



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

DISMISSAL

OAL DKT. NO. EDS 02185-21

AGENCY DKT. NO. 2021-32551

ELIZABETH CITY BOARD OF EDUCATION

Petitioner,

v.

D.B. ON BEHALF OF K.G.,

Respondent.

Amy Pujara, Esq., for Petitioner (DiFrancesco Bateman Kunzman Davis Lehrer & Flaum, PC, attorneys)

D.B., Respondent, pro se

Record Closed: May 6, 2021

Decided: May 6, 2021

BEFORE **KELLY J. KIRK, ALJ:**

STATEMENT OF THE CASE

Petitioner, Elizabeth Board of Education (Board or District) filed a Due Process Petition against respondent, D.B. on behalf of K.G., seeking an Order (1) “requiring K.G. to attend and participate in his program at Deron School or the out-of-district placement deemed appropriate by the CST” and (2) “rejecting Respondent’s demand for a new home

instructor;” and awarding “such other and further relief as the Court deems just and proper.”

PROCEDURAL HISTORY

On or about March 1, 2021, the District filed a Due Process Petition against D.B. on behalf of K.G. No answer was filed by D.B. (Mom). The matter was transmitted by the New Jersey Department of Education (the Department), Office of Special Education Policy and Dispute Resolution, to the Office of Administrative Law (OAL), where it was filed on March 2, 2021. On March 9, 2021, the District filed an application for emergent relief, consisting of a letter brief and Certification of Jose Rodriguez, with one exhibit.

By email dated March 10, 2021, the parties were advised that a telephone prehearing conference had been scheduled for March 17, 2021. The email also stated as follows:

Additionally, it appears from the petition that K.G. is eighteen years old. Accordingly, K.G. must also participate unless [D.B.] submits a power-of-attorney or documentation of guardianship, if any, in advance of the prehearing conference.

No power-of-attorney or documentation of guardianship was submitted in advance. The parties appeared by telephone for the prehearing conference, but K.G. was unable to participate. Mom advised that K.G. was non-verbal and that she had applied for guardianship after receipt of the March 10, 2021 email. Mom further advised that she and K.G. were homeless and that K.G.’s father was not involved in his life. Based upon Mom’s representations, the prehearing conference was adjourned to March 24, 2021 to allow time for Mom to submit written confirmation of her representations and documentation of the guardianship application in advance.

A March 23, 2021 letter from the undersigned to the parties stated in pertinent part the following:

The District’s petition reflects that [D.B.] is the parent of K.G. However, since K.G. is eighteen years old, my March 10, 2021

email advised that he was required to participate in the March 17, 2021 telephone prehearing conference unless [D.B.] submitted a power-of-attorney or documentation of guardianship, if any, in advance of the prehearing conference. However, I did not receive any documentation in advance and during the telephone conference [D.B.] stated that she does not have a power-of-attorney or guardianship. She also stated that K.G., who has autism, is nonverbal and therefore unable to participate. [D.B.] further stated that she had recently applied for guardianship, which may take several months, and that no one else, including K.G.'s father, is expected to seek guardianship.

Request was made that [D.B.] confirm the foregoing in writing so that it could be determined if the matter could proceed, and the telephone prehearing conference was adjourned to March 24, 2021. However, I am not yet in receipt of any correspondence from [D.B.]. Accordingly, so that the telephone prehearing conference may proceed tomorrow, it is requested that [D.B.] confirm via email that the contents of this letter are accurate. Additionally, it is requested that she also confirm via email that she presently has no permanent address for the file.

Mom replied to the email on March 23, 2021 and included the guardianship application and forms. With respect to Item #5 of Form B, the instructions for the guardianship application state:

This section identifies people who may have an interest in the guardianship proceeding and should receive Notice of the action. Fill in the name, address, relationship to the alleged incapacitated person, and age for all those that should receive notice of this action. List all known persons closely related to the alleged incapacitated person (i.e. parents, children, siblings).

Form B, Item #5 of Mom's application reflects only "[D.B.]" in response to "The names, addresses, relationships and ages of the persons most closely related to the alleged incapacitated person (parents, children, siblings)".

The telephone prehearing was held on March 24, 2021, based upon the guardianship application and Mom's representations, including that "I have been the sole caregiver for [K.G.] from his initial evaluation with Dr. Bentley at UMDNJ up to now and

and [sic] I have applied for guardianship but the paperwork hasn't been processed.” Opposition to the Board’s application for emergent relief was due by March 30, 2021 at noon, and oral argument via Zoom was scheduled for March 31, 2021. The hearing was scheduled for May 7, 2021.

On March 29, 2021, Mom filed an email, with attached releases, in opposition to the Board’s application for emergent relief. On March 30, 2021, the parties appeared for oral argument. At that time, Mom confirmed that she did not have a power of attorney or legal guardianship but had filed an application for guardianship. However, Ms. Pujara disclosed that the District had been made aware that K.G.’s father had filed a missing person report for K.G. with the police. As a result of the unexpected potential guardianship issue, oral argument could not be heard, and the District withdrew the application for emergent relief, without prejudice.

On April 6, 2021, the Board submitted to the OAL a proposed Amended Due Process Petition¹, stating that the “enclosed due process petition has been amended to reflect the addition of Respondent K.G.” and that “[g]oing forward, all future correspondence from the Board shall include Respondent K.G.” The letter enclosing the proposed Amended Due Process Petition reflected that “K.G.” was copied via email and regular mail. However, the proposed Amended Due Process Petition did not reflect any contact information for K.G. (Dad), including confirmation of his email address.

FACTUAL DISCUSSION

The Due Process Petition reflects respondent as “D.B. o/b/o K.G.” and alleges that “D.B. is the parent of K.G., an 18-year old male who is currently a special education student in the District.”

¹ Pursuant to N.J.A.C. 6A:14-2.7(i), “[a]fter a petition requesting a due process hearing is submitted to the Office [of Special Education Programs], the petition may be amended only with the consent of the other party, or if an administrative law judge allows the party to amend the petition.” Generally, pleadings may be freely amended when, in the judge’s discretion, an amendment would be in the interest of efficiency, expediency, and would not create undue prejudice. N.J.A.C. 1:1-6.2(a). However, in view of the circumstances detailed herein, amendment of the Due Process Petition is not allowed.

The proposed Amended Due Process Petition reflects respondents as “K.G. and D.B. o/b/o K.G.” and alleges that “K.G. and D.B. are the parents of K.G., an 18-year old male who is currently a special education student in the District.”

The “RELIEF SOUGHT” in the Due Process Petition (and in the proposed Amended Due Process Petition) is as follows:

WHEREFORE, Petitioner, Elizabeth Board of Education, respectfully requests the Court to:

- (1) Enter an Order requiring K.G. to attend and participate in his program at Deron School or the out-of-district placement deemed appropriate by the CST;
- (2) Enter an Order rejecting Respondent’s demand for a new home instructor;
- (3) Award Petitioner such other and further relief as the Court deems just and proper.

LEGAL ANALYSIS AND CONCLUSIONS

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482, ensures that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and ensures that the rights of children with disabilities and parents of such children are protected. 20 U.S.C. § 1400(d)(1)(A), (B); N.J.A.C. 6A:14-1.1. A “child with a disability” means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A).

States qualifying for federal funds under the IDEA must assure all children with disabilities the right to a FAPE. 20 U.S.C. § 1412(a)(1); Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Each district board of education is responsible for providing a system of free, appropriate special education and related services. 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-school, or secondary-school education in the state involved; and (D) are provided in conformity with the individualized education program required under 20 U.S.C. § 1414(d). 20 U.S.C. § 1401(9); Rowley, 458 U.S. 176. 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. § 1412(a)(1)(A), (B).

Regarding the transfer of parental rights at the age of majority, the IDEA regulations state:

(a) General. A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law)—

(1)

(i) The public agency must provide any notice required by this part to both the child and the parents; and

(ii) All rights accorded to parents under Part B of the Act transfer to the child;

(2) All rights accorded to parents under Part B of the Act transfer to children who are incarcerated in an adult or juvenile, State or local correctional institution; and

(3) Whenever a State provides for the transfer of rights under this part pursuant to paragraph (a)(1) or (a)(2) of this section, the agency must notify the child and the parents of the transfer of rights.

(b) Special rule. A State must establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child's eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.

[34 CFR § 300.520]

In New Jersey, except when a parent has obtained legal guardianship, all rights under N.J.A.C. 6A:14 (Special Education) transfer to the student upon attainment of the eighteen birthday. N.J.A.C. 6A:14-2.3(m). The district board of education must provide the adult student and the parent with written notice that the rights under N.J.A.C. 6A:14 have transferred to the adult student. Ibid. The adult student must be given a copy of the special education rules (N.J.A.C. 6A:14), the due process hearing rules (N.J.A.C. 1:6A), and the procedural safeguards statement published by the Department of Education. Ibid. An adult student must be given notice and participate in meetings. N.J.A.C. 6A:14-2.3(m)(1). The district board of education or the adult student may invite the parent to participate in meetings regarding the identification, evaluation, classification, or educational placement of, or the provision of a free, appropriate public education to, the adult student. Ibid. Consent to conduct an initial evaluation or reevaluation, for initial implementation of a special education program and related services, or for release of records of an adult student must be obtained from the adult student. N.J.A.C. 6A:14-2.3(m)(2). The district board of education must provide any notice required under this chapter to the adult student and the parent. N.J.A.C. 6A:14-2.3(m)(3). When there is a disagreement regarding the identification, evaluation, classification, or educational placement of, or the provision of a FAPE to an adult student, the adult student may request mediation or a due process hearing or authorize, in writing, his or her parent to request mediation or a due process hearing and, while participating in such proceedings, to make educational decisions on his or her behalf. N.J.A.C. 6A:14-2.3(m)(4).

While there is no dispute that K.G. has a disability, he has not been determined to be incompetent, and I **CONCLUDE** that parental rights transferred to K.G. when he attained the age of eighteen. Since the Due Process Petition reflects the respondent as “D.B. o/b/o K.G.”, it appears that school records reflected D.B. as K.G.’s parent and that prior interactions had been with Mom. However, K.G. is now an adult student, and Mom does not have a power-of-attorney or written authorization to represent him, nor has she obtained legal guardianship of K.G. While K.G. may be non-verbal and disabled, whether his disability requires a legal guardian has not yet been determined by the Superior Court of New Jersey. Therefore only K.G. – who was not named as a party or served with the Due Process Petition – has authority to legally make decisions on his behalf. Further, although Mom represented that she has a pending guardianship application, given the circumstances

that have arisen with Dad, it cannot at this juncture simply be assumed for purposes of this Due Process Petition that Mom will obtain guardianship. I therefore further **CONCLUDE** that K.G. should have been a respondent and the Due Process Petition is defective.

Additionally, the Due Process Petition alleges, inter alia, that “[t]he program and placement at Deron School was designed to provide K.G. with a free appropriate public education (“FAPE”);” that “Respondent did not provide any information to the District regarding how the program set forth in the IEP did not offer FAPE;” that “Respondent’s decision to withhold instruction to K.G. impedes upon the Board’s constitutional mandate to provide a Thorough and Efficient Education and IDEA requirements to provide K.G. with a Free, Appropriate Public Education;” and that “Respondent’s refusal to consent to any proposed placement compromises the Board’s ability to provide K.G. with a FAPE in the least restrictive environment.” However, the Due Process Petition does not seek an order stating that the Deron School or other out-of-district placement would provide a FAPE or an order amending the IEP to reflect a specific placement. Rather, the Due Process Petition seeks an order “requiring K.G. to attend and participate in his program at Deron School or the out-of-district placement deemed appropriate by the CST”.

Every parent, guardian or other person having custody and control of a child between the ages of six and sixteen years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school. N.J.S.A. 18A:38-25. K.G. is eighteen years old. Since K.G. is not a child between the ages of six and sixteen years, and has reached the age of majority in New Jersey, neither K.G. nor D.B. would be bound by compulsory education laws. Moreover, even if applicable, a parent or guardian’s failure to comply with compulsory education laws is a disorderly person offense not adjudicated in this forum. Accordingly, I **CONCLUDE** that even absent the adult student/guardianship issue, “ordering him to attend and participate” would exceed the scope of my authority.

In view of the foregoing, I **CONCLUDE** that the Due Process Petition should be dismissed.

ORDER

It is hereby **ORDERED** that the District's Due Process Petition 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 (2020) 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 (2020).

May 6, 2021



DATE

KELLY J. KIRK, ALJ

Date Received at Agency

Date Mailed to Parties:
db