State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 00491-17

AGENCY DKT. NO. 2017-25390

J.T. ON BEHALF OF G.T.,

Petitioner,

v.

DOVER TOWN BOARD OF EDUCATION,

Respondent.

_____

J.T., pro se, petitioner

Derlys Maria Gutierrez, Esq., for respondent (Adams, Gutierrez & Lattiboudere, attorneys)

Record Closed: September 26, 2017 Decided: October 5, 2017

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

STATEMENT OF THE CASE

Petitioner, J.T., on behalf of her son, G.T., filed for a due-process hearing against respondent, Dover Town Board of Education (District), requesting compensatory education.

PROCEDURAL HISTORY

On November 14, 2016, petitioner's request for due process dated November 7, 2016 (2016 Petition) was filed with the Office of Special Education. The Office of Special Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on January 12, 2017. The District's answer and affirmative defenses were filed with the OAL on January 27, 2017. The District filed a motion to dismiss the due-process petition on May 9, 2017. Petitioner filed opposition on June 9, 2017, and the District filed a reply on June 26, 2017. A telephone conference was held on August 7, 2017, and the District contacted the Office of Special Education to obtain a copy of petitioner's 2015 request for due process, dated April 15, 2015 (2015 Petition). On September 21, 2017, the District withdrew its prior motion and filed a new motion to dismiss, accompanied by a brief and certification of counsel with two exhibits. Petitioner filed opposition on September 21, 2017, and further opposition, with attachments, on September 26, 2017. The District filed a reply to the opposition on September 26, 2017.

LEGAL ANALYSIS AND CONCLUSION

The Board filed a motion to dismiss. N.J.A.C. 6A:3-1.10 provides that at any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason. Although the Board filed an answer and affirmative defenses after transmittal of the pleadings to the OAL, pursuant to N.J.A.C. 1:1-12.1(a), where a party seeks an order of a judge, the party shall apply by motion, stating the grounds upon with the motion is made and the relief or order being sought. N.J.A.C. 1:1-12.1(a)(2). The judge may render any ruling or order necessary to decide any matter presented which is within the jurisdiction of the transmitting agency or the agency conducting the hearing. N.J.A.C. 1:1-14.6(h). Additionally, the judge "may take such other actions as are necessary for the proper, expeditious and fair conduct of the hearing or other proceeding, development of the record and rendering of a decision."

N.J.A.C. 1:1-14.6(p). Accordingly, as a result of the initial telephone conference and per the Prehearing Order, dated April 12, 2017, the Board was permitted to file a motion to dismiss.

Review of the Board's motion reflects that it includes a certification with exhibits consisting of: (A) the 2015 Petition; and (B) a Notice of Agreement, dated July 9, 2015 (Agreement). 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. N.J.A.C. 1:1-1.3(a). New Jersey Court Rule 4:6-2 allows, in lieu of an answer, a motion for, *inter alia*, lack of jurisdiction and failure to state a claim upon which relief can be granted. However, if, on such motion to dismiss, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion." R. 4:6-2. Given the inclusion of the certification and exhibits, the respondent's motion is akin to a motion for summary judgment. Further, petitioner's 2016 Petition requests compensatory-education services for the period when G.T. was enrolled in the District's school, alleging that his placement was improper and that multiple suspensions as a result caused him to not make educational progress. Thus, accepting petitioner's factual allegations as true, the 2016 Petition does not fail to advance a cause of action. Likewise, absent the signed Agreement, such cause of action would otherwise be within the jurisdiction of the Commissioner and the OAL.

When required in individual cases, the administrative law judge at any time of the proceeding may convert any form of proceeding into another, whether more or less formal, or whether in-person or by telephone. N.J.A.C. 1:1-14.6(d). Accordingly, the matter is hereby converted to a motion for summary decision, and is governed by N.J.A.C. 1:1-12.5. Pursuant to N.J.A.C. 1:1-12.5(b), summary decision may be "rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Further, "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in

an evidentiary proceeding." Ibid. This standard is substantially similar to that governing a civil motion under R. 4:46-2 for summary judgment. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010); Contini v. Bd. of Educ. of Newark, Agreement, 121 (App. Div. 1995).

In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court set forth the standard governing a motion for summary judgment:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

In the 2015 Petition, petitioner's description of the nature of the problem and any facts related to the problem was as follows:

> The Dover School District has not provided the proper education assistance needed for my son to get the proper education. My son [G.T.] has been constantly being removed out of the classroom and kept in the office most of the day and not getting the proper learning needed. When Aide is absent, school fails to provide someone to be with him during s[c]hool hours, instead the classroom aide watches him from far distance. There is no social skill program that my son would benefit and his behavior has not been controlled by the school. I requested from school in writing for daily email notification of son behavior by the teacher. It's been more than a month and teacher has not provided no daily behavior modification. School is not equipped with the necessary program for my son to get a proper education. I have requested by email for what the changes in the behavior modification the school has done since November 2014 when my son was suicidal on school ground. As of today, never received one. On April 2, 2015 my son was trying to hurt himself, they removed him for classroom (which I agree to this point). My son didn't talk to the caseworker assigned and school decided to just bring him to after school program. I've tried to work with the

> school district, but my son instead of improving has not changed instead the behavior are escalating. Where was the aide for him when he was trying to hurt himself, his aide was absent and no aide was provided for him. I've requested that my son be placed out of district, not getting any cooperation from the school. The request for school to see where my son stand in academically has not been accessed.

In the 2015 Petition, petitioner's description of how the problem could be resolved was as follows:

> Requesting that an independent evaluation be done in the learning and a behavioral assessment of my son [G.T.]. I'm also requesting an out of district placement in a program that would provide the necessary program for my son to be able to get a proper education. I'm also requesting that my son by provided a ESY program in a out of district program that would provide his needs.

Thereafter, the District and petitioner signed a Notice of Agreement (Agreement) at the mediation conference on July 9, 2015, which Agreement stated:

> The parties agree to the following:
>
> 1) The district agrees to place the student in the Windsor Learning Center for the 2015 summer extended school year and the 2015–2016 school year. The student has been attending the Windsor Learning Center since July 6, 2015 pursuant to an IEP developed on June 18, 2015.
>
> 2) The district agrees to conduct an independent psychiatric evaluation no later than September 30, 2015.
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> 3) By this agreement, the parties agree that the student remains eligible for special education and related services.
>
> 4) The parties agree that the reevaluation eligibility date is July 9, 2015.
>
> 5) The district agrees to contact Windsor Learning Center to facilitate a meeting with the school director to discuss the extension of the school behavior intervention plan to the home/family environment no later than July 17, 2015.

> 6) The parent agrees that by this agreement, she is withdrawing the request for independent evaluation[n] dated April 15, 2015.

However, approximately sixteen months later, petitioner filed the 2016 Petition, reflecting a description of the nature of the problem and any facts related to the problem as follows:

> Requesting for Compensatory Educational Services for school time loss while my son was improperly placed at right setting which caused him to be constantly removed from class—in school suspension and suspension. It caused him not to progress in learning—delayed/stopped and caused damage to him.

Further, in the 2016 Petition, petitioner's description of how the problem could be resolved was: "Requesting for Compensatory Educational Services after school tutoring x3 weekly in the subject which he is delayed reading/writing and math."

Respondent's motion asserts that petitioner was obligated by law to have raised all claims relating to G.T.'s enrollment in District (prior to his enrollment at Windsor), and that failure to do so renders any such claims barred by the entire controversy doctrine. Conversely, J.T. argues that her compensatory-education claims are not barred, relying upon discussions with the mediator and special-education ombudsman. As noted on each page of the Agreement, pursuant to N.J.A.C. 6A:14-2.6(d)(7), all discussions that occurred during the mediation process shall remain confidential and shall not be used as evidence in any subsequent due-process hearing or civil proceeding. Accordingly, such discussions are not considered herein.

With respect to respondent's argument,

> [t]he [entire controversy doctrine] requires that a litigant assert in one action all related claims against all parties or be precluded from bringing a second action. Melikian v. Corradetti, 791 F.2d 274, 279 (3d Cir.), cert. denied, 498 U.S. 821, 112 L. Ed. 2d 43, 111 S. Ct. 69, reh'g denied, 498 U.S. 1017, 112 L. Ed. 2d 598, 111 S. Ct. 594 (1990). Accordingly, all claims which arise out of the same common

> nucleus of operative facts must be resolved in a single action. Bennun v. Rutgers State Univ., 941 F.2d 154, 165 (3d Cir.), cert. denied, 502 U.S. 1066, 117 L. Ed. 2d 124, 112 S. Ct. 956 (1992). . . . The ECD precludes not only claims that were brought in a previous litigation, but also related claims that could have been litigated in that previous action. See Bernardsville Quarry v. Borough of Bernardsville, 929 F.2d 927, 930 (3d Cir.), cert. denied, 502 U.S. 861, 116 L. Ed. 2d 144, 112 S. Ct. 182 (1991); Printing Mart-Morristown v. Rosenthal, 650 F. Supp. 1444, 1447 (D.N.J. 1987), aff'd, 856 F.2d 184 (3d Cir. 1988).
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> [D.K. v. Roseland Bd. of Educ., 903 F. Supp. 797, 800 (D.N.J. 1995).]

"If parties or persons will, after final judgment is entered, be likely to have to engage in additional litigation to conclusively dispose of their respective bundles of rights and liabilities that derive from a single transaction or related series of transactions, the omitted components of the dispute or controversy must be regarded as constituting an element of one mandatory unit of litigation." Id. at 800 (citing Ditrolio v. Antiles, 142 N.J. 253, 268 (1995)). Further, New Jersey has a "strong public policy in favor of the settlement of litigation." Gere v. Louis, 209 N.J. 486, 500 (2012). In this regard, in J.H.R. v. Board of Education of East Brunswick, 308 N.J. Super. 100, 118 n.8 (App. Div. 1998) (citations omitted), the court stated:

> . . . New Jersey's strong policy commitment to the "Entire Controversy Doctrine" requir[es] resolution of *all* issues in a single litigation. Cogdell v. Hospital Center at Orange, 116 N.J. 7, 560 A.2d 1169 (1989). Not only have the federal courts recognized the doctrine as part of the substantive law of this State, Rycoline Products, Inc. v. C & W Unlimited, 109 F.3d 883 (3d. Cir.1997), but in an action brought pursuant to 20 U.S.C.A. § 1415(e)(2) (1986), *amended by* 20 U.S.C.A. § 1415(i)(2)(A) (Supp. 1997), the District Court held that the Entire Controversy Doctrine was applicable to a proceeding brought pursuant to 20 U.S.C.A. § 1415(b) (1986), *amended by* 20 U.S.C.A. § 1415(b), § 1415(e), § 1415(f) (Supp.1997). D. K. v. Roseland Bd. of Educ., 903 F.Supp. 797 (D.N.J.1995).

The 2015 Petition did not specifically reference "compensatory education," but any claim for compensatory education for the 2014–2015 school year would be related to petitioner's claims that the District had not provided G.T. with a free and appropriate public education in 2014–2015 and petitioner's request for an out-of-district placement. Thus, whether omitted or included in the 2015 Petition, it would be regarded as and constitute a mandatory unit of the 2015 Petition. Further, the executed Agreement resolved the 2015 Petition, which included claims of denial of a free and appropriate public education and a request for an out-of-district placement. Thus, the 2016 Petition would be additional litigation to dispose of the rights and liabilities of G.T.'s 2014–2015 school year and individualized education plan (IEP), and contrary to applicable law.

No decision is made herein with respect to the merits of the claims asserted in the 2016 Petition or the merits of other allegations raised in petitioner's opposition to the motion, including, but not limited to, least restrictive environment, noncompliance with an IEP, and out-of-district placement. Rather, I **CONCLUDE** only that New Jersey's policy favoring settlements and the entire controversy doctrine bar the 2016 Petition, as the 2016 Petition relates to claims petitioner knew or should have known at the time she filed her 2015 Petition, and at the time she signed the Agreement.

ORDER

It is hereby **ORDERED** that respondent's motion is **GRANTED**, and petitioner's 2016 Petition is dismissed.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2017). 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 Programs.

October 5, 2017

DATE

KELLY J. KIRK, ALJ

10/5/17

Date Received at Agency:

Date Sent to Parties:

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