State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 08677-16

AGY REF NO. 2016/24293

H.L. and J.L o/b/o V.L.,

Petitioners,

v.

MARLBORO TOWNSHIP BOARD OF EDUCATION,

Respondent.

_____

Michael I. Inzelbuch, Esq., for Petitioners

Robin S. Ballard, Esq., for Respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: November 14, 2016 Decided: November 28, 2016

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a request for a due process petition with the Office of Special Education Programs, New Jersey Department of Education (NJDOE) on April 12, 2016. Respondent challenged the sufficiency of the Petitioners' request for a due process hearing, which was filed with NJDOE on April 15, 2016.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13, to the Office of Administrative Law (OAL), where it was filed on June 13, 2016.

JoAnn LaSala Candido, ALAJ, issued a decision, dated April 19, 2016, wherein she concluded that Petitioners' due process petition was sufficient.

A prehearing conference was held on June 22, 2016, and a prehearing order was entered by the undersigned on June 24, 2016.

Respondent filed a notice of motion for summary decision on October 19, 2016. Petitioners filed their response thereto on November 3, 2016. Respondent filed its response on November 14, 2016.

FINDINGS OF FACT

1. Respondent operates the Marlboro Township Public Schools, a school district that provides educational services to students through grade eight.
2. V.L. is a resident of Marlboro and entitled to educational services from Respondent.
3. V.L. is currently in ninth grade and enrolled at the Lewis School in Princeton, New Jersey.
4. From first grade through seventh grade V.L. attended the Marlboro Township Public Schools.
5. Petitioners privately placed V.L. at the Lewis School for eighth grade.
6. V.L. was found eligible for special education and related services through the Individuals with Disabilities Education Act (IDEA) under the category of Specific Learning Disability.
7. At the conclusion of seventh grade V.L. remained eligible for special education.

8. During his tenure at the Marlboro Township Public Schools V.L. received specialized instruction and other supports through her Individualized Education Programs (IEPs).

9. Petitioners did not request due process during this time period.

10. An IEP was proposed for V.L. for the 2015-2016 academic year on June 18, 2016.

11. Written notice of the proposed IEP for V.L. was sent to Petitioners no later than June 24, 2015.

12. At the IEP meeting Petitioners expressed concerns about V.L. The concerns were documented in the IEP.

13. Petitioners requested that V.L. be placed in general educational setting with supports for reading and math, instead of the resource center as recommended in the IEP.

14. Petitioners sent a letter to Respondent on June 25, 2015, requesting V.L.'s records be forwarded to the Lewis School.

15. Mr. Klein, Respondent's Director of Special Education, responded by letter on July 2, 2015, declining to send V.L.'s records to the Lewis School, and further advising Petitioners they could request a copy of V.L.'s records.

16. Petitioners requested V.L.'s records on July 12, 2015.

17. Petitioners did not reject the IEP for the 2015-2016 academic year.

18. Petitioners signed a contract enrolling V.L. in the Lewis School on July 9, 2015.

19. Petitioners did not notify Respondent that they intended to make a unilateral placement in the Lewis School, and seek reimbursement for the costs thereof, until August 12, 2015, via correspondence from their counsel.

LEGAL ANALYSIS AND CONCLUSION

Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

In the instant matter there is no dispute as to material facts and the matter is ripe for summary decision.

Individuals with Disabilities Education Act

Federal funding of state special education programs is contingent upon the states providing a "free and appropriate education" (FAPE) to all disabled children. 20 U.S.C.A. §1412. The Individuals with Disabilities Act (IDEA) is the vehicle Congress has chosen to ensure that states follow this mandate. 20 U.S.C.A. §§ 1400 et seq. "[T]he IDEA specifies that the education the states provide to these children 'specially [be] 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.'" D.S. v.

Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010) (citations omitted). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C.A. § 1401(9); N.J.A.C. 6A:14-1.1(d). 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.A. §1412(a)(1)(A), (B). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

New Jersey follows the federal standard that the education offered "must be 'sufficient to confer some educational benefit' upon the child." Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 47 (1989) (citations omitted). The IDEA does not require that a school district "maximize the potential" of the student but requires a school district to provide a "basic floor of opportunity." Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200, 102 S. Ct. 3034, 3047, 73 L. Ed. 2d 690, 708 (1982). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more than a "trivial" or "de minimis" educational benefit is required, and the appropriate standard is whether the child's education plan provides for "significant learning" and confers "meaningful benefit" to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (internal citations omitted).

The Individuals With Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1401 to 1482, and State statutes, N.J.S.A. 18A:46-1 to -55, are designed "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C.A. § 1400(d)(1)(A). A state may qualify for federal funds under the IDEA by adopting "policies and procedures to ensure that it meets" several enumerated conditions. 20 U.S.C.A. § 1412(a). These requirements for federal funding include the following conditions: all eligible children must be provided with FAPE, 20 U.S.C.A. § 1412(a)(1), and education agencies and intermediate educational units must develop an IEP for each eligible child before the beginning of each school year. 20 U.S.C.A. § 1412(a)(4).

Although the ultimate obligation to offer a FAPE is borne by the school district, 20 U.S.C.A. §1412(1); 34 C.F.R. § 300.1(a) (2013); N.J.A.C. 6:28-1.1(a), (e), -2.1(a), "the IDEA contemplates a collaborative effort between the parties in the preparation of the IEP and makes available a host of procedural safeguards to counterbalance district bargaining advantages." T.P. and P.P. ex rel. J.P. v. Bernards Twp. Bd. of Educ., EDS 6476-03, Final Decision (March 12, 2004), <http://njlaw.rutgers.edu/collections/oal/>; Rowley, supra, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). A judicially created equitable remedy has been created whereby parents can make a unilateral placement for their child if they are dissatisfied with the actions of the school district. However, this first requires that the parents meaningfully engage in the IEP process. T.P., supra, EDS 6476-03 (citing Sch. Comm. of Burlington v. Mass. Dep't of Educ., 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985); Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379 (8th Cir. 1998)). "[T]he IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations." C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 72 (3d Cir. 2010). "Parents who unilaterally change their child's placement . . . , without the consent of state or local school officials, do so at their own financial risk." Sch. Comm. of Burlington, supra, 471 U.S. at 373-74, 105 S. Ct. at 2004, 85 L. Ed. 2d at 397.

Pursuant to N.J.A.C. 6A:14-2.10(c)(2), the party seeking removal of the child from the school must provide notice of their intent to do so at least ten days in advance of removal. Failure to do so can warrant the denial of a reimbursement claim.

When a parent places a child into private school unilaterally, a court or hearing officer may require reimbursement where there is compliance with standards set forth in 20 U.S.C.A. §1412(a)(10)(C)(iii), which states:

> The cost of reimbursement [for unilateral private school placement] may be reduced or denied--
>
> (I) if--

> (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
>
> (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa).

The pertinent New Jersey regulation, N.J.A.C. 6A:14-2.10(c), is consistent with this federal provision.

Under the facts and circumstances presented, Petitioners did not act reasonably. "A commonsense understanding of the basis for the ten-day written-notice requirement is to afford the parties, in the context of a collaborative effort, an opportunity to resolve the issues of the provision of FAPE without the need for a private placement for which the District had no input." K.S. and M.S. ex rel. A.S. v. Summit City Bd. of Educ., EDS 9012-12, Final Decision (Nov. 5, 2012), <http://njlaw.rutgers.edu/collections/oal/>; B.M. ex rel. M.M. v. Livingston Twp. Bd. of Educ., EDS 5503-09, Final Decision (August 5, 2009), <http://njlaw.rutgers.edu/collections/oal/> (the notice requirement is meant to give school districts the opportunity to remedy the problem and offer alternatives).

In the instant case Petitioners do not rebut respondent's assertion that they failed to provide adequate notice. Rather, their joint certification in opposition to the motion for summary decision merely states that they voiced significant concerns about V.L.'s education. While Petitioners' counsel asserts that there is a factual dispute regarding notice, it is merely argument. The evidence, including Petitioners' joint certification, demonstrates that notice was not timely provided.

I **CONCLUDE** that respondent is entitled to summary decision because Petitioners acted unreasonably, and made a unilateral placement without giving proper notice.

ORDER

It is hereby **ORDERED** that the Respondents' motion for summary decision is **GRANTED**; and

It is further **ORDERED** that Petitioners' due process petition is **DISMISSED WITH PREJUDICE**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2016) 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 (2016). 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.

November 28, 2016

DATE **THOMAS R. BETANCOURT**, ALJ

Date Received at Agency:

Date Mailed to Parties:

APPENDIX

List of Moving Papers

For Petitioner:

Brief in opposition to motion for summary decision with Exhibits N

Certification of H.L. and J.L, Petitioners, with Exhibit A

For Respondent:

Motion for Summary Decision

Respondents' brief in support of Motion for Summary Decision

Certification of Robert Klein, Director of Special Education, with Exhibits 1 through 8

Respondents' reply brief