



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 03919-20

AGENCY REF. NO. 2020-31307

D.F. ON BEHALF OF N.F.,

Petitioner,

v.

ELIZABETH CITY BOARD OF EDUCATION,

Respondent.

D.F. on behalf of **N.F.**, pro se

Amy A. Pujara, Esq., for respondent (DiFrancesco, Bateman, Kunzman, Davis & Lehrer, LLP, attorneys)

Record Closed: December 21, 2020

Decided: January 22, 2021

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Petitioner D.F., on behalf of his minor son, N.F., challenges the appropriateness of the individualized education program (IEP) currently in place, specifically demanding that N.F. be placed back into the in-class-support placement, and seeks independent evaluations and a new functional behavior assessment. Respondent Elizabeth City

Board of Education (“the District”) asserts that N.F.’s current IEP and placement are proper and that any and all issues raised in the foregoing due-process petition were addressed via the settlement agreement approved by the Honorable Jeffrey Gerson, ALJ, on February 20, 2020.

PROCEDURAL HISTORY

Petitioner requested an independent educational evaluation on January 8, 2020. On January 17, 2020, the District filed its due-process petition seeking an Order denying petitioner’s request for independent evaluations. On February 19, 2020, D.F. filed his due-process petition seeking independent evaluations, including a functional behavior assessment (FBA), as well as placement in an in-class-support program. Shortly thereafter, the parties entered into a settlement agreement which purported to resolve all issues between them, approved by Jeffrey A. Gerson, ALJ, on February 20, 2020. See R-2. Notwithstanding the signed settlement agreement, D.F. declined to withdraw the forgoing due process petition which he filed one day earlier on February 19, 2020. A hearing was conducted on October 30, 2020. Final submissions were received on December 21, 2020, at which point the record was closed.

ISSUE

Is the December 19, 2019, IEP reasonably calculated to provide significant learning and meaningful educational benefit, in light of N.F.’s individual needs and potential, so as to provide N.F. with a free appropriate public education (FAPE) in the least restrictive environment? Is the foregoing due-process petition precluded by the settlement agreement entered into and signed by the parties on February 20, 2020?

FACTUAL DISCUSSION

N.F. is a classified student in the Mild/Moderate Learning or Language Disabilities (LLD) program at Joseph Battin School #4 in the Elizabeth Public School District. An IEP

was developed by petitioner and the child study team, together with counsel for the District and counsel for petitioners, for the 2018–19 school year. The 2018–19 IEP, agreed to by petitioner, included placement in the District’s LLD program, as well as a personal aide, counseling, occupational therapy, and other classroom accommodations. The 2018–19 IEP, which was in place from December 10, 2018, to December 9, 2019, was not the subject of any due-process proceeding or complaint filed by petitioner.

The 2019–20 IEP (R-1) contains similar program recommendations, with a more individualized behavior plan. In order to accommodate his disabilities, the District sought to continue N.F.’s placement in the LLD program, which includes smaller class sizes and a personal aide to assist N.F. in his program, and implement new behavior strategies to work on N.F.’s elopement and aggression in the classroom.

On February 20, 2020, D.F. entered into a settlement agreement with the District. See R-2. The essential terms of the settlement agreement provided for the District to move N.F. from the current LLD program at School 4 to the in-class-support program for thirty days beginning on February 24, 2020. The agreement further stated that a meeting would be held on March 31, 2020, at which point the parties would discuss N.F.’s progress and placement. If the parties disagreed on N.F.’s progress after said meeting, the due-process petition filed by D.F. would proceed. See R-2, paragraph 5.

Summary of Testimony

D.F.

D.F. is the father of N.F. He testified as a fact witness. D.F. is unhappy with the placement of N.F. in the LLD program, and feels that his son would be better served if he were placed back into the in-class-support program that he had been placed in years prior. To further his position, he demanded that independent evaluations and a new functional behavior assessment be performed.

D.F. remembers entering into a settlement agreement on February 20, 2020 (R-2), but he nonetheless decided to proceed with the foregoing due-process petition that he filed one day earlier, on February 19, 2020, because he felt that the District did not uphold its end of the bargain.

Dr. David Lerman

Dr. David Lerman (Lerman) is employed at the District as a school psychologist and serves as a case manager and child study team member. Lerman was admitted as an expert in the areas of school psychology and educational planning for students with disabilities. Lerman also testified as a fact witness regarding N.F.'s educational progress and programing. Lerman provided N.F. with counseling during the 2018–19 school year.

Lerman testified that N.F.'s specific academic and emotional needs were carefully considered in developing the IEP in question. N.F.'s extensive history of elopement and behavioral issues in the classroom were reviewed with D.F. at the December 18, 2019, IEP meeting. Petitioner's insistence that N.F. remain in the same general-education program that proved to be unsuccessful in the past does not demonstrate that the District's proposed program was too restrictive or inappropriate in any way.

Dr. Lerman further testified that the LLD program, behavioral intervention plan, and other supports included in the December 2019 IEP provided N.F. with the tools he needed to succeed in the classroom. Furthermore, Dr. Lerman testified that, in his expert opinion, the December 2019 IEP would provide N.F. with a meaningful educational benefit in the least restrictive environment.

On cross-examination, petitioner questioned Dr. Lerman's opinion that N.F.'s placement in the LLD program was the least restrictive environment. Lerman testified that when considering the least restrictive environment, he does not only consider a given student's academics, but their behavior, and how disruptive said behavior may be to their academics and to other students in the class. Thus, though the LLD placement may

seem to be more restrictive in terms of student-to-teacher ratio or percentage of time in special education, it allows for more access to the curriculum for the student.

LEGAL DISCUSSION

State and federal laws require local public school districts to identify, classify, and provide a free appropriate public education (FAPE) to children with disabilities. 20 U.S.C. § 1412; N.J.S.A. 18A:46-8, -9. As a recipient of federal funds under the Individuals with Disabilities Education Act (IDEA), the State of New Jersey has a policy that assures all children with disabilities the right to FAPE. 20 U.S.C. § 1412. The responsibility to provide FAPE, including special education and related services, rests with the local public school district. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1(d). In accordance with N.J.S.A. 18A:46-1.1, the burden of proving that FAPE has been offered likewise rests with school personnel. FAPE is an education that is specially 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. G.B. v. Bridgewater-Raritan Reg'l Bd. of Educ., 2009 U.S. Dist. LEXIS 15671, *5 (D.N.J. Feb. 27, 2009) (citing Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982)). FAPE includes special education and related services that are provided at public expense under public supervision and direction and without charge that meet the standards of the State educational agency; that include an appropriate preschool, elementary, and secondary school education; and that are provided in conformity with an IEP as required under 20 U.S.C. § 1414(d). 20 U.S.C. § 1401(9).

Federal law is complied with when a local school board provides a handicapped child with a personalized education program and sufficient support services to confer some educational benefits on the child. Rowley, 458 U.S. at 188–89. In Rowley the Court determined that although the Act mandates that states provide a certain level of education, it does not require states to provide services that necessarily maximize a disabled child's potential. Instead, the IDEA requires a school district to provide a "basic floor of opportunity." Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533–34 (3d Cir. 1995)

(quoting Rowley, 458 U.S. at 201). While our courts have consistently held that the IDEA does not mandate an optimal level of services, an IEP must provide meaningful access to education, and confer some educational benefit upon the child. Rowley, 458 U.S. at 192. In order to be appropriate, the educational benefit conferred must be more than trivial. Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999). The central legal issue is whether the educational services and program offered are sufficient to confer an educational benefit that is meaningful and significant and, therefore, not de minimis, in nature. Lascari v. Ramapo Indian Hills Reg'l Sch. Dist., 116 N.J. 30 (1989).

In the case at bar, the District asserts that the IEP that was offered to N.F. and the corresponding placement in the Mild/Moderate Learning or Language Disabilities program provide a meaningful educational benefit for N.F. and are appropriate. To further this point, the District offered the testimony of child study team member Dr. Lerman, who opined that the December 2019 IEP would provide N.F. with a meaningful educational benefit in the least restrictive environment.

Petitioner offered no expert testimony to support his challenge to the IEP in question. Petitioner's claims are, thus, unsupported by the record. I, therefore, **CONCLUDE** that the District has provided and continues to provide FAPE to N.F. in the least restrictive environment, pursuant to the IDEA and N.J.A.C. 6A:14-1 et seq.

With regard to respondent's assertion that the foregoing due-process petition was rendered moot upon the parties entering into the settlement agreement on February 20, 2020, I **FIND** that the subject agreement does not, on its face, require D.F. to immediately withdraw his due-process petition upon entering into the agreement, and does contemplate the possibility of D.F. proceeding with the due-process petition in the future. See R-2, paragraph 5. I therefore **CONCLUDE** that the due-process petition was ripe for a hearing.

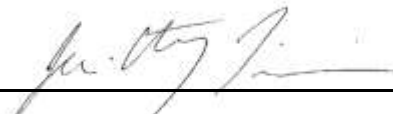
ORDER

It is hereby **ORDERED** that the petitioner's complaint challenging the appropriateness of the IEP and seeking an in-class-support placement, and any other relief, is hereby **DISMISSED**.

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.

January 22, 2021

DATE



JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

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APPENDIX

LIST OF WITNESSES

For Petitioner:

D.F. (petitioner)

For Respondent:

Dr. David Lerman

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

None

For Respondent:

- R-1 IEP, January 14, 2020, to December 17, 2020
- R-2 Settlement Agreement, February 20, 2020
- R-3 Elizabeth Board of Education Due Process Petition
- R-4 Request for independent educational evaluation
- R-5 Functional Behavior Assessment, March 18, 2020
- R-6 Behavior Support Plan, March 18, 2020
- R-7 IEP: December 10, 2018–December 9, 2019
- R-8 Student Behavior Logs: September and October 2018
- R-9 Dr. Platt Report 2018
- R-10 Functional Behavior Assessment: February 7, 2018
- R-11 Neurological/Neurodevelopmental Evaluation by Kavita Sinha, MD.: September 4, 2018
- R-12 Emails with parent D.F., September 2018

- R-13 Occupational Therapy Services Log: 2018
- R-14 Speech/Language Re-evaluation Report: January 20, 2018
- R-15 IEP: April 19, 2018–April 18, 2019
- R-16 Joint letter re: Settlement, August 13, 2018
- R-17 Emails with parent D.F., March–June 2020
- R-18 Resume: Alexandra Hernandez
- R-19 Resume: Aida E. Mendez-Boud
- R-20 Resume: Carolyn Driscoll
- R-21 Resume: Mebelin E. Duran-Perez
- R-22 Resume: Jessica Polsky
- R-23 Resume: Dr. David B. Lerman