



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 05533-20

AGENCY DKT. NO. 2020-31618

S.M. ON BEHALF OF J.D.,

Petitioners,

v.

**CAPE MAY COUNTY SPECIAL
SERVICES BOARD OF EDUCATION,
WILDWOOD CITY BOARD OF EDUCATION,
AND LOWER TOWNSHIP BOARD OF EDUCATION,**

Respondents.

S.M., petitioner, pro se

Brett E. J. Gorman, Esq., for respondents (Parker McCay, PA, attorneys)

Record closed: March 9, 2021

Decided: April 15, 2021

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

On March 27, 2020, petitioners filed for due process seeking notification of absences and a corrective action plan to address student absences as well as compensatory education.

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on July 19, 2020, as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was conducted in this matter on March 9, 2021, and the record closed.

FACTUAL BACKGROUND

The following facts are undisputed unless stated otherwise. J.D. is a ten-year-old non-verbal student diagnosed with Autism Spectrum Disorder. He has been placed in an out of district placement with Cape May County Special Services Board of Education (CMCSS, or District) since approximately 2013. J.D. currently resides with his mother in Wildwood, New Jersey. Prior to 2018, J.D. and his mother resided in Lower Township New Jersey. J.D. and his mother were homeless for approximately eighteen months from 2018 to 2020 and lived in various motels or with friends and relatives. S.M. is J.D.'s father and has joint custody of his son but did not reside with him during any of the time period in question. During his period of homelessness, J.D. began missing many days of school. During the 2017-2018 school year he was absent from school forty-nine days. In 2018-2019 J.D. was absent sixty-two days. In 2019-2020 he was absent forty days. Both prior to and after his period of homelessness J.D. did not have a serious absence record. S.M. asserts that respondents neglected their duty to educate J.D. and seeks monetary damages as well as compensatory education.

TESTIMONY

Melanie Bobik

Ms. Bobik is a case manager and school psychologist at CMCSS and was admitted as an expert in School Psychology and Case Management. She was J.D.'s case manager until September 2020. J.D.'s 2016-2017 Individualized Education Program (IEP) placed him in the same program he had been in since attending

CMCSS. That IEP provided for visual supports as J.D. struggled with verbalization. He also received speech therapy and occupational therapy, a one-on-one aide and an Extended School Year (ESY) program. J.D. also wore a helmet to prevent injuries. (R-19.) As of the date of J.D.'s IEP, March 4, 2016, he was meeting his goal of understanding the school routine and was following his schedule. His growth and social development increased during the 2015-2016 school year and was making progress. (R-19, pp 130 & 134.)

In his February 2017 IEP, J.D. was placed in the same program and continued to make progress. (R-21.). In November 2017 CMCSS began seeing an increase in anxiety self-injurious behavior in J.D. and a Behavior Intervention Plan was created. (R-23.). On February 26, 2018, the District conducted another IEP and indicated that J.D.'s attendance was effecting his educational progress as he had missed twenty-five days of school up to that time. (R-26.) CMCSS attempted to rule out medical issues as cause for his deteriorating social behavior and noted that J.D. could not self-regulate as his anxiety was through the roof. It was at this time that the District discovered that J.D. and his mother were moving around, living with friends and family. The District also noted that J.D. was not sleeping more than an hour or two each night. According to Ms. Bobik's notes from February 7, 2018, she felt J.D. was in crisis.

In approximately May 2018, CMCSS discovered that J.D. had a serious dental issue that required surgery. His skill regression and behavior regression continued and was attributable to both his dental issues and his living conditions as he and his mother continued to move often. J.D.'s dental issues persisted for more than a year after it was discovered by CMCSS. During that time, several dental appointments were canceled, and J.D. continued to have behavioral issues in school. In July 2019 J.D. finally received dental surgery. He and his mother were still living in a motel, but he began sleeping after the surgery. J.D. and his mother did not find a permanent residence until some time in early 2020. By March 2020, J.D. was progressing satisfactorily according to his progress reports. (R-45). J.D. was making satisfactory progress both prior to and almost immediately after his dental issues and homelessness were resolved. Once these issues were resolved, J.D.'s behavior also began to improve. It is Bobik's expert opinion that J.D.'s absences, his behavior issues and his poor academic performance

over approximately eighteen months were all attributable to both his dental issues and homelessness. It is also Bobik's opinion that J.D.'s educational program is appropriate for him and he makes progress in that program when not hampered by his dental issues and homelessness.

S.M.

S.M. is J.D.'s father. He does not reside with J.D. but has joint custody of his son. In August 2020, S.M. submitted to the court a packet of information and documents which included many of the exhibits marked and moved into evidence by the respondents. He also submitted a written synopsis of his testimony and the facts as he understood them. These documents and S.M.'s written synopsis, were admitted into evidence as P-1. S.M. relied on this synopsis and it was incorporated into his testimony. S.M. feels that the respondents neglected J.D. by allowing him to miss so many days of school without taking action. It is clear to S.M. that J.D.'s lack of progress was due to his absences. S.M. asserts that the respondents' actions were "unethical, unconstitutional on grounds of freedom of education." (P-1.) He also feels that because J.D. missed so many days, the respondents were stealing from the taxpayers. S.M. also admitted into evidence an audio recording of a Family Court proceeding conducted on May 1, 2019, in Cape May County Superior Court. (P-2.) During that proceeding, the Superior Court Judge states that the school has not made an issue with absences. S.M. submits this audio recording to show that the actions of the respondents were criminal. S.M. seeks reimbursement "in full of criminal acts, unethical acts, unconstitutional federal acts of education system, depriving child of educational freedom." (P-1, at 4.) He also requests that faculty members be either terminated or demoted for their fraudulent acts.

FINDINGS OF FACT

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common

experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Having considered the testimonial and documentary evidence offered by the parties, the testimony of the petitioner appeared on its face to be incredible or inherently unbelievable. It was clear that he wanted the respondents to pay monetary damages for J.D.'s lack of progress but also admitted that the program he is in was appropriate. S.M. did not present an expert or show proof that any action taken by any of the respondents were inappropriate or unethical.

Having considered the testimonial and documentary evidence presented I **FIND** the following additional **FACTS**:

In approximately May 2018, CMCSS discovered that J.D. had a serious dental issue that required surgery. J.D. and his mother were homeless for approximately eighteen months from 2018 to 2020. During this period of time his educational performance and behavior regressed. Once these issues were resolved, J.D.'s behavior and educational progress began to improve. J.D.'s absences, his behavior issues and his poor academic performance over approximately eighteen months were all attributable to both his dental issues and homelessness. The districts went over and above what is required in an attempt to help J.D. It was CMCSS that noticed his dental issues and brought it to his parents' attention.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA) was enacted to assist states in educating disabled children. It requires states receiving federal funding under the Act, such as New Jersey, to have a policy in place that ensures that local school districts provide disabled students with a Free Appropriate Public Education (FAPE) designed to meet their unique needs. See 20 U.S.C.A. § 1412; N.J. Const. art. VIII, IV, 1; N.J.S.A. 18A:46-8; N.J.A.C. 6A:14-1.1 et seq., Hendrick Hudson Cent. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). State regulations track this requirement that a local school district must provide FAPE as that standard is

set under the IDEA. N.J.A.C. 6A:14-1.1. A FAPE and related services must be provided to all students with disabilities from age three through twenty-one. N.J.A.C. 6A:14-1.1(d). A 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, or secondary school education in the State involved; and d) are provided in conformity with the individualized education program (IEP) required under sec. 614(d). 20 U.S.C.A. § 1401(9).

School districts are responsible to provide students with services in order to access their education in accordance with Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. 794. In order to be liable under section 504 a school district must have deprived a student “of meaningful access to a benefit which he is entitled.” C.G. v. Penn. Dep’t of Educ., 734 F.3d 229, 235 (3d Cir. 2013). (Failure to establish claims under section 504 and ADA in a class action when plaintiffs could not demonstrate that “the funding formula deprived the class members a program, benefit, or services that was provided to disabled students in non-class districts.”). Additionally, a district that receives federal funds violates section 504 if it denies a qualified individual with a disability a reasonable accommodation that the individual needs in order to enjoy meaningful access to the benefits of public service. Alexander v. Choate, 469 U.S. 287 (1985). “Meaningful access” means “evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance.” Id.

The Burden of Proof Rests With the School District

As a recipient of federal funds under the IDEA, 20 U.S.C.A. § 1400 et seq., the State of New Jersey has a policy that assures all children with disabilities the right to a FAPE. 20 U.S.C.A. § 1412. The responsibility to provide FAPE, including special education and related services, rests with the local public school district. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1 et seq.; 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 the school personnel. On January 14, 2008, New Jersey adopted legislation that placed the

burden of proof and the burden of production in special education matters with the respective school district, regardless of which party seeks relief. N.J.S.A. 18A:46-1.1. This statute has not been revoked, modified, or found to be preempted by federal law. Accordingly, I **CONCLUDE** that the respondents have the burden of proof regarding the petition at issue.

Based on the evidence submitted and the testimony of the witnesses, it is clear that J.D.'s educational program is appropriate for him and he makes progress in that program when not hampered by his dental issues and homelessness. I **CONCLUDE** that all of his IEP's were appropriate but factors outside the control of the respondents impacted his progress. I further **CONCLUDE** that the respondents provided J.D. with FAPE.

S.M. seeks monetary damages for the respondents' actions asserting that their actions were criminal, unethical, unconstitutional and deprive J.D. of educational freedom. Having found as fact that the respondents went over and above what is required in an attempt to help J.D., I **CONCLUDE** that the respondents' actions were appropriate. While this tribunal does not have the authority to assess punitive damages in any case, I **CONCLUDE** that no criminal, unethical or unconstitutional acts were committed by any of respondent's employees as it relates to J.D.

CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the respondents implemented and provided J.D. with FAPE. I further **CONCLUDE** that the respondents met their burden of proof regarding the petition. I further **CONCLUDE** that petitioner has failed to provide any evidence to support his argument that the respondents committed any criminal acts, unethical acts, unconstitutional federal acts of education system, or deprived J.D. of educational freedom.


ORDER

It is **ORDERED** that the relief requested by petitioner as set forth above, is **DENIED** and the petition is **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.

April 15, 2021

DATE



JOHN S. KENNEDY, ALJ

Date Received at Agency

Date Mailed to Parties:

JSK/dm

APPENDIX

WITNESSES

For petitioner:

S.M., father of J.D.

For respondent:

Melanie Bobik – Case Manager/School psychologist

EXHIBITS

For petitioner:

- P-1 S.M.'s written synopsis of facts and documents submitted 8-5-2020
- P-2 Audio recording of 5-1-2019 Family Court proceeding

For respondent:

- R-1 June 13, 2013, Initial Referral and Evaluation Plan
- R-2 August 22, 2013, CST Evaluations
- R-3 September 5, 2013, Notice of Eligibility and Initial IEP
- R-4 November 4, 2013, Occupational Therapy Evaluation
- R-5 October 8, 2014, CHOP Developmental and Behavioral Evaluation
- R-6 October 8, 2014, CHOP Speech and Language Evaluation
- R-7 November 26, 2014, Occupational Therapy Progress Report
- R-8 December 9, 2014, Rationale for Out of District Placement
- R-9 December 9, 2014, IEP

- R-10 February 2, 2015, Cape May County Special Services Admissions Conference
- R-11 February 12, 2015, Request for Student Aide
- R-12 March 13, 2015, Request for Student Aide
- R-13 March 13, 2015, IEP
- R-14 March 23, 2015, Request for Related Services
- R-15 March 30, 2015, Notice of Additional Assessment
- R-16 March 30, 2015, School Nurse Note
- R-17 June 10, 2015, Letter to Mother Regarding ESY
- R-18 December 12, 2015, Neurological Evaluation
- R-19 June 4, 2016, IEP
- R-20 December 7, 2016, Custody Order
- R-21 February 28, 2017, IEP
- R-22 November 7, 2017, BCBA Consultation Form
- R-23 December 20, 2017, Behavior Intervention Plan
- R-24 2017 VB-Mapp Testing Results
- R-25 January 3, 2018, Reevaluation Planning Meeting
- R-26 February 26, 2018, IEP
- R-27 March 14, 2018, IEP
- R-28 2017-2018 Progress Reports
- R-29 2017-2018 Report Cards
- R-30 2017-2018 School Year Behavior Data
- R-31 May 31, 2018, Behavioral Consultation Plan
- R-32 June 19, 2018, V-B Mapp Testing Report
- R-33 February 20, 2019, Consent for Behavioral Support Services
- R-34 March 6, 2019, IEP
- R-35 2018-2019 Progress Reports
- R-36 2018-2019 Report Cards
- R-37 2018-2019 VB-Mapp Testing Results
- R-38 June 4, 2019, DCP&P Letter to Melanie Bobik
- R-39 July 12, 2019, Dynamic Learning Year-End Report
- R-40 July 25, 2019, Letter from Melanie Bobik to Petitioner
- R-41 September 17, 2019, Marcroft Medical Visit Summary

- R-42 January 23, 2020, Request for Student Aide
- R-43 March 9, 2020, IEP
- R-44 2019-2020 Progress Reports
- R-45 2019-2020 Report Cards
- R-46 2019-2020 School Year Behavior Data
- R-47 December 1, 2020, Reevaluation Planning and Consent
- R-48 January 14, 2021, Occupational Therapy Evaluation
- R-49 January 15, 2021, CST Evaluations
- R-50 January 15, 2021, Speech Evaluation
- R-51 January 27, 2021, IEP
- R-52 2020-2021, Report Cards
- R-53 2020-2021, Behavioral Data
- R-54 Truancy Complaints
- R-55 Melanie Bobik Contact Logs
- R-56 Michele Jenney Case Manger Notes
- R-57 Michele Jenney Emails with Petitioner
- R-58 School Nurse Log
- R-59 2017-2021 Attendance Data
- R-60 Melanie Bobik Resume
- R-61 Michele Jenney Resume
- R-62 Victoria Hill Resume
- R-63 Nicole Szczur Resume
- R-64 Jonathan Price Resume
- R-65 Melanie Bobik Email with Petitioner
- R-66 Victoria Hill Messages with Mother
- R-67 Nicole Szczurs Messages with Parents