State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION ON MOTION FOR INVOLUNTARY DISMISSAL

OAL DKT. NO. EDS 16805-19

AGENCY DKT. NO. 2020-30962

EAST BRUNSWICK TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

A.K. AND R.K. ON BEHALF OF H.K. AND HATIKVAH INTERNATIONAL CHARTER SCHOOL,

Respondents.

Jodi S. Howlett, Esq., for petitioner, East Brunswick Township Board of Education (Cleary, Giacobbe, Alfiere and Jacobs, LLC, attorneys)

Michael I. Inzelbuch, Esq., for respondent, A.K. and R.K. on behalf of H.K.

Thomas O. Johnston, Esq., for respondent, Hatikvah International Charter School (Johnston Law Firm, LLC, attorneys)

Record Closed: May 10, 2021 Decided: June 4, 2021

BEFORE **SUSAN L. OLGIATI**, ALJ:

STATEMENT OF THE CASE

This matter arises out of a request by petitioner, East Brunswick Board of Education (East Brunswick or the District) for a due process hearing challenging H.K.'s placement at the Laurel School of Princeton (Laurel School) pursuant to an October 28, 2019, individualized education program (IEP). The IEP placement was the result of a settlement agreement between A.K. and R.K. (the parents), on behalf of H.K., and Hatikvah International Academy Charter School (Hatikvah). Respondent Hatikvah brings the present motion for dismissal at the end of the District's case arguing that East Brunswick has failed to meet its burden to demonstrate it can provide in- district, the educational placement determined by H.K's IEP team.

PROCEDURAL HISTORY

On November 27, 2019, East Brunswick filed with the Office of Special Education Programs (OSEP), a due process petition challenging H.K.'s placement at the Laurel School. The petition was timely filed and on December 2, 2019, was transmitted to the Office of Administrative Law (OAL) for hearing.

On January 21, 2020, the parents filed a request for emergent relief seeking to enforce H.K's "stay put" at the Laurel School and directing East Brunswick to make immediate payment to the Laurel School. Hatikvah supported the parents' request. By Order dated February 6, 2020, the undersigned granted the request for emergent relief designating the Laurel School as H.K.'s stay put placement pending resolution of the due process complaint. The Order also directed that Hatikvah was responsible for funding the costs of the placement, including the cost of transportation to be provided by East Brunswick. Hatikvah filed an appeal challenging the above determination.[1]

[1] By Order dated May 12, 2020, U.S.D.J. Thompson granted Hatikvah's request to vacate the undersigned's Order requiring Hatikvah to reimburse East Brunswick for transportation services pending the due process proceeding. The court denied Hatikvah's request to vacate the Order directing it to pay tuition costs pending outcome of the due process proceeding. See Hatikvah Int'l Acad. Charter Sch. v. E. Brunswick Twp. BOE, 2020 U.S. Dist. LEXIS 90406. That decision is on appeal to the Third Circuit.

On or about July 17, 2020, Hatikvah filed a motion for summary decision and order directing East Brunswick to reimburse Hatikvah for all costs paid to the Laurel School. The parents joined in the motion. Oral argument was heard on August 13, 2020. Following oral argument, the undersigned permitted East Brunswick to file a supplemental response to the motion to address respondents' arguments that petitioner failed to identify any program for H.K. and/or made only bare, unsupported allegations regarding its ability to provide for H.K.'s program in a less restrictive educational environment. East Brunswick submitted a response to Hatikvah's statement of facts/counterstatement of disputed material facts and a supporting Affidavit of Nicole McNamara, Supervisor of Special Education for the District. On October 27, 2020, this ALJ issued an Order concluding that East Brunswick was entitled to a due process hearing on the issues and denying the motion for summary decision.

The due process hearing was held on March 17, March 24, and April 15, 2021, via Zoom due to the on-going COVID-19 pandemic and related restrictions per Executive Order. Immediately following East Brunswick's presentation of its case in chief, respondents advised of their intent to move for dismissal of the action. On April 22, 2021, Hatikvah filed a motion to dismiss pursuant to R. 437-2.(b). On April 30, 2021, the parent respondents filed a letter brief in support of the motion. On May 10, 2021, East Brunswick filed its opposition to a motion for summary decision. [2]

BACKGROUND/FACTUAL DICUSSION

H.K., was born in May 2010, he is deemed eligible for special education and related services under the classification of "multiply disabled." He lives with his parents, in East Brunswick. H.K. was previously enrolled at Hatikvah. For the 2018-2019 school year, Hatikvah proposed an IEP placing H.K. at the Bridge Academy in Lawrenceville. In September 2018, H.K.'s parents rejected the proposed IEP and unilaterally placed him at the Laurel School, an accredited private school for students with disabilities.

[2] Respondent Hatikvah refers to its motion, as a motion to dismiss pursuant to R. 4:37-2(b). The District contends that Hatikvah mischaracterized its motion as a "motion for directed verdict" and argues that the proper motion in this instance is one for summary decision.

On or about October 2, 2018, the parents filed a due process petition against Hatikvah and the District seeking, among other remedies, tuition reimbursement for H.K.'s unilateral placement at the Laurel School for the 2018-2019 school year. (A.K. and R.K. o/b/o H.K. v. East Brunswick and Hatikvah, OAL Dkt. EDS 16374-18.) On October 28, 2019, while that matter was pending at the OAL, Hatikvah and the parents entered into an on-the-record settlement in which Hatikvah agreed to reimburse the parents for the costs of H.K.'s placement at the Laurel School through the date of the agreement and to implement an IEP placing H.K. at the Laurel School from October 2019 through October 2020. East Brunswick was also a party to the matter, but did not participate in the OAL proceedings and was not a party to the settlement.[3]

The October 28, 2019, and the October 26, 2020, IEP[4] agreed upon by Hatikvah and the parents provides that:

> [H.K] requires specialized multi-sensory phonemic awareness instruction by a specialized trained/certified instructor for a minimum of one hour with daily progress monitoring and carryover of strategies across all subjects throughout the day. [H.K] requires the consistency of a program where the specialized study of reading/writing using an Orton-Gillingham type program is generalized across all core subjects and supported by teachers who are trained/certified in an Orton-Gillingham type program in very small class sizes.

See Joint Hearing Exhibit J-42 at 0001791.

The District's programs were considered and rejected for the following reasons:

> (a) East Brunswick Public School's resource room/ICR combination program was rejected because it is very much like the current placement that is not adequately meeting the student's needs. The student: teacher ratio is not reduced, and the multisensory program is not offered across disciplines.

[3] While East Brunswick chose not to participate in the due process proceedings relating to OAL Dkt. EDS 16374-18, counsel for East Brunswick was at the OAL on October 28, 2019, [on another matter] and was present in the courtroom when the settlement agreement between the parents and Hatikvah was placed on the record.

[4] On or about December 1, 2020, East Brunswick filed an Amended Petition for due process to include the IEP dated October 26, 2020. This IEP was corrected on or about November 16, 2020. The parties stipulated that the changes related to the "Health/Medical Background" section. See corrected/updated version of IEP at J-100.

(b) East Brunswick Public School's self-contained program was rejected because the intensity of the reading and writing program was insufficient to meet the student's needs, the math program was less multi-sensory than the current math program; and the social studies and science programs did not adequately include reading and writing instruction consistent with the student's multi-sensory reading and writing curriculum. Additionally, the placement presented an inappropriate cognitively dissimilar peer group.

Id. at 0001780.

In her August 2020 affidavit[5], in further opposition to Hatikvah's motion, Nicole McNamara, advised that she thoroughly reviewed the October 2019 IEP and determined that the District could implement the IEP at Memorial Elementary School. See J-92, McNamara Affidavit, August 24, 2020, at para 5. To that end, she further affirmed to facts including that:

- She reviewed H.K.'s pupil records provided by Hatikvah including the IEP. (Id. at para 2)
- The Special Class for Learning or Language Disabilities ("LLD") at Memorial Elementary School provides intensive multisensory reading and writing in a small group environment of similarly aged peers that is infused and reinforced through all subjects throughout the school day as required in the IEP. (Id. at para 6)
- The District's LLD program provides specialized reading and writing through the use of an Orton-Gillingham program across all subjects. (Id. at para 7)
- The District's LLD program provides a structured, organized classroom environment and may provide H.K. with a separate, quiet space to allow him to stay on task. The District's program also provides a positive behavioral support system and social-emotional learning to address H.K.'s executive functioning skills. (Id. at para 8)
- All teachers in the District's LLD program are trained or certified in Orton- Gillingham. (Id. at para 9)
- The District can provide H.K. with individual occupational therapy twice per week. (Id. at para 10)

[5] The affidavit is dated 2019. However on cross-examination, McNamara confirmed that the correct year is 2020.

- The District would also provide H.K. with a 1:1 aide to ensure continuity of his behavioral supports and continuation of multisensory instruction in his special area classes. (Id. at para 11)
- The District's program would also provide H.K. with counseling and BCBA consultation on a monthly basis. (Id. at para 12)

See J-92, McNamara Affidavit, August 24, 2020.

McNamara further affirmed that she had not been contacted by anyone at Hatikvah for information concerning the District's special education programs available for H.K. and that to her knowledge, no representative of Hatikvah had observed the programs available for H.K. at Memorial Elementary School when it proposed the October 28, 2019 IEP. (Id. at para 3 & 4)

LEGAL ANALYSIS AND CONCLUSIONS

The issue to be determined is whether East Brunswick can demonstrate that it can provide the educational placement determined by H.K.'s IEP Team, in-district, and, if so, whether the charter school must place H.K. in the program.

As an initial matter, the parties disagree as to the appropriate from of dispositive motion brought in this instance. Chapter One of the New Jersey Administrative Code is referred to as the New Jersey Uniform Administrative Procedure Rules (UAPR). N.J.A.C. 1:1-1.2. The UAPR does not include a rule pertaining to a motion for involuntary dismissal. However, pursuant to N.J.A.C. 1:1-1.3(a), this chapter "shall be construed to achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. In the absence of a rule, a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible with these purposes."

In an administrative hearing, if the party with the burden of proof proceeds first, the respondent may rely on R. 4:37-2(b) to move for involuntary dismissal at the close of the petitioner's case "on the ground that upon the facts and upon the law the [petitioner] has shown no right to relief." 37 New Jersey Practice, Admin. Law & Practice, § 5.19 (Steven

L. Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000); R. 4:37-2(b). Thus, Hatikvah's motion pursuant to R. 4:37-2(b), motion for involuntary dismissal is proper.

The applicable standard for a motion for judgment of involuntary dismissal is "whether 'the evidence, together with the legitimate inferences therefrom, could sustain a judgment in favor' of the party opposing the motion, *i.e.*, if, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied." Dolson v. Anastasia, 55 N.J. 2, 5 (1969) (quoting R. 4:37-2(b)).

Pursuant to N.J.S.A. 18A:36A-11(b), a charter school is responsible for the provision of services to students with disabilities while the fiscal responsibility for student remains with the district of residence. For this reason, the statute requires the charter school to provide the resident district with notice within fifteen (15) days of any IIEP which results in a private school placement.

N.J.S.A. 18A:36A-11(b) further provides that the district of residence may challenge a charter school's private placement within thirty calendar days. The implementing regulation, N.J.A.C. 6A:23A-15.4, provides the following process for such a challenge:

> When the school district of residence determines to challenge the placement, the school district of residence may, within 30 days of receiving notice of the placement, file for a due process hearing against the charter school and parent(s) of the student. The due process hearing shall be limited in scope to a determination by an administrative law judge as to whether there is a less-restrictive placement that will meet the student's educational needs and, if so, whether the charter school must place the student is such program.

In L.Y. o/b/o J.Y. v. Bayonne BOE, 2011 U.S. Dist. LEXIS 32952 (D.N.J. March 29, 2011), a matter similarly involving a charter school private placement, the parent argued that N.J.S.A. 18A:36A-11(b) violated the following procedural rights afforded to

parents under the Individuals with Disabilities Education Act (IDEA): 1) to have parental participation in program decision-making; 2) to have the IEP team be the exclusive program decision-makers; 3) to receive advance notice of a school agency's proposal to change their child's program; 4) to receive a detailed written description of the program offered by an educational agency; and 5) to have their child's IEP immediately implemented. As a result, the parent in L.Y. argued that the statute conflicts with the IDEA and was unconstitutional both on its face and as applied. Id. *10-11.

U.S.D.J. Stanely R. Chesler reconciled N.J.S.A. 18A:36A-11(b) with the IDEA's procedural safeguards by noting that a resident district's challenge to an IEP is limited to a review of the restrictiveness of the program's placement. Id. at *13. He further explained and concluded that in permitting this limited challenge, the statute furthers compliance with the IDEA by ensuring that students with disabilities are placed in the least restrictive environment. Id. at *14-15. In addressing the parent's contentions regarding the statute's denial of participation in the IEP formulation process and allowing a non-IEP team member to challenge and prevent a decided upon IEP, Judge Chesler concluded that in a due process challenge:

> **the resident school district is prohibited from disputing whether a child is in fact disabled, the development of the IEP, or the nature of the special services determined by the IEP team. The N.J.S.A. 18A:36A-11(b),merely provides a district of residence with an opportunity to demonstrate that it can provide the educational placement that was determined by the IEP, in-district.** In the event that an administrative law judge determines a less restrictive placement will meet the student's educational needs, the charter school continues to provide all study team services for the student, including the development of an IEP and the monitoring of its implementation.

Id. 15-16. (Emphasis added).

As to the parent's contentions regarding the statute's conflict with parental rights to advance notice of a proposed change a child's educational placement, Judge Chesler noted that "educational placement" within the meaning of the IDEA refers to the provision of special education and related services rather than a specific place, such as a specific

classroom or school. Id. at 16-17. As to the parent's remaining contentions, Judge Chesler noted that:

> **[t]he statute does not allow a resident district to propose a new program. Rather, N.J.S.A.18A:36A-11(b),permits challenges to a program's location, not its substance**. Therefore, N.J.S.A.18A:36A-11(b), does not conflict with the IDEA's "prior notice" or "detailed description" requirement since **it does not permit a district of residence to challenge the *type* of special education decided-upon by the IEP team**.

Id. at 17-18. (Bold emphasis added)

Accordingly, Judge Chesler found N.J.S.A.18A:36A-11(b) constitutional and that it did not conflict with the procedural requirements of the IDEA. The United States Court of Appeals for the Third Circuit affirmed the ruling. L.Y. v. Bayonne BOE, 542 Fed. Appx. 139*, 2013 U.S. App. LEXIS 22632** (3d Circ. Oct. 7, 2013).

Here, in support of its contention that it could provide in-district, the educational placement determined by H.K.'s IEP, East Brunswick relied on the affidavit of Nicole McNamara. However, upon cross-examination, McNamara admitted that many of the facts to which she affirmed were inaccurate, in error, and/or misleading. She claimed to be unaware that the affidavit was made under oath. She further testified that if she had "caught" the errors in the affidavit, she would not have signed the document. McNamara also acknowledged issues with her statement regarding the District's LLD program providing a specialized reading and writing program through the use of "an Orton-Gillingham program across all core subjects." She explained that she should have clarified that Orton-Gillingham approaches were *"infused"* throughout all core subjects. This statement was later refuted by the testimony of April Fabiano, the LLD teacher at Memorial Elementary.

McNamara clarified that April Fabiano was not certified in Orton-Gillingham, but that she was trained in same.

Additionally, McNamara acknowledged that her statements regarding not being contacted by anyone at Hatikvah for information regarding the District's special education programs for H.K and no representative of Hatikvah observing programs available for H.K. at Memorial Elementary school, were in error.

Despite affirming that she had thoroughly reviewed H.K.'s IEP and his pupil records, she could not recall what documents she had reviewed or when she had reviewed them.

Finally, McNamara acknowledged that the District's plan to provide H.K. with a 1:1 aide was something that was not provided for in his IEP.

Having had the opportunity to listen to the testimony of the witnesses and to observe their demeanor, I do not the accept the testimony of McNamara as reasonable or reliable. Her testimony was internally inconsistent and often confusing, it was also inconsistent with the testimony of Fabiano. Therefore, I do not accept McNamara's testimony as credible.

April Fabiano testified that she is not Orton-Gillingham certified. She further explained that the extent of her Orton-Gillingham training by East Brunswick since 2013, consisted of a total of twelve hours, over the course of three days. Fabiano advised that she began her first out-of-the-District training in Orton-Gillingham on April 14, 2021, the day before her testimony in this matter and well over a year after the District filed its petition challenging the Laurel School placement.

Additionally, Fabiano testified that her LLD class has twelve students. Some of whom are classified in Autism, Communication Impaired, and Hearing Impaired categories and none of whom who have full scale IQ levels above 90.

Fabiano also testified that there are currently no 1:1 aides in the classroom. She further offered that in the past, when she had a 1:1 aide in her class, she took measures to ensure that it was not obvious to whom the aide was assigned, as it could be "demeaning." Fabiano testified that she was unaware that H.K. required a BCBA (Board Certified

Behavior Analyst) and confirmed that no students in her class have behaviors that warrant a BCBA. She testified that she does not use Orton-Gillingham in her classroom and that the paragraph in McNamara's affidavit, regarding the use of an Orton-Gillingham program in all core subjects, was false as to her classroom. Fabiano explained that she uses multi-sensory instructional strategies are "infused" throughout the day, but acknowledged it was not by an Orton-Gillingham program, nor through a single uniform program. Ms. Fabiano acknowledged that Orton-Gillingham "is not synonymous with "multi-sensory."

The testimony of Fabiano, which I accept as credible, confirmed that the LLD program at Memorial Elementary School differs from H.K's IEP in that it does not have very small class sizes, does not use an Orton-Gilligan type program across all core subjects, does not have a teacher who is certified or appropriately trained in an Orton-Gillingham type program, consists of students who are not cognitively similar to H.K., who has a full scale IQ of 98. Fabiano further confirmed that the District's program differs from H.K.'s IEP in that it would have a 1:1 aide for H.K. and provides for monthly BCBA consultations.

Kristin Grosso-Schork, a Learning Disabilities Consultant for the District, testified that East Brunswick offers multi-sensory programing across all disciplines. She further testified that true Orton-Gillingham does not use a prescribed or singular program. She testified that while students in the LLD program are generally grouped with their peers, students benefit from being grouped with others and serving a model for others. On cross-examination, Grosso-Schork acknowledged that the intellectual level of his peers could impact H.K. She further testified that while the District does not necessarily employ Orton-Gilligham it can be "infused" and "injected" into the program. Grosso-Schork explained that as a teacher she participated in an Orton-Gillingham lecture approximately ten years ago.

The District argues that it presented multiple witnesses[6] who testified that it can provide H.K. with the program in the October 28, 2019, IEP in the least restrictive environment.

[6] In addition to the witnesses identified herein, the District also presented testimony from Lisa Lagrande, a Licensed Social Worker for the District.

The District's arguments ignore that the testimony of Fabiano confirmed that the District's program, as previously outlined herein, differs from the educational placement in H.K.'s IEP in several material ways. Thus, the District's proposed change in program is not simply a change in location, but rather is a change in substance. Such a change is not permitted. See, L.Y. o/b/o J.Y. v. Bayonne BOE, 2011 U.S. Dist. LEXIS 32952 (D.N.J. March 29, 2011).

Further, the District fails to address the fact that the affidavit of McNamara, upon which it relied at the summary decision stage and continued to rely at hearing was largely discredited.

The District also argues the Hatikvah has not set forth any evidence or "expert testimony" to suggest that it is unable to provide the program in H.K.'s 2019 IEP. As a result, it contends that the present motion is premature and that expert testimony from respondents is required to determine whether the District's programing is insufficient to meet H.K.'s needs. The District bears the burden of proof in this matter. The District's contention that the burden should shift to respondent to present expert testimony regarding the insufficiency of its programming is without merit. The testimony presented by the District confirmed material differences between the program it proposed and the educational placement determined by H.K.'s IEP. Moreover, H.K.'s 2019 and 2020 IEPs specifically rejected the District's program and found that it did not meet the student's needs. See J-42 and J-100. Finally, while the District presented several fact witnesses who testified regarding the programming it offers , these witnesses acknowledged that they are neither certified in, nor use or implement, Orton-Gillingham.

For these reasons, I **CONCLUDE** that the District has not met its burden of proof to demonstrate, through competent evidence, that it can provide the educational placement determined by H.K.'s IEP Accordingly, I **CONCLUDE** that respondents' motion for involuntary dismissal should be **GRANTED.** I further **CONCLUDE** that because the District has failed to meet its burden of proof, in accordance with N.J.S.A. 18A:36A-11(b), it is responsible for the cost of H.K.'s placement at the Laurel School determined by the October 28, 2019 IEP.

ORDER

Based on the foregoing, it is hereby **ORDERED** that respondents' motion for involuntary dismissal is **GRANTED** and the petition is **DISMISSED**. It is further **ORDERED** that East Brunswick is responsible for the cost of H.K.'s placement at the Laurel School determined by the October 28, 2019 IEP.

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). 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 Policy and Dispute Resolution.

June 4, 2021 _____

DATE **SUSAN L. OLGIATI**, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

SLO/lam

APPENDIX

DOCUMENTS RELIED UPON

Hatikvah's motion to dismiss, April 22, 2021.

Parents' letter brief in support of the motion, April 30, 2021.

East Brunswick's opposition to the motion, May 10, 2021.

Joint hearing exhibits