State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION GRANTING

MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDS 2269-16

AGENCY DKT. NO. 2016 23919

A.P. ON BEHALF OF M.G.,

Petitioner,

v.

CAMDEN CITY BOARD

OF EDUCATION,

Respondent.

_____

Peter Kober, Esq., for petitioner (Kober Law Firm, attorneys)

Michael Goldman, Esq., for respondent (Florio, Perrucci, Steinhardt and Fader, LLC, attorneys)

Record Closed: May 11, 2016 Decided: May 16, 2016

BEFORE **LISA JAMES-BEAVERS,** ALJ:

STATEMENT OF THE CASE

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§1400 to 1482. Petitioner A.P. seeks a determination that her child, M.G.'s placement at Creative Arts High School (Creative Arts) in the Camden City School District (the District) does not provide him with a free appropriate public education

(FAPE) and seeks an out-of-district placement at Y.A.L.E. School in Audubon, New Jersey.

PROCEDURAL HISTORY

Petitioner filed a complaint for due process with the Office of Special Education Programs (OSEP) on January 15, 2016. On February 16, 2016, the OSEP filed the complaint with the Office of Administrative Law. The parties appeared for a first hearing before Judge John Futey on March 3, 2016. Petitioner's counsel did not appear with petitioner. The settlement conference proceeded with petitioner present and petitioner's counsel participating by telephone. Respondent Camden City Board of Education (Board) filed an answer on March 10, 2016. On March 16, 2016, the Board filed a motion asking that this tribunal dismiss the complaint or award sanctions as a result of petitioner's counsel's failure to appear at the settlement conference before Judge John Futey on March 3, 2016. On April 15, 2016, I denied the motion to dismiss, but granted the motion for sanctions and invited Mr. Goldman to submit a certification as to his attorney fees.

The Board set forth in its answer that A.P. prematurely filed the due process petition and did not give the Board an opportunity to address M.G.'s needs as they arose. I received Mr. Goldman's certification of fees and expenses on May 4, 2016. I received Mr. Kober's response to same on May 9, 2016. On May 2, 2016, the Board filed this Motion for Summary Decision arguing that: 1) the District provided M.G. a FAPE; 2) the District properly monitored M.G. and modified his IEP for the 2016-17 school year based on his performance; and 3) by changing the IEP in April 2016, the issues in the due process petition pertaining to M.G.'s education are now moot. On May 6, 2016, Mr. Kober faxed a Statement in Lieu of Brief in response to the Motion for Summary Decision; however, same was not stamped into the office until May 9, 2016. Therein, he states that petitioner agrees with the statement of undisputed facts, except the date in Fact Number Twelve should be April 19, 2016, rather than 2015. With regard to the legal arguments, he sets forth:

> Point One – Petitioner does not dispute respondent's argument that respondent provided the minor child with a FAPE for the 2015-2016 School Year.
>
> Point Two – Petitioner does not dispute that the District complied with the procedural requirements of IDEA for the 2015-2016 school year.
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> Point Three – Petitioner does not dispute that as a result of the change in the minor child's IEP for the 2016-2017 School Year, this action is moot for no longer presenting a justiciable controversy.

Mr. Kober presented a Stipulation of Settlement with the Statement in Lieu of Brief. Mr. Kober signed the Stipulation, but his client did not sign, nor was there a space for his client to sign. A hearing was scheduled for May 11 and 18, 2016. I advised the parties to appear for the hearing on May 11, 2016. Mr. Kober appeared with petitioner and Mr. Goldman appeared with the Director of Special Services. On that date, after conferring with counsel in chambers and being assured that the petitioner no longer wished to pursue the due process petition, I went on the record. First, regarding the sanctions, I agreed with Mr. Kober that the Board's attorney would have had to prepare for and attend the settlement conference whether he appeared or not, and imposed a flat sanction of $500 toward the preparation of the motion. Having read petitioner's Statement in Lieu of Brief agreeing to the arguments in the Board's motion, I then placed A.P. under oath. She testified under questioning from her attorney that she understood that she was giving up her right to a hearing and agreeing that the Board provided an "adequate" education to M.G. in 2015-2016 and that the placement of M.G. in an Autism class in the District for the 2016-2017 school year according to M.G.'s April 19, 2016 IEP would resolve the dispute. She testified that she and her attorney had discussed this in her attorney's office at some point prior to the hearing. In answer to my questions, she testified that although her first language was Spanish, she understood everything that I said and all of the questions that her attorney had asked her. However, when I asked her if she was then fine with proceeding without an interpreter, she answered that she would like an interpreter. She had already

participated in the settlement conference and the hearing up until that point without an interpreter stating that she had understood. In reviewing the IEPs, there is no interpreter listed on the attendance sheet but petitioner's sister is listed as attending. The IEP notes several comments that she made.

On May 11, 2016, I granted the motion for summary decision and advised I would send an Order. At no point from the filing of the petition did petitioner ever request an interpreter. The issue came up during the April 22, 2016, telephone conference and I advised petitioner's attorney that if petitioner wanted one, he would have to put the request for an interpreter in writing. To my knowledge, no such request was ever made.

STATEMENT OF FACTS

Petitioner A.P. is the parent and legal guardian of M.G., a special education student who has been diagnosed with Autism. M.G. attends Creative Arts Morgan Village Academy (Creative Arts) within the Camden City School District (the District). This matter arises out of A.P.'s claim that the Board's placement of M.G. at Creative Arts fails to provide M.G. with a free appropriate public education (FAPE).

M.G. is an eighth grade student at Creative Arts. Creative Arts operates a kindergarten through twelfth grade school for the residents of the City of Camden. On October 30, 2015, the Board implemented an IEP for M.G. based on four evaluations.

The first evaluation was an Occupational Evaluation, after which the evaluator concluded that M.G. was not a candidate for occupational therapy because he did not demonstrate delays in fine and visual/perceptual motor skills.

The second was an Educational Assessment, in which the evaluator found that M.G.'s scores fell in the below average range with relative strength in Reading and weaknesses in Math and Writing. At this evaluation, A.P. expressed a desire for M.G.

to be placed in a special school for Autism. Id. Despite acknowledging A.P.'s desire, the evaluator did not recommend that M.G. be placed in a special school for Autism.

The third evaluation was a Social Evaluation, in which the evaluator found that M.G. is classified as Autistic and was in a Learning Disabilities Mild to Moderate class. Despite acknowledging A.P's desire to place M.G. in a Special School for Autism, this evaluator did not recommend placement in a special school.

The fourth was a Psychological Evaluation. During this evaluation, the evaluator found that M.G. "has a cognitive functioning significantly below average within the Very Delayed Range." The evaluator also found that M.G. has significant problems with Anxiety, Interpersonal Relations, and Attention problems. However, this evaluator also did not recommend that M.G. be placed in a special school for Autism.

Petitioner participated in the IEP meeting on October 30, 2015, as evidenced by her signature on the attendance sheet. During the IEP meeting, petitioner expressed a desire for M.G. to do well in school and said she wanted M.G. in the best educational environment to serve his needs. Petitioner stated that she wanted M.G. to attend Y.A.L.E. School because she felt that school would best meet his needs. She expressed that M.G.'s needs were not being met at Creative Arts and that he should receive an out-of-district placement. However, the Child Study Team recommended continuing M.G.'s placement in a Self-Contained Learning Disabilities Mild to Moderate Class. Despite this recommendation, at the IEP meeting, A.P. stated that she would continue to pursue other educational options for M.G. even if she had to seek a remedy via legal means.

The October 30, 2015, IEP provided that M.G. would remain in a Learning Disability Mild to Moderate class to improve M.G.'s academic skills. In the following two marking periods, M.G. received poor grades. On January 15, 2016, petitioner filed a due process petition, claiming that Creative Arts does not provide M.G. a FAPE because he is not getting the required support and an appropriate school setting would

be one specifically tailored to meet the needs of students with Autism. In this petition, A.P. is seeking payment of tuition and costs for enrollment at Y.A.L.E. School because it provides the educational setting and specialized instruction specifically for students with Autism. On April 19, 2016, the District conducted M.G.'s annual IEP review and recommended that M.G. be placed in an Autistic Program for the 2016-17 school year.

LEGAL DISCUSSION

A. Summary Decision Standard

Under N.J.A.C. 1:1-12.5(b), a "motion for summary decision shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b). A 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." Id. A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995). Petitioner agrees that there are no facts in dispute and that, therefore, the case is appropriate for summary decision.

B. Whether the District Deprived M.G. of a FAPE by Placing Him in a Learning Disabilities Mild to Moderate Classroom

The primary purpose of the IDEA, 20 U.S.C. 1400 to 1487, is to ensure that all disabled children will be provided a FAPE. 20 U.S.C. 1400(d)(1)(A). New Jersey has also enacted legislation and adopted regulations that assure all disabled children the right to a FAPE. See N.J.S.A. 18A:46-1 to -46. In the IDEA, a "child with a disability" is defined as a child "(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness),

serious emotional disturbance (referred to in this title as "emotional disturbance"), orthopedic impairments, **autism**, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services." 20 U.S.C. 1401(3)(a) (emphasis added).

Under the IDEA, a FAPE requires 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 IEP required under Sec. 614." 20 U.S.C. 1401(9). "Special education" within the meaning of a FAPE is "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings . . . ." 20 U.S.C. 1401(29).

In Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the Court determined that, although the IDEA mandates that a state provide a certain level of education, it does not require states to provide services that will maximize a disabled child's potential. Rowley, supra, 458 U.S. at 201. The Court stated:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child . . . The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child to benefit from special education." We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

> [Rowley, supra, 458 U.S. at 200-01, 102 S.Ct. at 3048, 73 L.Ed.2d at 708 (citations omitted).]

The New Jersey Department of Education has adopted the federal standard set forth in Rowley for determining whether a child is receiving a FAPE. Lascari, supra, 116 N.J. at 47-48. The Supreme Court of New Jersey explained that a FAPE guarantees a basic floor of opportunity "sufficient to confer some educational benefit upon the handicapped child." Id. at 48; Rowley, supra, 458 U.S. at 200-01.

A FAPE is provided through an IEP. See 20 U.S.C.S. 1412(a)(4). The IEP is the "'centerpiece' of the IDEA's system for delivering education to disabled children." D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010). "An IEP consists of a specific statement of a student's present abilities, goals for improvement of the student's abilities, services designed to meet those goals, and a timetable for reaching the goals by way of the services." Holmes v. Millcreek Twp. Sch. Dist., 205 F.3d 583, 589 (3d Cir. 2000) (citing 20 U.S.C. 1401(a)(20)).

The issue of whether an IEP is appropriate is a question of fact. S.H. v. State-Operated Sch. Dist., 336 F.3d 260, 271 (3d Cir. 2003). In evaluating the adequacy of an IEP, the focus should be on the IEP actually offered and not on what could have been provided. Lascari v. Bd. of Educ., 116 N.J. 30, 46 (1989). Here, petitioner claimed that M.G. did not and cannot receive a FAPE at Creative Arts. A.P.'s due process petition claimed that Creative Arts cannot provide M.G. a FAPE because 1) M.G. does not get the support he requires; 2) his student peers are not typically placed; 3) the schoolwork is above his learning capacity; 4) the curriculum is not at his learning level; and 5) the daily school environment is not appropriate to his needs. Nonetheless, petitioner has responded to the Motion for Summary Decision that she does not dispute that the Board provided M.G. a FAPE for the 2015-2016 school year. Therefore, I **CONCLUDE** that summary decision is appropriate on that claim.

C. Whether the Board Complied with the Procedural Requirements of the IDEA

The IDEA "allows a party to challenge an IEP because of procedural flaws in the IEP's formulation as well as 'on substantive grounds based on a determination of whether the child received a [FAPE].'" Van Duyn v. Baker Sch. Dist. 5J, 481 F.3d 770, 779 (9th Cir. Or. 2007); 20 U.S.C. 1415(f)(3)(E)(i). The child's parents or "the local educational authority may bring a complaint to the state educational agency about any matter relating to the IEP or the child's free appropriate public education." Id. at 776; 20 U.S.C.S. 1415(b)(6), (7). If the complaint is not resolved, a due process hearing is held to determine "whether the child received a free appropriate public education." Id; 20 U.S.C.S. 1415(f)(3)(E)(i). After the due process hearing and any other administrative remedies, "an aggrieved party may file a civil action in federal district court." Id; 20 U.S.C.S. 1415(i)(2)(A).

M.G. is Autistic and qualifies as a student with a disability under the IDEA. As a student with a disability, M.G. is entitled to a FAPE provided at the public expense. To receive a FAPE, M.G. must be provided access to specialized instruction and related services individually designed to provide him an educational benefit. This benefit must be meaningful in light of M.G.'s potential, but does not have to be the optimal level of services he could receive.

There does not appear to be any procedural challenge to the IEP in the due process petition. A.P. does not allege that she was not informed of the IEP meetings or that the IEP team was insufficient. Also, the IEP appears to have been reviewed at least annually. Therefore, because there is no procedural challenge to the IEP and petitioner did not dispute that a FAPE was provided, I **CONCLUDE** summary decision on this issue is appropriate.

D. Whether the issues in the Due Process Petition are moot because the District changed M.G.'s IEP to place him in a Special Autism Class

The Board claims that this case is moot because the new IEP from April 19, 2016, places M.G. in a Special Autism Class at Creative Arts.

The Constitution limits the judiciary to the adjudication of actual cases and controversies. U.S. CONST. Art. III, § 2. "'[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 216 (3d Cir. 2003) (citing Powell v. McCormack, 395 U.S. 486, 496, 23 L.Ed. 491, 89 S.Ct. 1944 (1969)). "The court's ability to grant effective relief lies at the heart of the mootness doctrine." Id. (citation omitted).

However, one exception to the mootness doctrine occurs when the issue is "capable of repetition, yet evading review." Weinstein v. Bradford, 423 U.S. 147, 149, 46 L.Ed.2d 350, 96 S.Ct. 347 (1975)(per curiam). This exception is limited to when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." Id. Conduct is capable of repetition if there is a reasonable expectation or a demonstrated probability that the same controversy will recur. Honig v. Doe, 484 U.S. 305 (1988).

In Rowley, the Supreme Court upheld the lower court's decision that this exception to the mootness doctrine applied to allow a disabled child to avoid dismissal of the case. Rowley, supra, 458 U.S. 176 (1982). The school district argued that the challenged IEP, which was created for the 1978-1979 school year, was no longer an issue because that year passed, thereby rendering the case moot. Id. at 186, fn. 9. The Court disagreed on the grounds that:

> [j]udicial review invariably takes more than nine months to complete, not to mention the time consumed during the preceding state administrative hearings. The District Court thus correctly ruled that it retained jurisdiction to grant relief because the alleged deficiencies in the IEP were capable of repetition as to the parties before it yet evading review.

[Id.]

Here, petitioner claims that Creative Arts cannot provide M.G. a FAPE. Petitioner is seeking to have the District pay for M.G. to attend a private school with specialized instruction tailored to meet the needs of Autistic students. The Board claims this matter is moot because the April 2016 IEP places M.G. in a Special Autism Class.

Although petitioner has agreed that the case is moot for no longer presenting a justiciable controversy, I disagree. The relief requested in this case was tuition for enrollment in a private school. Thus, the Court would have been able to grant relief if it believes petitioner's claim that Creative Arts did not and cannot provide a FAPE. This matter also likely falls into the exception to the mootness doctrine because it is capable of repetition yet evading review. A new IEP has to be created each year. If the creation of a new IEP rendered challenges to past IEPs moot then an IEP would rarely be challenged because litigation may take longer than one year. I **CONCLUDE** that summary decision is not appropriate on the issue of mootness and must be denied on that basis.

CONCLUSION

Based on the petitioner's agreement that M.G. was provided a FAPE for the 2015-2016 school year and that she is satisfied with the new IEP placing M.G. in the Autistic class, I **CONCLUDE** that the Board has proven that there are no genuine issues of material fact in dispute and the Board is entitled to prevail as a matter of law.

ORDER

I **ORDER** that the Board's Motion for Summary Decision is hereby **GRANTED** and petitioner's due process petition is hereby **DISMISSED WITH PREJUDICE.** Although petitioner has signed the new April 2016 IEP placing M.G. in the Autistic class, the present petition did not challenge that IEP and thus, her rights to challenge the appropriateness of that IEP in the future are not affected by this decision.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2015) 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.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2015). 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.

May 16, 2016
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency

Date Mailed to Parties:

cmo