:14-4.2.

Federal funding of state special education programs is contingent upon the states providing a "free and appropriate education" (FAPE) to all disabled children. 20 U.S.C.A. § 1412. The Individuals with Disabilities Act (IDEA) is the vehicle Congress has chosen to ensure that states follow this mandate. 20 U.S.C.A. § 1400 et seq. "[T]he IDEA specifies that the education the states provide to these children 'specially [be] designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.'" D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010) (citations omitted). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1(d). Subject to certain limitations, FAPE is available to all children with disabilities residing in the State between the ages of three and twenty-one,

inclusive. 20 U.S.C.A. § 1412(a)(1)(A), (B). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

New Jersey follows the federal standard that the education offered "must be 'sufficient to confer some educational benefit' upon the child." Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 47 (1989) (citations omitted). The IDEA does not require that a school district "maximize the potential" of the student but requires a school district to provide a "basic floor of opportunity." Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200, 102 S. Ct. 3034, 3047, 73 L. Ed. 2d 690, 708 (1982). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a "trivial" or "de minimis" educational benefit is required, and the appropriate standard is whether the child's education plan provides for "significant learning" and confers "meaningful benefit" to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (internal citations omitted).

As noted in D.S., an individual education plan (IEP) is the primary vehicle for providing students with the required FAPE. D.S., supra, 602 F.3d at 557. An IEP is a written statement developed for each child that explains how FAPE will be provided to the child. 20 U.S.C.A. § 1414(d)(1)(A)(i). The IEP must contain such information as a specific statement of the student's current performance levels, the student's short-term and long-term goals, the proposed educational services, and criteria for evaluating the student's progress. See 20 U.S.C.A. § 1414(d)(1)(A)(i)(I)-(VII). It must contain both academic and functional goals that are, as appropriate, related to the Core Curriculum Content Standards of the general education curriculum and "be measurable" so both parents and educational personnel can be apprised of "the expected level of achievement attendant to each goal." N.J.A.C. 6A:14-3.7(e)(2). Further, such "measurable annual goals shall include benchmarks or short-term objectives" related to meeting the student's needs. N.J.A.C. 6A:14-3.7(e)(3). The school district must then review the IEP on an annual basis to make necessary adjustments and revisions. 20 U.S.C.A. § 1414(d)(4)(A)(i).

A due process challenge can allege substantive and/or procedural violations of the IDEA. If a party files a petition on substantive grounds, the Administrative Law Judge (ALJ) must determine whether the student received a FAPE. N.J.A.C.6A:14-2.7(k). If a party alleges a procedural violation, an ALJ may decide that a student did not receive a FAPE only if the procedural inadequacies: (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or (3) caused a deprivation of educational benefits. Ibid.

In the instant matter, Petitioners do not allege either substantive or procedural violations of the IDEA. Rather, Petitioners disagree with the Respondent school district over methodology. Respondent school district proposes to use the Total Communication methodology. Petitioners object as they prefer the "auditory-oral," program, also referred to as Audio Visual Therapy (AVT). This is the sole reason Petitioners seek due process. Petitioners argue that the Total Communications methodology is a philosophy and that AVT is not a methodology. This is mere semantics. Petitioners further argue that to deny E.R. AVT is a denial of FAPE.

The IDEA defines FAPE as special education and related services provided in conformity with the IEP. See 20 U.S.C.A. § 1401(9). The IDEA, however, leaves the interpretation of FAPE to the courts. See Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999). In Rowley, the United States Supreme Court held that a state provides a handicapped child with FAPE if it provides personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The Supreme Court reasoned that the Act was intended to bring previously excluded handicapped children into the public education systems of the states and to require the states to adopt procedures which would result in individualized consideration of and instruction for each child. Rowley, supra, 458 U.S. at 189, 102 S. Ct. at 3042, 73 L. Ed. 2d at 701.

In Rowley, supra, 458 U.S. at 208, 102 S. Ct. at 3052, 73 L. Ed. 2d at 713, the Court further held: "We previously cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of

education policy. San Antonio Independent School District v. Rodriguez, 411 U.S. at 42."

In Lachman v. Illinois State Board of Education, 852 F.2d 290 (7th Circuit 1988), the Court addressed an issue akin to the instant matter. In Lachman the parents wanted a full time "cued speech" instructor. The school, as in the instant matter, proposed using the "total communication" approach. Id. at 291-292. The Seventh Circuit dismissed the petition, finding that the parents could not dictate methodology:

> Courts must avoid imposing their views of preferable educational methods upon the responsible authorities. Once it is shown that the Act's requirements have been met, questions of methodology are for resolution by the responsible authorities.
>
> [Lachman, supra, 852 F.2d at 292.]

The Court further noted:

> Rowley and its progeny leave no doubt that parents, no matter how well Motivated, do not have a right . . . to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child. See Rowley, 458 U.S. at 207, 102 S.Ct. at 3501. See also Wilson, 735 F.2d at 1178, 1182 (the states "have the power to provide handicapped children with an education they consider more appropriate than that proposed by the parents.")
>
> [Id. at 297.]

Petitioners offered no authority for their argument that this matter is about denial of FAPE, and not about a choice of methodology other than three administrative decisions: two from California and one from Illinois. None of the cited cases are binding. Further, none of the cited cases are persuasive.

I **CONCLUDE** that Petitioners' due process petition is based solely upon a disagreement on methodology and should be **DISMISSED**.

Having reached the above conclusion, I shall briefly address the two other issues raised in both Respondent's motion to dismiss the Amended Complaint, and Petitioners' cross-motion to enforce stay put. Those two remaining issues are stay put, and reimbursement to Petitioners for the cost of the IEE.

The "Stay Put" provision of the IDEA provides that:

> [D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until such proceedings have been completed.
>
> [20 U.S.C.A. § 1415(j).]

The federal regulation's two New Jersey counterparts, N.J.A.C. 6A:14-2.6(d)(10) and N.J.A.C. 6A:14-2.7(u), contain substantially similar language. N.J.A.C. 6A:14-2.6(d) provides that:

> Pending the outcome of mediation, no change shall be made to the student's classification, program or placement, unless both parties agree, or emergency relief as part of a request for a due process hearing is granted by the Office of Administrative Law according to N.J.A.C. 6A:14-2.7 as provided in 20 U.S.C.A. § 1415(k) . . . .

In the instant matter stay put does not apply. Petitioner moved from Bloomfield to Newark sometime after November 24, 2015. Petitioners request that E.R. stay put at the Lake Drive School, a school E.R. attended while residing in Bloomfield, and continued to attend until January 4, 2016.

Further, in Cinnaminson Twp. Bd. of Ed. V. K.L. o/b/o R.L., 68 IDELR 104 (D.N.J. Aug. 9, 2016) the Court noted, at 117:

> The reason that the "stay-put" provision becomes inoperative after a student moves is because "the purpose of the stay-put provision, which is to maintain the status quo in situations where the school district acts unilaterally, is not

> implicated." J.F., 629 F. App'x at 237 (citing Ms. S. v. Vashon Island Sch. Dist., 337 F.3d 1115, 1133 (9th Cir. 2003) ("Although the 'stay-put' provision is meant to preserve the status quo, we recognize that when a student transfers educational jurisdictions, the status quo no longer exists")). Therefore, the use of 20 U.S.C.A. § 1414 (d)(2)(C)(i), instead of "stay-put" placements, balances the goal of maintaining educational consistency for special needs students with the recognition that families have accepted some amount of discontinuity in their child's education when they voluntarily change school districts.

Accordingly, stay put does not apply in the instant matter.

Lastly, I will address the issue of reimbursement for the IEE.

N.J.A.C. 6A:14-2.5(c)(2) states:

> Upon completion of an initial evaluation or reevaluation, a parent may request an independent evaluation if there is disagreement with the initial evaluation or a reevaluation provided by a district board of education. A parent shall be entitled to only one independent evaluation at public expense each time the district board of education conducts an initial evaluation or reevaluation with which the parent disagrees. The request for an independent evaluation shall specify the assessment(s) the parent is seeking as part of the independent evaluation request.

N.J.A.C. 6A:14-2.5(c)(2)(1) states: "Such independent evaluation(s) shall be provided at no cost to the parent unless the school district initiates a due process hearing to show that its evaluation is appropriate and a final determination to that effect is made following the hearing."

The initial question is whether the district has met the regulatory requirements. N.J.A.C. 6A:14-2.5(a) provides:

> In conducting an evaluation, each district board of education shall:
>
> 1. Use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information:

i. Provided by the parent that may assist in determining whether a child is a student with a disability and in determining the content of the student's IEP; and
ii. Related to enabling the student to be involved in and progress in the general education curriculum or, for preschool children with disabilities to participate in appropriate activities;

2. Not use any single procedure as the sole criterion for determining whether a student is a student with a disability or determining an appropriate educational program for the student; and

3. Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(b) Each district board of education shall ensure:
1. That evaluation procedures including, but not limited to, tests and other evaluation materials according to N.J.A.C. 6A:14-3.4:
i. Are selected and administered so as not to be racially or culturally discriminatory; and
ii. Are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally unless it is clearly not feasible to do so; and
iii. Materials and procedures used to assess a student with limited English proficiency are selected and administered to ensure that they measure the extent to which the student has a disability and needs special education, rather than measure the student's English language skills;

2. Any standardized tests that are administered:
i. Have been validated for the purpose(s) for which they are administered; and
ii. Are administered by certified personnel trained in conformance with the instructions provided by their producer;

3. The student is assessed in all areas of suspected disability;

4. Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the student are provided;

> 5. Tests are selected, administered and interpreted so that when a student has sensory, manual or communication impairments, the results accurately reflect the ability which that procedure purports to measure, rather than the impairment unless that is the intended purpose of the testing;
>
> 6. The evaluation is conducted by a multi-disciplinary team of professionals consisting of a minimum of two members of the child study team, and, where appropriate, other specialists who shall conduct the evaluation in accordance with the procedures in N.J.A.C. 6A:14-3.4. A minimum of one evaluator shall be knowledgeable in the area of the suspected disability; and
>
> 7. In evaluating each student with a disability, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the suspected eligibility category.

Clearly, Respondent has fulfilled its regulatory requirement. Further, Petitioners do not suggest that that Respondent failed to fulfill its regulatory requirement, or otherwise failed to comply with N.J.A.C. 6A:14-2.5 or N.J.A.C. 6A:14-3.4. Petitioners requested an additional test that comports with the methodology they prefer.

I **CONCLUDE** that Respondents due process petition should be **GRANTED** and Petitioners' motion for reimbursement for the IEE be **DENIED**.

Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

In the instant matter the only dispute as to a material fact is about methodology. I have found as fact that the Total Communication program and AVT are both methodologies. There is no dispute as to any remaining material facts, all of which were taken from Petitioner's Amended Complaint, and the matter is ripe for summary decision.

ORDER

It is hereby **ORDERED** that the Respondents' motion for summary decision is **GRANTED**; and,

It is further **ORDERED** that Respondent's due process petition is **GRANTED**; and,

It is further **ORDERED** that petitioners' cross motion is **DENIED**; and,

It is further **ORDERED** that petitioners' due process petition (Amended Complaint) 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 (2016) 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 (2016). 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.

January 27, 2017

______________________________	______________________________
DATE	**THOMAS R. BETANCOURT**, ALJ

Date Received at Agency: ______________________________

Date Mailed to Parties: ______________________________

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APPENDIX

List of Moving Papers

For Petitioner:

Notice of Cross-Motion

Letter Memorandum in support of Cross-Motion and in opposition to Motion for Dismissal

For Respondent:

Motion for Dismissal

Letter Memorandum support of Motion for Dismissal

Letter Memorandum in opposition to Cross-Motion