# *State of New Jersey*

OFFICE OF ADMINISTRATIVE LAW

**DECISION**

OAL DKT. NO. EDS 10842-16

AGENCY DKT. NO. 2016 24632

**C.E. AND A.E. ON BEHALF OF C.E.,**

Petitioners,

v.

**NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,**

Respondent.

_____

**Denise Lanchantin Dwyer**, Esq., for petitioners

**James L. Plosia**, **Jr.**, Esq., for respondent (Plosia Cohen, attorneys)

Record Closed: April 18, 2018 Decided: April 26, 2018

BEFORE **RICHARD McGILL**, ALJ:

This matter concerns a request for a due process hearing by C.E. (hereinafter "Mr. E." and A.E. (hereinafter collectively "petitioners") on behalf of their son, C.E., who was classified as eligible for special education and related services based on the criteria for autistic. Petitioners contend that the Northern Highlands Regional High School District Board of Education (hereinafter "respondent" or "District") breached the terms of a settlement agreement from a prior due process proceeding and as a result failed to provide C.E. with a free appropriate public education (hereinafter "FAPE"). At this point,

petitioners are requesting reimbursement for all costs associated with C.E.'s out-of-district placement at Riverview School (hereinafter "Riverview") located in Massachusetts.

Respondent's contentions are that there was no breach of the settlement agreement or denial of FAPE. Respondent seeks denial of the relief requested by petitioners and dismissal of the due process petition.

## PROCEDURAL HISTORY AND ISSUES

Petitioners' request for a due process hearing was received by the Office of Special Education on June 3, 2016. The matter was transmitted to the Office of Administrative Law on July 21, 2016, for a hearing in accordance with 20 U.S.C. §1415 and 34 C.F.R. § 300.511.

In a Prehearing Order dated December 7, 2016, the issues were stated as follows:

> (1) whether respondent breached the terms of a Settlement Agreement dated July 10, 2015, by failing to hold an IEP meeting as required by Paragraph 6 of said agreement, and failing to have a stay-put program in place; and (2) if so, whether respondent failed to provide C.E. with a free appropriate public education for the 2016-2017 school year.

Respondent's motion to bifurcate the proceeding was granted by Order dated April 3, 2017. In accordance with that Order, the issue whether respondent "breached the terms of the Settlement Agreement dated July 10, 2015, by failing to hold an IEP meeting as required by Paragraph 6 of said agreement" would be considered first separately. The hearing in regard to the first part of the bifurcated proceeding was held on May 3, 2017, at the Office of Administrative Law in Newark, New Jersey. Thereafter, the parties submitted initial and reply briefs.

In the Order dated December 29, 2017, a determination was made that respondent did not breach the terms of the Settlement Agreement dated July 10, 2015, by failing to hold an IEP meeting as required by Paragraph 6 of said agreement. A second Order dated December 29, 2017, granted petitioners' motion to further bifurcate the proceeding to consider the question whether respondent breached the terms of the Settlement Agreement dated July 10, 2015, by failing to have a stay-put program in place, prior to

and separate from, the issue whether respondent failed to provide C.E. with a free appropriate public education for the 2016-2017 school year. A hearing in regard to the first portion of the second bifurcation was held on January 17, 2018, and the parties submitted initial and reply briefs.

In an Order dated April 2, 2018, a determination was made that respondent breached the Settlement Agreement dated July 10, 2015, by failing to have an in-district stay-put program in place for C.E. In addition, a determination was made that the Prehearing Order dated December 7, 2016, should be deemed to be amended to include the relief that may be granted in this proceeding.

Respondent filed a motion for reconsideration, and due to impending hearing dates, a supplemental order was issued on April 4, 2018, making two additional determinations. The first additional determination was that respondent's argument that the second sentence of Paragraph 6 of the settlement agreement requires dismissal of the due process petition in this matter is without merit. The second additional determination was that respondent's argument to the effect that there is no potential remedy for a breach of the settlement agreement is without merit.

The remaining issues are whether respondent failed to provide C.E. with a free appropriate public education for the 2016-2017 school year and, if not, the relief to be granted in this proceeding. A hearing was conducted on April 9, 2018, and the record closed on April 18, 2018, upon receipt of briefs.

Findings of fact and significant determinations were made in the Orders dated December 29, 2017, April 2, 2018, and April 4, 2018. Therefore, those Orders are incorporated herein by reference.

## FACTS

Testifying for respondent, Cathy Berberian-Strandes was accepted as an expert in school social work and clinical social work, and Mr. E. testified for petitioners. Based upon the evidence presented at the hearing in this matter, I I**FND** as follows. While Ms. Berberian-Strandes was C.E.'s case manager for three weeks in May 2016, she reviewed C.E.'s file including records, evaluations, and information from Riverview. Ms. Berberian-Strandes was present at the individualized education program (hereinafter "IEP") meeting on May 26, 2016. C.E. attended Pascack Valley during high school, because the District did not have an equivalent program. By June 2015, C.E. had completed all academic requirements for graduation including 140 credits. Ms. Berberian-Strandes had minimal knowledge of Riverview, but reports indicate that C.E. was progressing there. Social and emotional goals are something to strive for. Staff at Riverview stated that C.E. would benefit from staying there. In September 2017, C.E. entered Adelphi University, and there is no indication that C.E. could not cope in that environment.

The purpose of the transition plan is to assist the student to continue his education, obtain employment and live independently. At Riverview, C.E. was taking classes both there and at Cape Cod Community College, and he had a job assignment at Riverview. He also had a goal in regard to travel training and another in social pragmatics. Difficulty in transitioning to adulthood is the reason to send a student to a school like Riverview.

According to Mr. E., the effect of filing the due process petitioner in June 2016 was to activate the stay-put requirement. Mr. E. expected the District to have a stay-put program in place by July 1, 2016, because it was part of the settlement agreement. In fact, C.E. never attended a stay-put placement in the District, and in September 2016 C.E. went back to Riverview. The full cost for C.E. to attend Riverview for the 2016-2017 school year was $80,500, and Mr. E. paid this amount. The District never offered a stay-put program for C.E.

Mr. E. explained the payments to Riverview in more detail. Mr. E. signed a contract on March 1, 2016, and he made an initial non-refundable payment of $8,000 on April 19, 2016. Mr. E. was hoping to resolve the question of an in-district program by April or May

2016, but this did not happen. With no other option, Mr. E. made a payment of $28,000, on July 6, 2016. This payment was due on July 15, 2016. Thereafter, Mr. E. made payments of $28,000 on August 15, 2016, and $13,500 on November 15, 2016.

## LAW AND ANALYSIS

As a recipient of Federal funds under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. § 1400 et seq., the State of New Jersey must have a policy that assures all children with disabilities the right to a free appropriate public education. 20 U.S.C. § 1412(a)(1). A free appropriate public education includes special education and related services. 20 U.S.C. § 1401(9). The requirement of a free appropriate public education is implemented in New Jersey through regulations codified at N.J.A.C. 6A:14-1.1 et seq. The responsibility to provide a free appropriate public education is specifically placed on the district board of education. N.J.A.C. 6A:14-1.1(d).

### A. FAPE

A State satisfies the requirement that it provide a child with disabilities with a FAPE by providing personalized instruction specially designed to meet the unique needs of the handicapped child with sufficient support services to permit the child to benefit educationally from that instruction. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203 (1982). As the United States Supreme Court stated, "The IDEA . . . requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S.__, 137 S. Ct. 988, 197 L.Ed.2d 335, 352 (2017). The IDEA requires school districts to provide a FAPE to students with disabilities under a comprehensive scheme that includes as its centerpiece the IEP. Honig v. Doe, 484 U.S. 305, 311 (1988).

Respondent argues that petitioner has not presented any evidence that C.E. did not receive a FAPE. The difficulty with respondent's argument is that it is inconsistent with N.J.S.A. 18A:46-1.1, which provides that in an administrative hearing in regard to a

FAPE, the burden of proof is on the school district. Under the circumstances, petitioners did not have an obligation to present evidence that C.E. did not receive a FAPE.

This is not to say that there was no evidence in regard to the question whether C.E. received a FAPE. Preliminary, it noteworthy that an IEP meeting in the spring would normally produce an IEP for the following school year. Nonetheless, the IEP dated May 26, 2016, as proposed by respondent, provided for continued placement of C.E. at Riverview for the period from May 27, 2016, to June 30, 2016. Respondent did not offer any IEP for the period beyond June 30, 2016. As of July 1, 2016, and going forward, there was no IEP whatsoever. Without an IEP, a student cannot receive a FAPE. Therefore, I **CONCLUDE** that respondent failed to provide a FAPE for C.E. during the 2016-2017 school year.

B. Stay Put

The pertinent regulation is N.J.A.C. 6A:14-2.7(u), which provides in pertinent part as follows:

> Pending the outcome of a due process hearing, including an expedited due process hearing, or any administrative or judicial proceeding, no change shall be made to the student's classification, program or placement unless both parties agree, or emergency relief as part of a request for a due process hearing is granted by the Office of Administrative Law . . . .

This provision represents Congress' policy choice that all children with a disability, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute is resolved. Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 (3d Cir. 1996). The inquiry becomes the identification of "the then current educational placement." Id., at 865. Because the term connotes preservation of the status quo, it refers to the operative placement actually functioning at the time the dispute first arises. Id., at 867.

In this case, there are two possible educational placements for stay-put purposes. In the Settlement Agreement, the parties purported to make an in-district program C.E.'s stay-put placement. The difficulty is that the parties never agreed on a program. In effect,

the parties had a placement without a program. If an in-district program is not the stay-put placement, then the last operative placement actually functioning at the time the dispute actually arose would be Riverview based on the IEP dated October 6, 2015. As it appears that each alternative leads to the same result, this analysis can move onto the relief.

C. Relief

Assuming that an in-district program was C.E.'s stay-put placement, the situation can be analyzed as a unilateral placement. When a state fails to satisfy the statutory mandate to provide a FAPE, the parents have the right to reimbursement for a unilateral placement in a private school. Burlington v. Department of Educ. of Commonwealth of Mass., 471 U.S. 359, 370 (1985); T.R. v. Kingwood Township Bd. of Educ., 205 F. 3d 572, 577 (3d Cir. 2000). In this jurisdiction, the right to reimbursement for a unilateral placement is codified at N.J.A.C. 6A:14-2.10.

One requirement for reimbursement under N.J.A.C. 6A:14-2.10(b) is that the local school district had not made a FAPE available to the student in a timely manner prior to the unilateral placement. A second requirement is that the private placement is appropriate. N.J.A.C. 6A:14-2.10(b). Additionally, the parents must provide notice to the district board of education of their concerns and their intent to enroll their child in a nonpublic school at public expense. N.J.A.C. 6A:14-2.10(c). If the parents engage in unreasonable actions, the cost of reimbursement may be reduced or denied. N.J.A.C. 6A:14-2.10(c)4.

The determination has been made herein that respondent failed to provide a FAPE for C.E. for the 2016-2017 school year, and it is evident from the testimony concerning Riverview that it is an appropriate placement for C.E. in regard to transition. Further, petitioners rejected the proposed IEP at the IEP meeting on May 26, 2016, and by letter dated June 2, 2016, petitioners' attorney gave the required notice of a unilateral placement.

Respondent in effect contends that petitioners engaged in unreasonable actions in that they never intended to send C.E. to the in-district program but rather were planning from the start to send C.E. to Riverview. As support for its position, respondent notes that Mr. E. made a nonrefundable payment of $8,000 in April 2016.

Nonetheless, Mr. E. had an explanation for the payment. In March and April 2016, he inquired about the in-district program, but he could not get a satisfactory answer. Concerned that there would be no program for C.E., Mr. E. made the $8,000 payment to Riverview to hold a place for C.E., while hoping that Riverview would refund the money if C.E. did not attend and another student could be found to take his place. It is also noteworthy that Mr. E. could have saved $80,500, if respondent made a free appropriate program available for C.E. Mr. E. may have had a concern, or even an expectation, that respondent would not make an appropriate program available for C.E. In view of actual events, Mr. E.'s concern was certainly reasonable. Under the circumstances, petitioners did not engage in any unreasonable actions within the meaning of N.J.A.C. 6A:14-2.10(c)4.

Petitioners satisfy all of the requirements for reimbursement for the costs of a unilateral placement of C.E. at Riverview for the 2016-2017 school year. It follows that this relief should be granted to petitioners.

Alternatively, despite the provision in the Settlement Agreement stating that as of July 1, 2016, C.E.'s stay-put placement would be an in-district program at Northern Highlands, respondent never offered this type of program and in fact there was no in-district program at Northern Highlands. These circumstances could be viewed as a situation in which the parties did not truly reach an agreement as to a change in C.E.'s program and placement. If the situation is viewed in this way, C.E.'s last operative placement at the time that the dispute arose would be Riverview, as C.E. was in attendance there in May 2016. The operative placement is not determined by the date the parents seek reimbursement for stay-put expenses, but by the date that the dispute between the parties and the school district "first arises" and proceedings conducted pursuant to IDEA begin. M.R. v. Ridley Sch. Dist., 744 F.3d 112, 124 (3d Cir. 2014) (citing Drinker v. Colonial Sch. Dist., 78 F.3d at 867. In Ridley, the Court determined that the

school district's obligation to pay for the stay-put placement continues through the appellate process in the federal court. Id. at 127. A fortiori the school district is required to pay the costs of the stay-put placement through the administrative proceeding. It follows that under this view of the stay-put placement, petitioners should be reimbursed for the costs of C.E.'s 2016-2017 school year at Riverview.

Respondent contends that no relief should not be granted, because C.E. did not need additional educational services after June 30, 2016. The difficulty with this argument is that petitioners had already filed their due process petition on June 3, 2016. As noted above, once the parents have filed for due process, stay put takes effect irrespective of the merits of their case. It follows that respondent's contention does not negate the relief to which petitioners are entitled in regard to the deprivation of an educational program during the stay-put period.

Finally, at this point, both parties are in agreement that C.E. has completed the requirements for graduation. It follows that respondent should now issue a diploma to C.E.

Based upon the above, I **CONCLUDE** that petitioners should be reimbursed $80,500 for the cost of C.E.'s placement at Riverview for the 2016-2017 school year. Further, I **CONCLUDE** that a diploma should be issued to C.E.

Accordingly, it is **ORDERED** that:

1. Petitioner be reimbursed by respondent in the amount of $80,500 for the cost of C.E.'s placement at Riverview for the 2016-2017 school year.
2. A diploma be issued to C.E. by respondent.

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

April 26, 2018

DATE

**RICHARD McGILL**, ALJ

Date Received at Agency April 26, 2018

Date Mailed to Parties:

ljb

# APPENDIX

## WITNESS LIST

For petitioners:

C.E.

Christine Ann Soto

For respondent:

Deanna Friedland

Cathy Berberian-Strandes

Thomas Buono

## EXHIBIT LIST

J-1 Northern Highlands IEP dated April 29, 2014

J-2 Report of Psychological Evaluation by Dr. Lyle Becourtney dated June 13, 2014

J-3 Report of Educational Evaluation by Tracy Larocca, LDT-C dated May 5, 2014

J-4 Progress Reports from Pascack Valley HS Park program dated June 15, 2015 for IEP Goals and Objectives for 2014-2015

J-5 Email from Mr. E. to D. Friedland April 13, 2015

J-7 Riverview School Invoice dated June 23, 2015

J-8 Petition for Due Process dated July 6, 2015 – EDS 10670-15

J-9 Decision Approving Settlement Agreement in EDS 10670-15 entered by ALJ Giordano July 31, 2015

J-10 Riverview School IEP dated August 19, 2015 for 2015-2016

J-11 Northern Highlands' IEP dated October 6, 2015 for 2015-2016 at Riverview School

J-12 Northern Highlands' notice dated February 25, 2016 of meeting on April 19, 2016

J-13 Letter from C. Soto to J. Plosia dated April 11, 2016 re: IEP meeting

J-14 Email exchange between C. Soto and J. Plosia April 27, May 2, 2016 re: IEP meeting

J-15 Email from M. Corbett to C. Soto dated April 29, 2016 forwarding documents including Northern Highlands official transcript for C.E.

J-16 Report card from Riverview School for 2015-2016

J-17 Riverview School report of progress toward IEP goals and objectives for 2015-2016

J-18 Northern Highlands' notice dated May 25, 2016 of meeting rescheduled for May 26, 2016

J-19 Letter from C. Soto to J. Plosia dated May 26, 2016 re: Request for independent evaluations

J-20 Letter from C. Soto to J. Plosia dated May 27, 2016 re: Request for Services for 2016-2017 School Year

J-21 Letter from J. Plosia to C. Soto dated May 31, 2016 replying to her May 27, 2016 letter

J-22 Letter from C. Soto to J. Plosia dated May 31, 2016 replying to his May 31, 2016 letter

J-23 Letter from C. Soto to J. Plosia dated June 1, 2016 rejecting proposed IEP dated May 26, 2016

J-24 Proposed IEP from May 26, 2016 meeting with cover letter dated June 2, 2016

J-25 Letter from C. Soto to J. Plosia dated June 9, 2016 rejecting proposed IEP dated May 26, 2016 received by mail

J-26 Report of speech-language evaluation by Elayne Stern, M.S., CCC-SLP on November 9, 2010

J-27 Phone record

P-8 Emails from Riverview School dated February 25, 2016

P-9 Letter dated June 2, 2016, from C. Soto to J. Plosia re: 10-day notice

P-10 Certification of Thomas Buono dated June 16, 2016

P-11 Letter dated June 20, 2016 from C. Soto to ALJ Ellen Bass

P-12 Order of ALJ Ellen Bass dated June 21, 2017 on application for emergent relief in EDS 08751-16

P-13 Riverview School Reservation and Enrollment Agreement

R-1 Resume of Cathy Berberian-Strandes

# *State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**ORDER**

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**Denise Lanchantin Dwyer**, Esq., for petitioners

**James L. Plosia**, **Jr.**, Esq., for respondent (Plosia Cohen, attorneys)

BEFORE **RICHARD McGILL**, ALJ:

This matter concerns a request for a due process hearing by C.E. (hereinafter "Mr. E.") and A.E. (hereinafter collectively "petitioners") on behalf of their son, C.E., who was classified as eligible for special education and related services based on the criteria for autistic. Petitioners contend that the Northern Highlands Regional High School District Board of Education (hereinafter "respondent" or "District") breached the terms of a settlement agreement from a prior due process proceeding and as a result failed to provide C.E. with a free appropriate public education (hereinafter "FAPE"). Along with other forms of relief, petitioners request a determination directing respondent to continue C.E.'s out-of-district placement at Riverview School located in Massachusetts and to be responsible for all costs associated therewith.

Respondent maintains that there was no breach of the settlement agreement or denial of FAPE. Respondent seeks denial of the relief requested by petitioners and dismissal of the due process petition.

## PROCEDURAL HISTORY AND ISSUES

Petitioners' request for a due process hearing was received by the Office of Special Education on June 3, 2016. The matter was transmitted to the Office of Administrative Law on July 21, 2016, for a hearing in accordance with 20 U.S.C.A. §1415 and 34 C.F.R. § 300.511.

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> (1) whether respondent breached the terms of a Settlement Agreement dated July 10, 2015, by failing to hold an IEP meeting as required by Paragraph 6 of said agreement, and failing to have a stay-put program in place; and (2) if so, whether respondent failed to provide C.E. with a free appropriate public education for the 2016-2017 school year.

Respondent's motion to bifurcate the proceeding was granted by Order dated April 3, 2017. In accordance with that Order, the issue whether respondent "breached the terms of the Settlement Agreement dated July 10, 2015, by failing to hold an IEP meeting as required by Paragraph 6 of said agreement" would be considered first separately. The hearing in regard to the first part of the bifurcated proceeding was held on May 3, 2017, at the Office of Administrative Law in Newark, New Jersey. Thereafter, the parties submitted initial and reply briefs.

## FACTS

Based upon the evidence presented at the hearing, I **FIND** as follows. C.E.'s date of birth is September 16, 1996, and he is now twenty-one years old. C.E. attended public schools in New Jersey since he was three years old as a student eligible for special education and related services. C.E. has a diagnosis of Asberger's syndrome and has difficulties with reading social cues, anxiety and perseverating on topics of interest to him. C.E.'s IQ is in the average range, and he does well academically. His difficulties are social in nature.

C.E.'s family lives in Upper Saddle River, where the school district serves grades pre-kindergarten to eight. In the eighth grade, C.E. attended middle school at the Park Academy, which is a special education program in an out-of-district public school. High school age students become the District's responsibility.

Respondent became responsible for C.E.'s education when he entered ninth grade. Toward the end of eighth grade, C.E.'s individualized education program (IEP) team determined that he should continue at Park Academy at Pascack Valley. Deanna Friedland became C.E.'s case manager, when he entered high school.

C.E. attended Park Academy for four years of high school. During the course of C.E.'s four years of high school, Mr. E. participated in IEP meetings with Ms. Friedland at least once a year and discussed programming. It became apparent by C.E.'s junior year that he would not be able to just go off to college. C.E.'s issues in high school were social in nature and involved the way that he interacted with other students. In his third year of high school, C.E. was in one or two mainstream classes. The Park Academy classes were in the same building as the general education classes.

Petitioners did not feel that C.E. was ready for college after the 2015-2016 school year, and they began to look for a transition program to prepare C.E. for further education, employment and independent living. Mr. E. looked into various schools for C.E. including Riverview School, which was a residential placement where the focus was on academics, social skills and life skills, which involved living away from home. After C.E. spent several

nights at Riverview in January or February 2015, Mr. E. thought that it would be a good fit, and he spoke with Ms. Friedland, who said that she would have to discuss it with her supervisor. Mr. E. offered to pay for the residential portion of placement at Riverview, if the District would pay for the academic portion. The costs were $45,000 and $31,000 for the academic and residential portions, respectively. Riverview's program is called "Getting Ready for the Outside World" ("GROW"), and there was a connection to Cape Cod Community College ("College"), which had a program called "Project Forward" that involved vocational training.

This effort led to a dispute with respondent and the filing of a due process petition. That dispute ended with a settlement wherein the parties agreed to a cost-sharing arrangement whereby C.E. would attend a residential transition program entitled Getting Ready for the Outside World (GROW) at the Riverview School. The settlement agreement was approved in a Decision Approving Settlement dated July 31, 2015. Paragraph 6 of that agreement states as follows:

> An IEP meeting will be held in the spring 2016. Unless the parties mutually agree at the IEP meeting that C.E. requires educational services past June 30, 2016, the District's legal responsibility to educate C.E. will terminate on June 30, 2016 at which time C.E. will be awarded his high school diploma from Northern Highlands Regional High School Board of Education. Should the Parents and/or the student make any claims upon the District for educational services after that date, C.E.'s "stay put" placement will, as of July 1, 2016 and until and unless there is a Court Order or mutually agreed-upon settlement establishing any other placement for C.E., be an in-district program at Northern Highlands.

When Mr. E. signed the Settlement Agreement, he expected to have a good faith IEP meeting, where all input was considered. In September 2015, C.E. began to attend Riverview, where he was not taking any general education classes. Mr. E. had to make full payment and get reimbursed by the District.

An IEP meeting was held by telephone on October 6, 2015. The IEP meeting participants included Mr. E., Ms. Friedland and five representatives of Riverview. There was no general education teacher at this meeting, and there was no objection from any participant. In addition, there was no special education teacher from the District.

At the time, C.E. was taking classes at Riverview, and he also attended the Project Forward Program at the College. Riverview reported at the meeting that C.E. was not interacting with the other students and that he was spending a lot of time in his room. During that meeting, the participants agreed to an IEP that was developed by Riverview and contained goals and objectives for C.E. for the period from October 6, 2015, to October 6, 2016. Goals related to areas including English language arts, reading, mathematics, travel training, vocational, social pragmatics and daily living skills. At one point, a representative of Riverview asked whether Mr. E. and the District planned for a program that lasted one, two or three years. When Mr. E. said that he hoped that C.E. would need only one year, Ms. Friedland interjected that there was a settlement agreement in place that ended June 30th. The meeting ended with an agreement to hold another IEP meeting in the spring. The meeting was set for March 8, 2016.

Ms. Friedland went on a leave of absence from January 2016 to June 1, 2016, and Cathy Berberian, who had previous involvement with C.E. in the eighth grade, covered for Ms. Friedland, until Maria Ade became the interim case manager. Ms. Berberian became involved again in May 2016.

A meeting, which Mr. E. understood to be an IEP meeting scheduled for March 8, 2016, was converted to a telephone conference and conducted by Ms. Ade, who was the acting case manager at the time. There was no notice for an IEP meeting on March 8, 2016. Mr. E. and representatives of Riverview participated in the telephone conference during which Riverview's representatives reviewed C.E.'s progress. C.E. was making some progress, but he still was not doing well in the social areas. In particular, C.E. was not achieving his goals in regard to travel training. C.E. still needed support fifty percent of the time for travel training, which would prepare a student to ride a bus by himself. C.E. made a little progress in socializing with other students. C.E. had a job at the café as part of the program, but he was having trouble getting there on time. C.E. did not like being at work. When Mr. E. commented that C.E. did not seem to be doing well, Ms. Ade responded that there was a settlement agreement in place. After Riverview offered to develop an IEP going forward, Ms. Ade said that the District would prepare the IEP. The

next IEP meeting was scheduled for April 19, 2016. The notice for the IEP meeting in April 2016 was issued on February 25, 2016.

Mr. E. was concerned that both Ms. Friedland and Ms. Ade had mentioned that the contract ends on June 30th and that they did not seem to be concerned about progress reports. As a result, Mr. E. requested a telephone call with Mr. Thomas Buono, who is respondent's Supervisor of Special Services, and they spoke on March 24, 2016. Mr. E. expressed his concerns, and Mr. Buono said that there was an agreement in place that ended on June 30th and that progress did not matter. Further, the most that the District ever provides for students who have completed four years of high school is one additional year. Mr. E. asked if there was anything in place in accordance with the stay-put provision in the settlement agreement in the event that C.E. did not return to Riverview, and Mr. Buono said that the District would create a program if necessary.

Dissatisfied with the response, Mr. E. asked for a meeting with the school superintendent. The meeting occurred on April 19, 2016. Mr. E. again expressed his concerns and said that the District personnel seemed to have made up their minds. The Superintendent responded that he had no direct involvement with the special needs team or its decision-making.

Mr. Buono normally is not involved in an IEP meeting, but he probably became involved when the case manager informed him that Mr. E. was interested in extending the contract. This would have been sometime in the spring.

Mr. Buono assigned Ms. Berberian to handle the IEP meeting on May 26, 2016, because she was already familiar with C.E.'s program. Mr. Buono met with Ms. Berberian before the IEP meeting, but he could not recall details. Mr. Buono acknowledged that he previously stated in a certification that he had extensive discussions with the child study team about C.E. prior to the meeting on May 26, 2016. Mr. Buono stated that the certification was done in November 2016 and that the contents of the certification are true.

As a result of the conversation between Mr. E. and the Superintendent, the IEP meeting scheduled for April 18, 2016, was cancelled and rescheduled for May 26, 2016.

The written notice of the meeting is dated May 25, 2016, but the participants had previous knowledge thereof. According to the notice, the purpose of the meeting was to review and revise the IEP and to plan for transition to adult life. After more than twelve years of involvement with special education, Mr. E. had an expectation as to what would happen at an IEP meeting. Mr. E.'s expectation was that there would be a team planning meeting, where there was a discussion of goals and C.E.'s progress.

The participants in the IEP meeting included petitioners, Cathy Berberian, who had become C.E.'s case manager, Supervisor Buono, Riverview advisor Ann Phelan, petitioners' attorney Christine Soto and Board attorney James Plosia. No general education teacher was present at the meeting. Supervisor Buono is also a special education teacher. At the IEP meeting on May 26, 2016, no one objected to the absence or presence of persons at the meeting.

Ms. Berberian was aware that excusal of a required participant from an IEP meeting requires written consent of both the parents and the school district. The District has a form for excusal. Petitioners were not hurt in any way by the absence of a District general education or special education teacher at the IEP meeting. Mr. E. thought that a Riverview teacher should have been on the telephone for the IEP meeting on May 26, 2016, to provide feedback as to C.E.'s progress.

During the meeting on May 26, 2016, Ms. Phelan from Riverview spoke about C.E.'s progress. Mr. E. acknowledged that he received information in regard to C.E.'s progress on March 8, 2016. As of the IEP meeting on May 26, 2016, petitioners were well informed as to C.E.'s status and progress at Riverview.

At an IEP meeting for a high school student, it would be typical to discuss a student's transition goals and services as well as a statement of graduation requirements and progress toward graduation. The goal is to prepare the student for further education, employment and independent living.

At the IEP meeting on May 26, 2016, there was no specific point-by-point review of an IEP, no revisions were made to an IEP, there was no planning for transition to adult

life, and no one offered Mr. E. a summary of C.E.'s performance. At the meeting, a representative of Riverview gave a five-to-ten-minute report about C.E.'s progress. C.E. was still struggling socially, and he had not achieved all of his goals and objectives. No one from the District questioned the Riverview representative about C.E.'s progress. After the Riverview representative hung up, Mr. Buono stated that the District's responsibility to C.E. ends on June 30th. Mr. E. brought up the stay-put program, and Mr. Buono said that the District would create one if necessary.

The due process petition in this matter was dated June 2, 2016, and filed on June 3, 2016. The petition sought continued education at Riverview for another year and did not mention education of C.E. in a District school.

Mr. E. did not see a draft IEP on May 26, 2016, but he received one on June 2, 2016. Mr. E. acknowledged that he did not see the written IEP until after the filing of the due process petition.

The case manager prepares a written summary of performance, which typically includes a review of the student's status, the student's plan for the future, some evaluation information and recommendations to assist the student in meeting his post-secondary goals. Ms. Berberian did not prepare that type of document for C.E., but she stated that that would not be done until the end of the school year.

## LAW AND ANALYSIS

The matter involves the interpretation of a settlement agreement between the parties in an earlier due process proceeding. A settlement agreement is a contract between the parties. D.R. v. East Brunswick Bd. of Educ. 838 F. Supp. 184, 189 (D.N.J. 1993). Proper interpretation of a contract requires consideration of the agreement as a whole rather than a single provision in isolation. Wheatly v. Sook Suh, 217 N.J. Super. 233, 239 (App. Div. 1987).

The issue in this portion of the bifurcated proceeding is whether the meeting on May 26, 2016, amounted to an IEP meeting as required by Paragraph 6 of the settlement

agreement. Petitioners maintain that the meeting on May 26, 2016, was deficient in that it did not comply with various regulations related to notice, attendees and the substance of the discussion.

With respect to notice, petitioners cite N.J.A.C. 6A:14-2.3(k)5, which contains special provisions, N.J.A.C. 6A:14-2.3(k)5ii, and iii, when the purpose of the meeting is to discuss transition services. Here, respondent provided notice of the May 26, 2016 meeting that complies with N.J.A.C. 6A:14-2.3(k)5. Petitioners acknowledge as much, but they contend that respondent refused to engage in substantive discussions of the subjects mentioned in the notice. It follows that there is no real deficiency as to the notice but rather the issue relates to the substance of the discussions during the meeting.

Petitioners' next argument is based on N.J.A.C. 6A:14-2.3(k)2, which lists the participants in meetings of the IEP team. This regulation refers to a general education teacher in N.J.A.C. 6A:14-2.3(k)2ii and a special education teacher in N.J.A.C. 6A:14-2.3(k)2iii. Petitioners maintain that the meeting on May 26, 2016, was deficient in that there was no general education teacher or special education teacher.

Petitioners' reliance on N.J.A.C. 6A:14-2.3(k)2ii is misplaced in that the regulation identifies a participant as follows: "Not less than one general education teacher of the student, if the student is or may be participating in the general education classroom; . . . . (Emphasis supplied.) Here, C.E. was not in any general education classrooms at Riverview. Petitioners' argument based on N.J.A.C. 6A:14-2.3(k)2iii lacks factual support in that Supervisor Buono is a special education teacher. It follows that petitioners' argument in regard to participants at the meeting on May 26, 2016, is without merit.

Petitioners next argue that respondent's representatives refused to engage in a discussion of C.E.'s progress relative to the goals and objectives in his IEP and his need for additional transitional services. As a related argument, petitioners maintain that respondents' representatives had made up their minds in advance of the meeting.

Petitioners' arguments are unpersuasive for several reasons. First, petitioners and respondent's representatives were fully apprised as to C.E.'s progress, or lack thereof, in

regard to the goals and objectives in his IEP. The telephone meeting on March 8, 2016, was devoted to review of C.E.'s progress at Riverview. During the IEP meeting on May 26, 2016, a representative of Riverview provided an update as to C.E.'s progress. It follows that respondent's representatives had the information that they needed to make a determination in regard to C.E.'s education.

Second, there is no indication that there were any restrictions on petitioners' opportunity to make a presentation in regard to C.E.'s situation. Likewise, there is no indication that there were any restrictions on the input from Riverview.

Third, petitioners seem to presuppose that the IEP meeting on May 26, 2016, would be the same as any other, despite the fact that Paragraph 6 of settlement agreement provides in part as follows: "Unless the parties mutually agree at the IEP meeting that C.E. requires educational services past June 30, 2016, the District's responsibility to education C.E. will terminate on June 30, 2016, . . . ." Petitioners' presupposition disregards the principle that consideration must be given to all provisions in the contract. The quoted provision would likely have a substantial impact on the IEP meeting. Under the circumstances, petitioners' expectation that the IEP meeting on May 26, 2016, would be like any other was unreasonable.

Fourth, the circumstances of the case lead to the question whether respondent is obligated to continue C.E.'s education due to lack of progress. In D.R. v. East Brunswick Bd. of Educ., supra, the parties reached a settlement agreement which provided that: (1) the Board of Education ("Board") would compensate the parents for placement of D.R. in an out-of-district residential placement at a specific annual rate of $27,500 for the 1991-1992 school year; (2) for the 1992-1993 school year the Board would contribute 90 percent of any increase over the 1991-1992 rate; and (3) the Board would be absolved of any other or further costs based upon this placement, related services, or transportation in connection therewith. Several months after the agreement was signed, the out-of-district placement increased the costs for the 1992-1993 school year to $62,487, primarily due to the addition of a one-to-one aide for D.R. The Board refused to pay the cost associated with the aide, and D.R.'s parents requested a hearing.

The Court determined that the settlement agreement had to be interpreted in light of the Individuals with Disabilities Act ("IDEA") 20 U.S.C.A. § 1401 et seq. Further, the settlement agreement between D.R.'s parents and the Board was binding and would not be set aside, unless it was found that D.R.'s circumstances had changed, making enforcement of the terms of the settlement a violation of IDEA. D.R. v. East Brunswick Bd. of Educ., 838 F.Supp. at 194.

It follows that respondent's substantive responsibility at an IEP meeting under the circumstances of this case was to determine whether there were any changes of circumstances with respect to C.E. Here, C.E.'s lack of progress in regard to specific goals in his IEP was a continuation of his ongoing problems in this area. There is no indication that there was any change of circumstances with respect to C.E.

Fifth, school district personnel are permitted to engage in preparatory activities to develop a proposal or a response to a parent proposal that will be discussed at a later meeting. N.J.A.C. 6A:14-2.3(l)2. Evidently, respondent's initial position was that its responsibility to C.E. ended on June 30, 2016, pursuant to the settlement agreement. Nonetheless, the fact that three of the District's employees mentioned that the agreement ends on June 30th does not warrant the inference that respondent would not move from its initial position in the event of an actual change in circumstances.

Sixth, petitioners cite a requirement in N.J.A.C. 6A:14-4.11(b)4 that applies when a student graduates or exceeds the age of eligibility. The school district is required to provide a written summary of his or her academic achievement and functional performance prior to the date of the student's graduation or the conclusion of the school year in which he or she exceeds the age of eligibility. The difficulty with this argument is that there is no requirement that the school district prepare the written summary at or before the IEP meeting.

In view of the above, respondent complied with the requirements for an IEP meeting with respect to notice, attendees and substantive discussions. Therefore, I **CONCLUDE** that respondent fulfilled its responsibility to conduct an IEP meeting for C.E. in the spring of 2016.

With a favorable determination in regard to the above-resolved issue, respondent seeks dismissal of the petitioners' due process petition. The difficulty with respondent's request is that in the due process petition itself, petitioners alleged two breaches of the settlement agreement. Since the question whether the second alleged breach is meritorious is still unresolved, it would be premature to dismiss the due process petition. Therefore, I **CONCLUDE** that the due process petition in this matter should not be dismissed based on the determination herein in regard to the IEP meeting on May 26, 2016.

Accordingly, it is **ORDERED** that:

1. The determination is made herein that petitioners' contention that respondent failed to hold an IEP meeting in the spring of 2016 as required by the settlement agreement is without merit.

2. The request to dismiss the due process petition in this matter be denied.

This order shall remain in effect until issuance of the decision in this matter.

December 29, 2017

DATE

**RICHARD McGILL**, ALJ

Date Mailed to Parties: December 29, 2017
ljb

# APPENDIX

## WITNESS LIST

For petitioners:

C.E.

For respondent:

Donna Friedland
Cathy Berberian-Strandes
Thomas Buono

## EXHIBIT LIST

J-1 Northern Highlands IEP dated April 29, 2014
J-2 Report of Psychological Evaluation by Dr. Lyle Becourtney dated June 13, 2014
J-3 Report of Educational Evaluation by Tracy Larocca, LDT-C dated May 5, 2014
J-4 Progress Reports from Pascack Valley HS Park program dated June 15, 2015 for IEP Goals and Objectives for 2014-2015
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J-7 Riverview School Invoice dated June 23, 2015
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J-10 Riverview School IEP dated August 19, 2015 for 2015-2016
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J-14 Email exchange between C. Soto and J. Plosia April 27, May 2, 2016 re: IEP meeting
J-15 Email from M. Corbett to C. Soto dated April 29, 2016 forwarding documents including Northern Highlands official transcript for C.E.
J-16 Report card from Riverview School for 2015-2016
J-17 Riverview School report of progress toward IEP goals and objectives for 2015-2016

J-18 Northern Highlands' notice dated May 25, 2016 of meeting rescheduled for May 26, 2016

J-19 Letter from C. Soto to J. Plosia dated May 26, 2016 re: Request for independent evaluations

J-20 Letter from C. Soto to J. Plosia dated May 27, 2016 re: Request for Services for 2016-2017 School Year

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J-25 Letter from C. Soto to J. Plosia dated June 9, 2016 rejecting proposed IEP dated May 26, 2016 received by mail

J-26 Report of speech-language evaluation by Elayne Stern, M.S., CCC-SLP on November 9, 2010

P-8 Emails from Riverview School dated February 25, 2016

# *State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**ORDER**

OAL DKT. NO. EDS 10842-16

AGENCY DKT. NO. 2016 24632

**C.E. AND A.E. ON BEHALF OF C.E.,**

Petitioners,

v.

**NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,**

Respondent.

_____

**Denise Lanchantin Dwyer**, Esq., for petitioners

**James L. Plosia**, **Jr.**, Esq., for respondent (Plosia Cohen, attorneys)

BEFORE **RICHARD McGILL**, ALJ:

This matter is a bifurcated proceeding in regard to a request for a due process hearing by C.E. (hereinafter "Mr. E.") and A.E. (hereinafter collectively "petitioners") on behalf of their son, C.E., who was classified as eligible for special education and related services based on the criteria for autistic. Petitioners contend that the Northern Highlands Regional High School District Board of Education (hereinafter "respondent" or "District") breached the terms of a settlement agreement from a prior due process proceeding and as a result failed to provide C.E. with a free appropriate public education (hereinafter "FAPE"). Along with other forms of relief, petitioners request a determination directing respondent to continue C.E.'s out-of-district placement at Riverview School located in Massachusetts and to be responsible for all costs associated therewith.

Respondent maintains that there was no breach of the settlement agreement or denial of FAPE. Respondent seeks denial of the relief requested by petitioners and dismissal of the due process petition.

## PROCEDURAL HISTORY AND ISSUES

This Order relates to the second portion of the bifurcated proceeding. On December 29, 2017, an Order was issued in regard to the first part of the bifurcated proceeding. The section of the December 29, 2017 Order entitled "Procedural History and Issues" is incorporated herein by reference. For clarity, the issues from the Prehearing Order dated December 7, 2016, are repeated herein as follows:

> (1) whether respondent breached the terms of a Settlement Agreement dated July 10, 2015, by failing to hold an IEP meeting as required by Paragraph 6 of said agreement, and failing to have a stay-put program in place; and (2) if so, whether respondent failed to provide C.E. with a free appropriate public education for the 2016-2017 school year.

In the Order dated December 29, 2017, a determination was made that respondent did not breach the terms of the Settlement Agreement dated July 10, 2015, by failing to hold an IEP meeting as required by Paragraph 6 of said agreement. A second Order dated December 29, 2017, granted petitioners' motion to further bifurcate the proceeding to consider the question whether respondent breached the terms of the Settlement Agreement dated July 10, 2015, by failing to have a stay-put program in place, prior to and separate from, the issue whether respondent failed to provide C.E. with a free appropriate public education for the 2016-2017 school year. A hearing in regard to the first portion of the second bifurcation was held on January 17, 2018, and the parties submitted initial and reply briefs.

## FACTS

The findings of fact from the Order dated December 29, 2017, are incorporated herein by reference. For ease of reference, Paragraph 6 of the Settlement Agreement dated July 10, 2015, stated as follows:

> An IEP meeting will be held in the spring 2016. Unless the parties mutually agree at the IEP meeting that C.E. requires educational services past June 30, 2016, the District's legal responsibility to educate C.E. will terminate on June 30, 2016 at which time C.E. will be awarded his high school diploma from Northern Highlands Regional High School Board of Education. Should the Parents and/or the student make any claims upon the District for educational services after that date, C.E.'s "stay put" placement will, as of July 1, 2016 and until and unless there is a Court Order or mutually agreed-upon settlement establishing any other placement for C.E., be an in-district program at Northern Highlands.

Based upon the evidence presented at the hearings in this matter, I **FIND** as follows. An IEP meeting was held on May 26, 2016. In a letter dated May 27, 2016, to respondent's attorney, petitioners' attorney requested that the District schedule a date and time for petitioners to visit the "stay put" transition program at Northern Highlands mandated in Paragraph 6 of the settlement agreement during the second week of June. Petitioners' attorney also requested that the District continue C.E.'s placement at the Riverview School ("Riverview") at partial district expense for the 2016-2017 school year.

By letter dated June 1, 2016, petitioners' attorney advised respondent's attorney that petitioners were in receipt of the final IEP dated May 26, 2016, and that they were rejecting that IEP because it denied C.E. a FAPE. By letter dated June 2, 2016, the District sent another copy of the IEP to petitioners. The statement of special education and related services lists the service dates as beginning May 27, 2016, and ending June 30, 2016. The IEP contains no special education or related services for the 2016-2017 school year.

Petitioners filed a request for due process with a cover letter dated June 2, 2016. By another letter dated June 2, 2016, petitioners' attorney gave the District formal notice pursuant to N.J.A.C. 6A:14-2.10 that they would seek reimbursement for all costs related

to C.E.'s unilateral placement at Riverview for the summer 2016 and the 2016-2017 school year. Petitioners filed a motion for emergent relief with a cover letter dated June 8, 2016. As emergent relief, petitioner sought to prevent respondent from graduating C.E. and issuing a diploma and to have C.E. remain at Riverview at his stay-put placement. By letter dated June 9, 2016, petitioners' attorney advised respondent's attorney that petitioners were rejecting the IEP forwarded with the cover letter dated June 2, 2016.

On June 20, 2016, petitioners withdrew their motion for emergent relief. In a Decision Approving Settlement dated June 21, 2016, Administrative Law Judge Ellen S. Bass noted that counsel for the District represented that no diploma would issue during the pendency of the matter and that counsel for petitioners advised that the motion for emergent relief would be withdrawn in light of the representation that the District would not issue a diploma pending full exploration of the claims of the parties at plenary hearing.

Thereafter, C.E. did not attend an extended school year program at the District or Riverview. C.E. completed the 2016-2017 school year at Riverview.

## LAW AND ANALYSIS

This matter involves the interpretation of a settlement agreement between the parties in an earlier due process proceeding. A settlement agreement is a contract between the parties. D.R. v. East Brunswick Bd. of Educ. 838 F. Supp. 184, 189 (D.N.J. 1993). A basic rule of contractual interpretation requires implementation of the common intention of the parties. Tessmar v. Grosner, 23 N.J. 193, 201 (1957). Consideration should be given to the words of the contract in the context of the circumstances at the time of the drafting, and a rational meaning should be applied in keeping with expressed general purpose. Schau v. Schau, 206 N.J. 1, 5-6 (2011), citing Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293, 302 (1953). Proper interpretation of a contract requires consideration of the agreement as a whole rather than a single provision in isolation. Wheatly v. Sook Suh, 217 N.J. Super. 233, 239 (App. Div. 1987). A contracting party should be bound by the apparent intention he or she outwardly manifests to the other party; it is immaterial that he or she has a different intention from that outwardly manifested. Brawer v. Brawer, 329 N.J. Super. 273, 283 (App. Div. 2000). A contract

may be such that the parties have impliedly agreed to certain terms and conditions which have not been expressly stated in the written document. Onderdonk v. Presbyterian Homes of N.J., 85 N.J. 171, 182 (1981). The conduct of the parties after execution of the contact is entitled to great weight in determining its meaning. Joseph Hilton & Associates, Inc. v. Evans, 201 N.J. Super. 156, 171 (App. Div. 1985). A settlement agreement in a special education case must be interpreted in light on the Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. § 1400 et seq. D.R. v. East Brunswick Bd. of Educ., 838 F. Supp. at 192-94.

Respondent maintains that the last sentence of Paragraph 6 was inserted not because either party anticipated that petitioners would even consider returning C.E. to an in-district placement, much less do so, but so that the District would not have to continue to pay for C.E.'s placement at Riverview in the event of a legal challenge. According to respondent, the intent of the parties was limited to this purpose.

Further, respondent contends that petitioners' actions in regard to their motion for emergent relief show that they did not intend for C.E. to attend an in-district program. According to respondent, petitioners did not attempt to argue that the in-district program was C.E.'s stay-put placement. Further, when petitioners became aware that there were no openings at Riverview, they withdrew their motion for emergent relief.

Additionally, respondent argues that in accordance with Paragraph 6 of the settlement agreement, there was no requirement to provide information about an in-district program. Likewise, there was no obligation to create an in-District program, because the sole purpose of the last sentence of Paragraph 6 was to establish that respondent did not have to pay for Riverview during the pendency of the action.

Petitioners contend that the settlement agreement required respondent to provide an in-district stay-put placement and that respondent failed to do so. Further, respondent's false assumption that C.E. would not attend an in-district program did not relieve it of its obligation to provide a stay-put placement. According to petitioners, respondent breached the settlement agreement by failing to provide an in-district stay-put placement.

The main question is whether the last sentence of Paragraph 6 of the settlement agreement required the District to provide an educational program for C.E. as of July 1, 2016, in the event that petitioners made a claim for additional services after June 30, 2016. The first consideration is the language of the agreement. The operable language is clear that in the event that petitioners make any claims for service beyond June 30, 2016, "C.E.'s 'stay-put' placement will, as of July 1, 2016 . . . be an in-district program at Northern Highlands." It seems evident in view of this language that the parties agreed to more than a nominal placement for the limited purpose described by respondent. Further, it is implied that the in-district program in this context will be one that complies with the requirements of the IDEA such as providing a FAPE for C.E.

The limited purpose of the last sentence of Paragraph 6 as claimed by respondent is not apparent from the language or the context. Moreover, the subsequent actions of the parties are not consistent with respondent's position. In March 2016, Mr. E. spoke with Mr. Buono and asked if there was anything in place in accordance with the stay-put provision in the settlement agreement in the event that C.E. did not return to Riverview, and Mr. Buono said that the District would create a program if necessary. This conversation indicates that both men viewed an in-district program as a real possibility. At the IEP meeting on May 26, 2016, Mr. E. brought up the stay-put program, and Mr. Buono again said that the District would create one if necessary. By letter dated May 27, 2016, petitioners' attorney requested an opportunity for petitioners to visit the "stay put" transition program at Northern Highlands mandated by Paragraph 6 of the settlement agreement. By letter dated June 2, 2016, petitioners' attorney gave formal written notice of a unilateral placement for C.E. The effect of this letter was to give respondent ten days to develop an IEP to provide a FAPE for C.E. These circumstances indicate clearly that both Mr. Buono and petitioners took seriously the possibility of an in-district program at Northern Highlands. In contrast, the circumstances mentioned by respondent concerning petitioners' motion for emergent relief are ambiguous at best. It may also be noted that the substantial cost of the program at Riverview is another good reason to give serious consideration to an in-district program. Under the circumstances, the conclusion is warranted that the last sentence of Paragraph 6 of the settlement agreement created an obligation for the District to provide an in-district program for C.E. To the extent that

respondent's representatives may have thought that it would never be necessary to provide the in-district program, this circumstance is immaterial.

The next question is whether respondent provided an in-district program for C.E. as his stay-put placement as of July 1, 2016. After the IEP meeting on May 26, 2016, the District developed an IEP that provided for services which ended on June 30, 2016. There was no program as of July 1, 2016, and beyond. Under the circumstances, it is evident that respondent did not provide the in-district program required by Paragraph 6 of the settlement agreement.

In view of the above, respondent had an obligation to provide an in-district program which met the requirements of IDEA and failed to do so. Therefore, I **CONCLUDE** that respondent breached the settlement agreement.

Respondent offers two arguments to the effect that petitioners are still not entitled to any relief. First, respondent contends that petitioners did not suffer any damage and that they had an obligation to mitigate damages. Second, respondent argues that there is no negation of the "mutually agree" provision in the second sentence of Paragraph 6.

The difficulty with these arguments is that they relate to the consequences of a breach. In this segment of the bifurcated proceeding, the issue is limited to whether respondent breached the settlement agreement. Therefore, these arguments will not be considered at this time.

In regard to the balance of the bifurcated proceeding, the remaining issue set forth in the Prehearing Order dated December 7, 2016, is whether respondent failed to provide C.E. with a free appropriate public education for the 2016-2017 school year. At this point, it is evident that there should be an issue as to what relief, if any, will be granted in this proceeding. Therefore, the Prehearing Order dated December 7, 2016, shall be deemed to be amended to include the relief that may be granted in this proceeding.

Accordingly, it is **ORDERED** that:

1. The determination is made herein that respondent breached the Settlement Agreement dated July 10, 2015, by failing to have an in-district stay-put program in place for C.E.

2. The request to dismiss the due process petition in this matter be denied.

3. The Prehearing Order dated December 7, 2016, be deemed to be amended as set forth above.

This order shall remain in effect until issuance of the decision in this matter.

April 2, 2018

DATE

**RICHARD McGILL**, ALJ

Date Mailed to Parties: April 2, 2018
ljb

# APPENDIX

## WITNESS LIST

For petitioners:

C.E.

Christine Ann Soto

For respondent:

Deanna Friedland

Cathy Berberian-Strandes

Thomas Buono

## EXHIBIT LIST

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J-3 Report of Educational Evaluation by Tracy Larocca, LDT-C dated May 5, 2014

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J-26 Report of speech-language evaluation by Elayne Stern, M.S., CCC-SLP on November 9, 2010

J-27 Phone record

P-8 Emails from Riverview School dated February 25, 2016

P-9 Letter dated June 2, 2016, from C. Soto to J. Plosia re: 10-day notice

P-10 Certification of Thomas Buono dated June 16, 2016

P-11 Letter dated June 20, 2016 from C. Soto to ALJ Ellen Bass

P-12 Order of ALJ Ellen Bass dated June 21, 2017 on application for emergent relief in EDS 08751-16

# *State of New Jersey*
OFFICE OF ADMINISTRATIVE LAW

**ORDER**

OAL DKT. NO. EDS 10842-16

AGENCY DKT. NO. 2016 24632

**C.E. AND A.E. ON BEHALF OF C.E.,**

Petitioners,

v.

**NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,**

Respondent.

_____

**Denise Lanchantin Dwyer**, Esq., for petitioners

**James L. Plosia**, **Jr.**, Esq., for respondent (Plosia Cohen, attorneys)

BEFORE **RICHARD McGILL**, ALJ:

On April 3, 2018, respondent filed a motion for reconsideration of an Order dated April 2, 2018, in regard to the above-mentioned matter. Specifically, respondent requests consideration of two additional issues, described as “enforceability of Settlement Agreement” and “potential remedy for the alleged breach of the Settlement Agreement,” which were not addressed in the Order dated April 2, 2018. This Order supplements the Order dated April 2, 2018, and may be read as if additional paragraphs therein, specifically, in place of the two short paragraphs on page seven following the paragraph which ends as follows: “Therefore, I **CONCLUDE** that respondent breached the settlement agreement.”

Respondent offers two related arguments based on the second sentence of Paragraph 6 of the settlement agreement dated July 10, 2015. First, respondent contends that because it did not agree at the IEP in spring 2016 that C.E. requires educational services past June 30, 2016, the District's legal responsibility to educate C.E. terminated on June 30, 2016. Second, based on the same language, respondent maintains that no remedy is available for failure to provide educational services after June 30, 2016.

Respondent's arguments are unpersuasive because they are inconsistent with several principles pertaining to interpretation of a contract. First, proper interpretation of a contract requires consideration of the agreement as a whole rather than a single provision in isolation. Wheatly v. Sook Suh, 217 N.J. Super. 233, 239 (App. Div. 1987). Second, consideration should be given to the words of a contract, and a rational meaning should be applied in keeping with its expressed general purpose. Schau v. Schau, 206 N.J. 1, 5-6 (2016) citing Atlantic Northern Airlines, Inc. v. Schwimmer. Respondent's interpretation in effect reads the third sentence in Paragraph 6 out of the settlement agreement. This approach is inconsistent with the above principles. The more appropriate approach is to read the second and third sentences of Paragraph 6 together to mean, as the language clearly implies, that respondent will be responsible to provide a "stay put" placement for C.E. Therefore, read as a whole, Paragraph 6 means that after June 30, 2016, respondent would be responsible for C.E.'s stay-put placement.

Third, a contracting party should be bound by the apparent intention manifested to the other party. Brawer v. Brawer, 329 N.J. Super. 273, 283 (App. Div. 2000). On its face, the third sentence of Paragraph 6 amounts to a promise to provide an in-district program as C.E.'s stay-put placement. Respondent's purpose in seeking this provision was to ensure that Riverview was not C.E.'s stay-put placement. Additionally, respondent's representatives apparently hoped, expected or believed that it would never be necessary to provide an in-district program for C.E. The difficulty is that these types of thoughts are immaterial to the proper interpretation of a contract.

Fourth, a settlement agreement in a special education must be interpreted in light of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq. D.R.

v. East Brunswick Bd. of Educ. 838 F. Supp. 184, 192-94 (D.N.J. 1993). A specific section of IDEA provides that a child shall remain in his stay-put placement during the pendency of proceedings. 20 U.S.C. § 1415(j). Therefore, an interpretation of a settlement agreement that eliminates a stay-put program is not appropriate.

In view of the above, respondent was obligated to provide C.E. with an in-district stay-put program after June 30, 2016. Therefore, I **CONCLUDE** that respondent's argument that the second sentence of Paragraph 6 of the settlement agreement requires dismissal of the due process petition in this matter is without merit.

Respondent's second argument is that there is no potential remedy for a breach of the settlement agreement in this case. This argument is also unpersuasive. It is well established in general that there may be a remedy in regard to the period while the due process petition is pending. M.R. v. Ridley Sch. Dist., 744 F.3d 112 (3d Cir. 2014); Susquenita Sch. Dist. v. Raelee S., 96 F.3d 78, 84 (3d Cir. 1996). As determined above, respondent took responsibility to provide a stay-put program for C.E. subsequent to June 30, 2016, by virtue of the third sentence of Paragraph 6 of the settlement agreement. For substantially the same reasons that respondent is responsible for C.E.'s stay-put placement, the second sentence of Paragraph 6 does not mean that there can be no remedy after June 30, 2016. Therefore, I **CONCLUDE** that respondent's argument to the effect that there is no potential remedy for a breach of the settlement agreement is also without merit.

Accordingly, it is **ORDERED** that the determinations herein be deemed to supplement the Order dated April 2, 2018.

This order shall remain in effect until issuance of the decision in this matter.

April 4, 2018

DATE

**RICHARD McGILL**, ALJ

Date Mailed to Parties:
April 4, 2018
ljb