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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING RESPONDENTS' MOTIONS FOR SUMMARY DECISION AND DENYING PETITIONER'S CROSS-MOTION FOR SUMMARY DECISION

OAL DKT. NOS. EDS 10989-19

AGENCY DKT. NO. 2020-30358

B.G. AND K.G. ON BEHALF OF E.G.,

Petitioners,

v.

FLEMINGTON-RARITAN BOARD OF EDUCATION and HUNTERDON CENTRAL REGIONAL BOARD OF EDUCATION,

Respondents.

Michael Poreda, Esq., for petitioners

Eric Harrison, Esq., for respondent Flemington-Raritan Board of Education (Methfessel & Werbel, P.C., attorneys)

John B. Comegno II, Esq., for respondent Hunterdon Central Regional Board of Education (Comegno Law Group, P.C., attorneys)

Record closed: December 10, 2020 Decided: December 28, 2020

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

Respondents, Flemington-Raritan Board of Education (Flemington) and Hunterdon Central Regional Board of Education (Hunterdon), filed motions for summary decision seeking to have this matter dismissed, claiming petitioners were not entitled to reimbursement for unilateral out-of-district placements of minor student, E.G. Petitioners filed a cross-motion for summary decision contending respondents failed to offer a free and appropriate public education (FAPE) pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. section 1400 et seq. (IDEA), and that petitioners are therefore entitled to full reimbursement for their out-of-district placement.

PROCEDURAL HISTORY

On July 12, 2019, petitioners filed a petition for due process with the Office of Special Education Policy and Procedure (OSEPP), Department of Education (DOE). The due process petition was transmitted to the Office of Administrative Law (OAL), where it was filed on August 12, 2019, to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14 F-1 to -13. Telephone hearings took place on September 16 and November 8, 2019.

On January 30, 2020, respondent Hunterdon filed a motion for summary decision. On February 2, 2020, respondent Flemington filed a motion for summary decision. On March 12, 2020, petitioners filed a cross-motion for summary decision. A telephone hearing took place on May 26, 2020, and oral argument took place on August 31, 2020, by telephone due to the Covid-19 pandemic. Additional telephone hearings took place on October 21 and November 20, 2020. No further documentation was received and the record closed on December 10, 2020.

FINDINGS OF FACT

Based on the briefs submitted for purposes of the motions for summary decision, and the oral argument of August 31, 2020, I **FIND** the following to be the undisputed facts:

1. E.G. was a seventeen-year-old student born September 6, 2003. E.G. attended first through fourth grade in Flemington, then attended school in the Franklin Township School District through the end of seventh grade. Despite emotional and behavioral challenges since early childhood, and behavioral issues at school including fights and meltdowns, E.G. was an excellent student, who performed well academically in classes geared towards gifted and talented students, until he was dismissed from the gifted program due to his behavior.

2. In 2013, Children's Specialized Hospital, an inpatient/outpatient facility for children with special health needs, diagnosed E.G. with Autism Spectrum Disorder (ASD), which had disrupted E.G.'s understanding of social norms and his own emotions.

3. Franklin Township denied petitioners' request that E.G. be classified for special education services for the 2015-2016 school year, but provided him with a 504 accommodations plan.

4. Over the years E.G. had displayed aggressive and disruptive behaviors towards his parents, B.G. and K.G., and his younger brother. Petitioners discussed placing E.G. into a residential program with a Care Management Organization (CMO) in February 2017.

5. On February 14, 2017, K.G. brought E.G. to a hospital emergency room after he had locked himself in a bathroom with a knife and refused to open the door. However E.G. was not admitted to the hospital for psychiatric care.

6. A Neurodevelopmental Diagnostic Evaluation (NDE) dated May 5, 2017, indicated significant conflict in the home and several incidents of misbehavior by E.G. at home, and indicated that these behaviors did not manifest themselves in school. The NDE referred to E.G. having been diagnosed with ASD. This NDE indicated that petitioners had already decided to send E.G. to an out-of-state residential program for adolescents dealing with issues of social development and behavioral difficulties.

7. An incident occurred on May 15, 2017, when K.G. forced E.G. to exit her car and walk home due to being verbally aggressive, but again E.G. was not admitted to the hospital for psychiatric care. There was an investigation by the Department of Child Protection and Permanency (DCP&P) into petitioners' methods of disciplining E.G.

8. On July 11, 2017, petitioners entered E.G. into Seven Stars, a residential program in Utah. The psychiatric evaluation conducted at that time, as well as the later Discharge Summary, noted that E.G. was admitted to Seven Stars due to aggressive behavior, family conflict, and the parents' inability to manage E.G.'s behavior.

9. On September 5, 2017, petitioners registered E.G. in Flemington as a district resident, even though E.G. was still enrolled at Seven Stars. Because E.G. had not been enrolled in Flemington since the 2012-2013 school year, Flemington then requested E.G.'s academic records from Franklin Township and Seven Stars. Petitioners failed to provide these records to Flemington.

10. On October 4, 2017, petitioners wrote to Flemington, confirming that E.G. was still enrolled at Seven Stars, and advising of their intent to continue having E.G. enrolled in a residential program and stating that they would seek reimbursement from Flemington. Petitioners also asked Flemington for an Individualized Educational Plan (IEP) for E.G. The Flemington administrative secretary then contacted petitioners, as confirmed by K.G's

email one week later, which email indicated that petitioner's interest was in having Flemington pay for E.G.'s residential placement in order to address E.G.'s therapeutic needs.

11. E.G. was discharged from Seven Stars on October 6, 2017. The Discharge Summary indicated that E.G. would still not be comfortable at home and that he should be admitted to another residential facility. The Discharge Summary confirmed that E.G. was being discharged into his parents' care to travel to Novitas Academy, a residential facility in Idaho.

12. On or about October 10, 2017, petitioners enrolled E.G. in Novitas. The Novitas Individual Services Plan (ISP) said E.G. was referred to residential treatment due to explosive and aggressive behavior at home and disruptive behavior in school.

13. On February 12, 2018, petitioners, through counsel, requested that Flemington provide an IEP which would provide for E.G. to be placed at Novitas. This correspondence from petitioners confirmed that their letter of October 4, 2017, was meant to be notice to Flemington of their intent to seek reimbursement from Flemington for their unilateral out-of-district placement of E.G. at Novitas.

14. After Flemington unsuccessfully attempted to schedule initial planning meetings in February 2018 and March 2018, an initial planning meeting was finally held on April 10, 2018. Flemington proposed initial evaluations for E.G. and the parents consented. Rather than require that E.G. return to New Jersey for the evaluations, Flemington agreed to allow E.G. to remain in Idaho during the testing and to accept assessments conducted by providers in Idaho.

15. On July 1, 2018, prior to completion of the initial evaluations, E.G. reached the age where he then became the responsibility of respondent Hunterdon.

16. Despite E.G. never having been enrolled in the Hunterdon school district, a Hunterdon child study team ("CST") conducted evaluations of E.G. On July 17, 2018, the Hunterdon CST concluded from the initial evaluations that E.G. was not eligible for special education or related services.

17. E.G. was discharged from Novitas on or about November 9, 2019. The Novitas ISPs called for E.G. to return home and attend a local day school, but the Novitas Discharge Summary indicated that E.G.'s parents sought to place E.G. at "SUWS Wilderness Program."

LEGAL ANALYSIS

The issue is whether this case is ripe for summary decision on whether respondents are responsible for reimbursing petitioners for their unilateral out-of-district placement of minor student E.G.

Summary decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). No evidentiary hearing need be held if there are no disputed issues of material fact. Frank v. Ivy Club, 120 N.J. 73, 98, cert. denied, 498 U.S. 1073 (1991). "When the evidence is so one-sided that one party must prevail as a matter of law, the [tribunal] should not hesitate to grant summary [decision]." Della Vella v. Bureau of Homeowner Protection, OAL Dkt. No. CAF 17020-13, 2014 WL 1383908 (N.J. Adm. 2014)(quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)).

Further, the non-moving party has the burden "to make an affirmative demonstration . . . that the facts are not as the movant alleges." Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div. 1962). This requirement, however, does not relieve the moving party from having to initially establish in its moving papers that there was no genuine issue of fact and that they were entitled to prevail as a matter of law. It is the "movant's burden to exclude any reasonable doubt as to the existence of

any genuine issue of fact." Conti v. Board of Education, 286 N.J. Super. 106 (App. Div. 1995) (quoting Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954)).

For an adverse party to a motion for summary decision to prevail they must, by responding affidavit, set forth specific facts showing that there was a genuine issue which could only be addressed in an evidentiary proceeding. N.J.A.C. 1:1-12.5(b).

The parties have conceded in their motion briefs and oral argument that the facts in this case are not in dispute. The parties' statements of facts are similar, and neither party has specifically raised any genuine issues of fact in dispute. Accordingly, I **CONCLUDE** that this case is ripe for summary decision.

Regarding the substantive issue, petitioners argued that the respondents must comply with the Individuals with Disabilities Education Act, 20 U.S.C. Section 1400 et. seq. (IDEA), and must provide a FAPE. They argue that the respondents' failure to provide an IEP constituted a denial of a FAPE, therefore entitling petitioners to reimbursement for their unilateral out-of-district placement of E.G. Petitioners claim the "Burlington-Carter" test for reimbursement of private school tuition is the appropriate test due to the respondents' failure to comply with IDEA.

More specifically, petitioners argued that Flemington failed to provide a FAPE by neglecting to schedule an eligibility determination meeting in a timely fashion. They state that Flemington denied E.G. a FAPE by not initiating a pre-evaluation conference within twenty days of the request, per N.J.A.C. 6A:14-3.3(e), and by failing to complete the evaluation within ninety days of receiving parental consent, per N.J.A.C. 6A:14-3.4(e).

K.G. requested an IEP on October 4, 2017, but no meeting was scheduled. After procuring legal counsel, said counsel requested an IEP from Flemington on February 12, 2018. The pre-evaluation meeting did not take place until April 10, 2018, fifty-nine days after counsel's request for an IEP.

Hunterdon correctly argued that IDEA is only for special education. At no time in the within matter was E.G. ever found eligible by a school district for special education

services. Franklin Township denied petitioners' request that E.G. be classified for special education services for the 2015-2016 school year, and ultimately gave E.G. a Section 504 accommodations plan. On July 17, 2018, the Hunterdon child study team concluded from the initial evaluations that E.G. was not eligible for special education or related services. Based on this, neither Flemington nor Hunterdon would be subject to IDEA and neither would have a responsibility to provide a FAPE to E.G. pursuant to IDEA.

In addition to E.G. not being eligible for special education, it is clear from the facts that E.G.'s issues were emotional and behavioral, not educational. Petitioners are attempting to have two school districts pay for their child's health and medical issues. But school districts are not required to fund services that are primarily medical. 34 C.F.R. section 300.104. As set forth by Hunterdon, school districts are not "financially responsible for the placement of students who need twenty-four-hour supervision for medical, social, or emotional reasons, and receive only an incidental educational benefit from their placement." Munir v. Pottsville Area School District, 723 F.3d 423, 432 (3d Circ. 2013)(citing Mary T. v. School District of Philadelphia, 575 F.3d 235, 245-46 (3d Circ. 2009). In Munir the key issue was whether the student "had to attend a residential facility because of his educational needs—because, for example, he would have been incapable of learning in a less structured environment—or rather, if he required residential placement to treat medical or mental health needs segregable for his educational needs." Ibid.

In her Certification, E.G.'s mother, K.G., certified that E.G. required mental health assistance. She certified that E.G.'s primary issues were emotional and behavioral. She discussed neurological and psychiatric disabilities, issuing lay opinions regarding E.G.'s mental health. Although E.G. had been an outstanding student and had been taking classes geared towards gifted academic students, K.G. tied any latter onset of academic decline to "the emotional pressure of trying to cope with his disabilities." (Certification of K.G., at 1.) She admitted that E.G. was able to handle his schoolwork, "but at an extremely high emotional cost." (Certification of K.G., at 2.) She asked to have E.G. retained in fourth grade "not because he was having problems with academics but because of social competency concerns." (Certification of K.G., at 3.) K.G. stated that E.G. was diagnosed with ASD and confirmed that this disrupted his "understanding of

social norms and his ability to regulate his own emotions." She alluded to his academics starting to suffer, but failed to provide any factual evidence, except that in confirming that E.G. was elevated to a class for gifted students but was only dismissed due to behavioral issues, she stated without providing evidence that E.G. subsequently failed math and received a D in English. (Certification of K.G., at 3.) The lion's share of K.G.'s Certification dealt with behavioral issues.

It must be noted that on July 11, 2017, petitioners entered E.G. into Seven Stars, a residential program in Utah. The psychiatric evaluation conducted at that time noted that E.G. was admitted to Seven Stars due to aggressive behavior and family conflict and the parents' inability to manage E.G.'s behavior. That evaluation (Exhibit C to Hunterdon Brief) indicated that in May 2017 E.G. made allegations of abuse against his parents, claiming that his parents hit him. That evaluation stated that petitioners continued to spank E.G. until he was twelve years old. A DCP&P investigation took place into B.G.'s and K.G.'s methods of disciplining E.G., shortly before they decided to enroll E.G. in a residential program.

I **CONCLUDE** that E.G.'s primary issues, and the reason for petitioners placing him unilaterally in an out-of-district residential program, were medical and behavioral, and not educational. I **CONCLUDE** that IDEA is not applicable to the within petition and that neither Flemington nor Hunterdon had an obligation to provide a FAPE to E.G. pursuant to IDEA.

But assuming arguendo that IDEA applied herein and that respondents had an obligation to provide a FAPE, petitioners' petition for reimbursement still must be denied because they failed to provide written notice in a timely manner to respondents that they intended to make a unilateral out-of-district placement for which they expected reimbursement.

As set forth in N.J.A.C. 6A:14-2.10(c)(2) and (4) and 20 U.S.C. Section 1412(a)(10)(C)iii., written notice of a parents' concerns or their intent to enroll their child in a nonpublic school must be provided at least ten days prior to removal from a public school or upon a judicial finding of unreasonableness regarding the parents' actions. In

the within matter, notice of petitioners' unilateral placement out-of-district was made on October 4, 2017, and petitioners did not dispute that E.G. was enrolled in Novitas by October 10, 2017, a mere six days later.

It is clear that parents who believe that a school district obligated to provide a FAPE had failed to do so may unilaterally remove their disabled child from that district, place the child in another school and seek tuition reimbursement. Mary T. v. School District of Philadelphia, at 242. But placing a child in another school without involving the school district could preclude reimbursement. School Commissioner of the Town of Burlington, Mass. V. Department of Education of Mass., 471 U.S. 359, 373-374 (1985). Failure to adhere to the ten-day-rule is an indication of a parent's failure to involve the school district. G.R. and K.R. obo J.R. v. Montclair Board of Education, OAL Dkt. No. EDS 13573-09 (June 2, 2010). Without at least the ten days' written notice, a school district is essentially denied the opportunity to address a parent's concerns. A nonpublic special education program at public expense "may be obtained only through teamwork with [public] school personnel" which includes compliance with N.J.A.C. 6A:14-2.10(c). See G.R. and K.R.. Reimbursement should be denied when parents proceed with a fixed idea regarding their child's placement rather than cooperating with the district in good faith. B.G. by F.G. v. Cranford Board of Education, 702 F. Supp. 1158, 1166 (D.N.J. 1988), aff'd 882 F.2d 510 (3d Cir. 1989); Patricia P. v. Board of Education of Oak Park, 203 F.3d 462 (7th Cir. 2000). IDEA and the state regulations allow for the denial of reimbursement, regardless of the conduct of a school district, when a parent does not provide timely notice of removal, in which case a court need not address the issue of FAPE. W.D. obo W.D. v. Watchung Hills Regional Board of Education, OAL Dkt. No. EDS 15092-12 (March 5, 2013). See K.M. and J.M. obo K.M. v. Watchung Hills Regional Board of Education, OAL Dkt. No. EDS 09284-13 (October 28, 2013), and K.M. and J.M. obo K.M. v. Watchung Hills Regional Board of Education, OAL Dkt. No. EDS 18846-13 (June 5, 2014). In both Watchung cases, reimbursement was denied when it was established that the parents had already committed to enrolling their child at a private school, and therefore the filing of notice of unilateral placement was merely done in order to gain reimbursement at public expense.

In this case, it appears the request for an IEP made by petitioners on October 4, 2017, was not a good-faith request for a CST or initial evaluations, but rather was made purely for the legal purpose of attempting to be reimbursed for their unilateral out-of-district placement. Petitioners had not been working with either respondent in an attempt to develop an educational program for E.G. at a respondent school. Rather, petitioners had already decided that they wanted E.G. to be schooled at a residential program. As of February 14, 2017, K.G. had requested residential placement from the CMO. On May 5, 2017, petitioners reported to their private evaluator that they intended to place E.G. in a residential program. Most importantly, when E.G. was discharged from Seven Stars on October 6, 2017, the Discharge Summary indicated that E.G. was being discharged into his parents' care to travel to Novitas Academy, a residential facility in Idaho. It was undisputed that E.G. was enrolled at Novitas on or about October 10, 2017, which was only six days after petitioners' notice to Flemington. It was clear that the decision to unilaterally place E.G. at Novitas was made before the petitioners ever attempted to cooperate with Flemington or investigate whether Flemington had an appropriate program for E.G. Additionally, the proper step would have been for petitioners to request initial evaluations with a Flemington CST, to first see if E.G. was eligible for special education, before simply demanding an IEP.

Petitioners argued that the ten-day-notice requirement in N.J.A.C. 6A:14-2.10(c) only applied to children who previously received special education. However, while the term "who previously received special education" is contained in subsection (b) of that regulation, subsections (a), (c) and (d) do not contain such specification, and therefore petitioners' conclusion as to the ten-day-rule's meaning is incorrect. Quite the opposite, the lack of this language in section (c) must be interpreted that the legislature did not intend for the ten-day-rule to be so limited.

Petitioners raised a procedural claim with regard to their October 4, 2017, notice of unilateral placement, but it appeared to be a misinterpretation of the applicable rule. Paragraphs twenty-five through twenty-seven of petitioner's due process petition claimed that Flemington failed to make an evaluation and eligibility determination within ninety days of their October 4, 2017, letter, thus denying E.G. a FAPE. This is not correct, because N.J.A.C. 6A:14-3.3(e) requires that when an initial referral is received, the

district's CST must convene a meeting with the parents within twenty calendar days of receipt of the request for evaluations. Then, once the CST decides whether or not an initial evaluation is required, the school district must then provide notice of said determination at least fifteen days before implementation of the proposed action. If the CST decided that initial evaluations were necessary, then the evaluations, eligibility determination, and development and implementation of the IEP would then have to be completed within ninety days of receipt of parental consent for the initial evaluations. N.J.A.C. 6A:14-3.4(e). It would therefore have been the twenty-day, not the ninety-day-rule that would have been violated if petitioner's October 4, 2017, letter had been deemed a good faith CST/initial evaluations request.

Despite how this was written in their petition, petitioners attempted to correct this misunderstanding in their motion brief. Yet it did not change the fact that the October 4, 2017, letter was not a good faith request, and therefore the twenty-day-rule was not triggered. Additionally, petitioners failed to properly apply the twenty-day and fifteen-day time frames to their correspondence of February 12, 2018, and therefore their argument of a procedural violation must fail. Petitioners also ignored in their time calculations the fact that Flemington had offered meeting opportunities in February and March 2018.

Further, a procedural violation is only actionable under the IDEA if it results in a loss of educational opportunity for the student, it seriously deprives a parent of participation rights, or it causes a deprivation of educational benefits to the student. C.H. v. Cape Henlopen School District, 606 F.3d 59 (3d Cir. 2010). In the within matter, a failure by a respondent to comply with the twenty-day or ninety-day-rule would not be actionable because there was no loss or deprivation of an educational opportunity for E.G., because it was petitioners' clear intent to enroll E.G. at Novitas, which is where he remained until he was discharged in 2019. Additionally, it was the parents themselves who voluntarily eschewed their rights to participate in the planning of their child's education with Flemington and Hunterdon.

I **CONCLUDE** that even if the IDEA was applicable in the within matter, petitioners failed to make a good faith request for a CST and initial evaluations, and failed to provide ten-day's notice of their intent to unilaterally place E.G. into an out-of-district program,

and therefore I **CONCLUDE** that petitioners are not entitled to reimbursement from Flemington for Novitas tuition for the 2017-18 school year and are not entitled to reimbursement from Hunterdon for Novitas tuition for the 2018-19 school year.

As there are no genuine issues of fact in dispute, and I have concluded this is not a special education case subject to IDEA, and that even if IDEA applied, the petitioners would not be entitled to tuition reimbursement for their unilateral out-of-district placement because they failed to coordinate and cooperate with the respondents to develop an in-district educational program, and failed to notify the districts of the out-of-district private school placement at least ten days prior to such placement, I **CONCLUDE** that respondents Flemington and Hunterdon are entitled to summary decisions in their favor.

ORDER

The motions for summary decision by respondents Flemington-Raritan Board of Education ("Flemington") and Hunterdon Central Regional Board of Education ("Hunterdon") are **GRANTED**. Petitioners' cross-motion for summary decision is **DENIED**. OAL Dkt. No. EDS 10989-19 is **DISMISSED** without prejudice.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) 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. § 1415(i)(2); 34 C.F.R. § 300.516 (2019).

December 28, 2020 _____

DATE **JEFFREY N. RABIN**, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

JNR/dw

APPENDIX

EXHIBITS

For petitioners:

Cross-motion and brief, dated March 12, 2020

For respondent Flemington:

Motion and brief, dated February 2, 2020

For respondent Hunterdon:

Motion and brief, dated January 30, 2020