State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING

PARTIAL SUMMARY DECISION

CINNAMINSON TOWNSHIP BOARD OF EDUCATION, Petitioner, v. **K.J. AND O.J. ON BEHALF OF E.J.,** Respondents,	OAL DKT. NO. EDS 18357-13 AGENCY DKT. NO. 2014 20588
K.J. AND O.J. ON BEHALF OF E.J., Petitioners, v. **CINNAMINSON TOWNSHIP BOARD OF EDUCATION AND MONTESSORI ACADEMY,** Respondents.	OAL DKT. NO. EDS 18805-13 AGENCY DKT. NO. 2014 20551 (CONSOLIDATED)

Amelia Carolla, Esq., for K.J. and O.J. on behalf of E.J. (Freeman, Carolla, Reisman & Gran, attorneys)

Caitlin Pletcher, Esq., for Cinnaminson Township Board of Education and Montessori Academy (Comegno Law Group, P.C., attorneys)

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By Petition received by the Office of Special Education Programs of the New Jersey Department of Education on November 29, 2013, petitioners K.J. and O.J., the parents of E.J., requested emergent relief seeking to enforce their right to stay put placement at Montessori Academy (Montessori), a determination of an appropriate placement for E.J., and compensatory education for the failure to properly implement his IEP. The Petition was transmitted to the Office of Administrative Law (OAL) on December 30, 2013 and, in accordance with 20 U.S.C. § 1415 and 34 C.F.R. §§ 300.500 to 300.587, the Commissioner of the Department of Education requested that an Administrative Law Judge (ALJ) be assigned to conduct a hearing in the matter. Separately, the Cinnaminson Board of Education ("Board" or "District") filed a Petition that was transmitted to the OAL on December 18, 2013, in which the District sought emergent relief seeking a determination that E.J. was suffering a significant break in services after his dismissal from Montessori, and an order that he be placed in the District's Next Step Program at New Albany School. The emergent hearing on both petitions was conducted on January 7, 2014. Additionally, an Order of Consolidation was entered dated January 9, 2014.

Prior to the emergent hearing, respondent Montessori filed a Motion to Dismiss, dated December 23, 2013, contending that the petitioners' Petition, relative to Montessori, should be dismissed because this tribunal did not have jurisdiction to order the private school to comply with state and federal laws concerning the education of students with disabilities. This Motion was held in abeyance pending the decision on the cross-requests for emergent relief.

By an Order Granting Emergent Relief entered on January 10, 2014, this tribunal concluded that Montessori is E.J.'s placement for compliance with stay put for the remainder of the due process hearings. Accordingly, this tribunal granted petitioners' request for emergent relief and ordered that the District immediately resume implementation of the May 20, 2013, Individualized Education Plan ("IEP") as written, including the continued funding of E.J.'s placement at Montessori, upon his reinstatement.

Following the decision on emergent relief, petitioners filed on or about February 3, 2014, an Answer in Opposition to Montessori's previous Motion to Dismiss. On or about February 10, 2014, Montessori filed a Reply to petitioners' opposition, to which petitioners responded on or about February 20, 2014. Additionally, petitioners included in their reply a Motion to Amend their Petition. By letter, dated March 4, 2014, Montessori filed a letter brief in Opposition to the petitioners' Motion to Amend.

By letter, dated March 5, 2014, respondent Montessori also filed a Motion for Summary Decision, with supporting Certification and Brief. In this submission, Montessori asserted that, in light of this tribunal's emergent relief Order, the relief sought by petitioners was either moot or inapplicable relative to Montessori primarily because the school is not the local educational agency responsible for E.J.'s education.

By an Order of this tribunal dated March 26, 2014, Montessori's Motion to Dismiss and Motion for Summary Decision were denied**,** and petitioners' motion to substitute the Amended Petition, dated February 20, 2014, for the original Petition filed on November 29, 2013, was granted.

On May 28, 2014, the District filed a Motion for Partial Summary Decision, with supporting Certification and Brief. In this submission, the District asserted that, in light of the plain language of the Settlement Agreement and General Release ("Settlement Agreement") that the District and petitioners entered into in March 2014, petitioners waive and release the very claims asserted herein, and dictate that this tribunal should enter partial summary decision in favor of the District on petitioners' claims relating to the 2013 extended school year, and the 2013-2014 school year.

FACTUAL DISCUSSION

E.J. is a seven-year-old male, born July 11, 2006, who has resided with his parents within the District at all times relevant hereto. The child has significant, ongoing special education needs and is eligible under state and federal law to receive a free, appropriate public education ("FAPE"). At all times relevant to this dispute the Board has been the local education agency ("LEA") responsible for ensuring the provision of

FAPE to the student. When E.J. was a three-year-old and four-year-old, he received special education and related services under the classification category of "Preschool Child with a Disability." Since the age of five years, he has been classified as eligible for special education and related services under the classification category of "Communication Impaired."

E.J. is diagnosed with childhood apraxia among other disorders, and he has shown issues with auditory processing. The speech language therapist, Lauren Zuboff, who has treated E.J. since the 2012-2013 school year described his apraxia of speech as meaning that his "motor skills and ability to make sounds are very delayed. He is not communicating at the level of a typical seven-year-old child, but instead at the level of about a three-year-old." An additional speech language therapist retained by the parents, Sarina Hoell, who has treated E.J. on a weekly basis, provided the same description that E.J.'s delayed communication skills have him functioning at the level of a three-year-old. Accordingly, E.J. has demonstrated academic difficulties in various areas, including notable difficulties in the areas of reading comprehension and mathematics. E.J. has also demonstrated behavioral difficulties in recent years, which have increased in the current 2013-2014 school year.

Since preschool, E.J. attended Montessori in Delran, New Jersey, a private school that is not approved or accredited by the State of New Jersey for the education of students with disabilities. Until kindergarten, the District authorized this placement, but in an IEP dated May 23, 2012, the District proposed that E.J. be placed in-district at the New Albany School, his local neighborhood school, for the 2012-2013 school year and the extended school year, with a specialized program and various related services, including a 1:1 aide, speech and language therapy, occupational therapy, and behavioral consulting services.

In June 2012, E.J.'s parents initiated prior litigation against the District through which they challenged the appropriateness of the May 23, 2012, IEP. On March 5, 2013, the Board and the parents settled the prior litigation by agreeing to a Settlement Agreement and General Release ("Settlement Agreement") through which, among

many other provisions, E.J. would remain at Montessori through June 30, 2014 at the expense of the District.

In negotiating the Settlement Agreement, the parties included language regarding what would happen in the event that E.J.'s attendance at Montessori was discontinued for reasons beyond the parent's control. Specifically,

Paragraph 3 of the Settlement Agreement states:

> Upon final ratification and approval of this Agreement, the Board shall amend the 2011-2012 IEP for E.J. to provide for related services to E.J. in the form of speech and language therapy three (3) times per week for thirty (30) minutes, occupational therapy two (2) times per week for forty-five (45) minutes, and behavioral consultations by a Behavior Analyst, qualified by both education and training, with E.J.'s daily one-to-one aide (who accompanies him for the duration of the school day) at a frequency of three (3) times per month for one (1) hour in duration. In addition, the IEP will be amended to provide that E.J.'s aide be trained in American Sign Language. Such related services will continue to be provided in the home on an individual basis and shall be implemented at these frequencies immediately upon ratification and final approval of this Agreement.

Paragraph 10 of the Settlement agreement states:

> In addition to the evaluations and assessments to be conducted by the District pursuant to Paragraph 9 above, the District shall conduct an Assistive Technology Evaluation by a qualified evaluator of its choosing. The District will use its best efforts to complete this evaluation by April 15, 2013. If the report of said evaluation is available on or before the time of the meeting to discuss E.J.'s goals and objectives pursuant to Paragraph 8 of this Agreement, then the recommendations of the Assistive Technology Evaluation may be discussed at that meeting, and, if determined to be appropriate by the IEP team, incorporated into E.J.'s IEP . . . Notwithstanding any other provision of this Agreement to the contrary, the parties specifically reserve all rights and remedies they may have with respect to the recommendations of the Assistive Technology Evaluation and/or the appropriateness of the same.

Paragraph 11 of the Settlement Agreement states:

> The Board retains the right and obligation to continue to monitor the appropriateness of E.J.'s educational program and placement for the period beyond June 30, 2014, and to request any and all evaluations which the child study team determines to be appropriate in connection therewith. Therefore, the Parties shall hold an IEP meeting in the Spring 2014 to assess the appropriateness of E.J.'s educational program and placement and determine the same for the period following June 30, 2014 . . .

Paragraph 14 of the Settlement Agreement states:

> . . . Similarly, the District agrees to provide the Parents with full access, in accordance with law, to E.J.'s education or student records, including but not limited to, progress reports, counseling notes, report cards, evaluations, assessments, testing results, anecdotal records, disciplinary records, or notes that are student records, as defined by law, pertaining to E.J.'s educational program.

Paragraph 15 of the Settlement Agreement states:

> It is understood and agreed that the District shall not be financially responsible for an alternative out-of-district placement for E.J. should he discontinue his attendance at Montessori Academy, unless the Parties mutually agree that a different placement is appropriate. In the event E.J. discontinues his attendance at Montessori Academy due to circumstances beyond the Parents' control, including E.J.'s inability to continue to attend Montessori Academy, the Parties shall hold an IEP meeting within fifteen (15) days and the District shall propose an IEP with an appropriate educational program and placement. If the Parties cannot reach a mutual agreement with respect to such alternative placement, the Parties expressly reserve all legal rights and remedies they may have at that time, including the right of the Parents to challenge the appropriateness of the proposed alternative placement or file a due process petition in connection with the same.

Paragraph 16 of the Settlement Agreement states:

> The parents, individually and on behalf of E.J., agree to waive their right to file or initiate, and shall not file, initiate, or cause to be initiated, any suit, demand, administrative, judicial or other proceeding, claim, complaint, due process petition, grievance, or action of any kind, in any forum whatsoever, relating to or arising out of the educational program or related services provided to E.J., or the provision of educational services to him, from the beginning of time through June 30, 2014. In addition, the parents, E.J., and any person or entity acting on his or their behalf, jointly and severally, hereby agree to indemnify, release, and forever discharge the Board, its members, officers, employees, administrators, agents, servants, and assigns from any and all claims which any of them have or might have against the Board or its members, officers, employees, administrators, agents, servants, and assigns, relating to or arising out of the educational program or related services provided to E.J., or the provision of educational services to him from the beginning of time through June 30, 2014, and hereby forever hold them harmless from the same. It is expressly understood, however, that either party may bring an action to enforce the terms of this Agreement. This release does not relieve the District of any legal obligations it may have toward E.J. for the period from July 1, 2014 and thereafter.

Paragraph 17 of the Settlement Agreement states:

> The parents and E.J. acknowledge that the Board has no control over the program offered at Montessori Academy, the staff, or the provision of services at that placement. Therefore, the parents, E.J., and any person or entity acting on his or their behalf further agree to release and hold forever harmless the Board, its members, officers, employees, administrators, agents, servants, and assigns for any liability of any kind for losses, damages, personal injury, emotional distress, or property destruction suffered by E.J. while on the premises of Montessori Academy, pursuant to the terms of this Agreement or any addendum or successor agreement hereto. It is expressly understood, however, that the provisions of this paragraph do not pertain to liability for injuries, losses or damages suffered by E.J. related to transportation to and from school or acts of District employees or contractors while on the premises of Montessori Academy, and all the parties reserve any rights, remedies, or defenses they may have with regard to the same.

Paragraph 30 of the Settlement Agreement states:

> This Agreement is a full and final settlement and constitutes a legal release of any and all claims that were or could have been raised in a due process petition or other proceeding, of any kind, as set forth in Paragraph 16 and 17 above, filed by parents relating to or arising out of the provision of educational services for E.J. for the period through and including June 30, 2014.

Pursuant to Paragraph 8 of the Settlement Agreement, the parties were required to collaborate to develop measurable and appropriate goals and objectives into a new IEP for E.J. That meeting took place on May 20, 2013, and an IEP was finalized that both the parents and the District agreed upon. In that May 20, 2013, IEP, the District maintained its belief that Montessori was an inappropriate placement for E.J., however it was obligated to continue the placement pursuant to the Settlement Agreement. The IEP meeting included the parents and representatives from the District's child study team, as well as Ellen Fox, School Head of Montessori. Thus, Montessori was aware of E.J.'s IEP and accepted tuition payments from the District in exchange for providing E.J. with an appropriate educational program in accordance with the May 20, 2013, IEP.

The May 20, 2013, IEP requires that E.J. be provided a 1:1 aide everyday for the entire school day at Montessori. The May 20, 2013, IEP, incorporates a behavior support plan created by Jennifer Amoroso, M.Ed., BCBA, on April 16, 2013, and revised April 17, 2013. This plan states that E.J. was referred in the Spring 2013 for a behavior support plan because he was engaging in inappropriate contact and inappropriate social behavior, specifically targeting one individual at Montessori. Thus, as far back as April 2013, his high rates of inappropriate contact and behavior were becoming a barrier to Montessori's work toward transitioning him from the kindergarten classroom to the elementary classroom. The resulting behavior support plan specifically outlined a response to his inappropriate contact by requiring that staff position themselves in E.J.'s safety zone at all times to be in position to block and redirect all inappropriate contact attempts. The plan requires that an aide be within arm's length of E.J. to minimize his opportunity to be aggressive.

Pursuant to the Settlement Agreement and the May 20, 2013, IEP, E.J. attended Montessori for the remainder of the 2012-2013 school year and the initial months of the 2013-2014 school year until early November 2013. Specifically, on November 4, 2013, an incident occurred in which E.J. is alleged to have struck a female student approximately six times[1], at which time Montessori made the unilateral decision to remove E.J. from its school. Ms. Fox certifies that while E.J. was attending Montessori, the school complied with such requirements of E.J.'s IEP that he is allowed to use an iPad during speech therapy sessions and that his behavioral intervention plan is followed to improve his behavior. This evidences an agreement with the IEP by Montessori and the school's intention to implement it.

The District learned of the incident on November 6, 2013, when it received a letter from Ms. Fox, the School Head of Montessori, to E.J.'s parents, dated November 4, 2013, informing them of the incident and the fact that E.J. had developed aggressive behaviors, including aggression specifically directed towards one little girl in particular, the same little girl who was struck[2]. The letter stated that Montessori "can no longer offer enrollment to [E.J.]" because of its "duty to all of our students to provide a safe learning environment." Ms. Fox went on to explain that E.J.'s behaviors were manageable when he was a three-year-old in the primary class, but that the elementary class at Montessori is a very large classroom involving much more student interaction and stimulation which has amplified E.J.'s problem behaviors. The elementary classroom contains forty to fifty students at all times, ranging in age from six to twelve. The letter concluded that E.J. was being dismissed because "Montessori Academy can no longer offer a beneficial and supportive classroom environment for [E.J.]" The letter does not state that E.J. was being dismissed as a disciplinary action.

[1] It remains unclear as to how the incident was physically able to occur since the teacher's summary of the event states that E.J.'s 1:1 aide "was, as usual, standing behind [E.J.] with her hands on his shoulders during the Pledge of Allegiance and the injured girl was "standing about 10 students away." Notably, there is no statement in the record as to what transpired from the point of view of the aide, who would appear to be, based upon the teacher's report, in the best position to explain the incident since she was literally standing behind E.J. with her hands on his shoulders.

[2] It remains unclear why this incident represented any type of new development since it was documented seven (7) months prior, in the April 2013 behavior support plan, that E.J. may engage in inappropriate and aggressive behavior.

By letter dated November 6, 2013, the District offered to immediately place E.J. in the "Next Steps Program," a self-contained program in-district at New Albany School. The letter to the parents outlined the program schedule, invited the parents to observe the program, and set forth all of the various program elements, services, and opportunities for E.J. within the program. Pursuant to the previously identified Paragraph 15 of the Settlement Agreement, the parties held an emergency IEP meeting organized by the District on November 12, 2013. The purpose of the meeting was to discuss a new placement for E.J., and, at least on a temporary basis, offer him a program and placement to be immediately implemented to ensure that he would not suffer any break in services as a result of Montessori's unilateral decision to disenroll him from their school.

The November 12, 2013, emergency IEP meeting was attended by the case manager, Director of Special Services, district behaviorist (a BCBA), Supervisor of New Albany School, Supervisor of Special Services/Learning Consultant, board attorney, occupational therapist, the parents, and the parent advocate. Although Montessori staff were invited by the District to attend, due to scheduling, they were unable to do so. At this emergency IEP meeting, the parents objected to discussing alternative placements as a result of Montessori's actions and, instead, requested that the District conduct a manifestation determination review meeting, even though they were informed that no disciplinary action was being taking against E.J.

Following the November 12, 2013, emergency IEP meeting, the parents were sent an IEP, dated November 14, 2013, through which the District offered E.J. placement in the self-contained Next Steps Program at New Albany School, with related services of a daily 1:1 aide, speech/language therapy four times per week (twice in school and twice in the home), occupational therapy two times per week (once in school and once in the home) for forty-five minutes each, daily transportation, behavioral consulting services, and various program modifications and supports.

On November 14, 2013, the District received a letter from Ms. Fox expounding upon the reasons for no longer permitting E.J. to attend Montessori. Ms. Fox stated that, following his transition from the primary to the secondary program at Montessori in

September 2013, "it is apparent that attending the elementary program is not appropriate for [E.J.]" Ms. Fox stated that E.J.'s "challenges may be [ex]acerbated by the fact that he is in a class with students ranging from ages six to twelve, who during the course of their work create too much auditory and visual stimulation for [E.J.]" Ms. Fox stated that E.J. "no longer chooses to work with the other children," "isolates himself," and "has become exceedingly obsessed with external stimuli, including calling the name of one particular student on whom he is fixated." She explained that E.J. "has become so disruptive in class that his personal aide frequently has to move him to the hallway in an attempt to calm him down. These behaviors have become more exaggerated as the year has progressed, so [E.J.] spends increasing amounts of time in the hallway." The letter states that E.J. is being dismissed not for disciplinary reasons, but because of the contention of Montessori that it is no longer an appropriate placement.

The District has contended that it cannot compel Montessori to re-enroll E.J., nor did it seek to do so, since both the District and Montessori agreed that Montessori is inappropriate to meet E.J.'s educational needs. On November 19, 2013, out of concern for E.J.'s immediate educational well-being, the District offered E.J. home instruction of ten hours per week as a temporary measure, as well as continuation of related services in the home, while the parents considered whether to accept the offering in the IEP from the November 12, 2013, emergency IEP meeting.

By email, dated November 22, 2013, the parents accepted the offer of home instruction, but explicitly stated that the acceptance was not an agreement to a change in placement for E.J. or a waiver of their rights regarding "stay put". Thereafter, on or about November 27, 2013, the parents filed a Due Process Petition challenging the District's IEP offering and claiming that the in-district program offered by the District is inappropriate to provide E.J. with FAPE. In their petition, the parents request temporary placement of E.J. back at Montessori in an elementary-level class taught by a different teacher than he had previously, and that the District identify and offer another appropriate alternative placement. Montessori asserts that there is only one elementary classroom at the school and that he was removed from that class.

Pursuant to this tribunal's Order Granting Emergent Relief entered on January 10, 2014, E.J. is to remain at Montessori as his stay put placement for the remainder of the due process hearings, with funding provided by Cinnaminson Township Board of Education.

On May 28, 2014, the District filed a motion for partial summary decision through which the District seeks the dismissal of the following claims made by the parents in their due process petition:

> (1) Petitioners' claim for compensatory education from the Board 'equal to the monetary amount that was or would have been spent on tuition and support services for all extended school and regular school year days that Montessori Academy refused to allow E.J. to use his Augmentative Communication Device.'
>
> (2) Petitioners' claim for compensatory education 'equal to the monetary amount that would have been spent on tuition and support services for all days on and after November 4, 2013, the date of his expulsion, that E.J. was denied a free and appropriate public education at Montessori Academy.'
>
> (3) Petitioners' claim for relief under the ADA and Section 504 from the Board which are based upon Montessori's alleged refusal to allow E.J. access to the Speak for Yourself application and alleged failure to implement the Behavior Services Plan in E.J.'s IEP.

According to the District, "[t]he plain language of the Settlement Agreement and General Release that [Cinnaminson] and petitioners entered into in March 2014 waives and releases [these] very claims . . . and dictates that the Court should enter partial summary decision in favor of [Cinnaminson] on petitioners' claims relating to the 2013 extended school year, and the 2013-2014 school year." The District further argues that, if K.J. and O.J. believe that the District has violated the terms of the Agreement, they should file an enforcement action in the appropriate forum, which is not the OAL.

LEGAL DISCUSSION

The New Jersey Uniform Administrative Procedure Rule, N.J.A.C. 1:1-12.5, governs the District's Motion for Summary Decision. The provisions of N.J.A.C. 1:1-12.5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. Pursuant to these rules, a case may be dismissed before it is heard if, based on the papers and discovery which have been filed, it can be decided "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." N.J.A.C. 1:1-12.5(b). As discussed further below, while the facts are not strongly in dispute in this matter, the District has established, as the moving party, that it is entitled to prevail as a matter of law.

The District contends that in light of the terms of the enforceable Settlement Agreement entered on March 5, 2013, incorporated into a Final Decision by Patricia M. Kerins, ALJ, on March 7, 2013, specifically paragraphs 16, 17 and 30, the clear language of the Settlement Agreement prohibits petitioners from filing any claims against the District that are related to or arise out of the educational program or related services provided to E.J., or the provision of educational services to him at Montessori for the period through and including June 30, 2014. And, further, petitioners expressly agreed to indemnify, release, and forever discharge the District, its members, officers, employees, administrators, agents, servants, and assigns from any and all claims which any of them have or might have against the District or its members, officers, employees, administrators, agents, servants, and assigns, relating to or arising out of the educational program or related services provided to E.J., or the provision of educational services to him at Montessori for the period through and including June 30, 2014, and hereby forever hold them harmless from the same. In essence, petitioners are now attempting to assert the very claims that are barred by the Settlement Agreement. The District concludes that, it cannot be disputed that petitioners are bound by the Settlement Agreement and, as such, the District is entitled to partial summary decision on petitioners' claims against the District that relate to the 2013 extended school year and the 2013-2014 school year.

Petitioners counter that in paragraph 16, they retained rights that survived execution and implementation of the Settlement Agreement, particularly, the right to bring an action to enforce the terms of the Settlement Agreement. Since the Settlement

Agreement obligates the District to do a number of things, petitioners are entitled to the completion of those items. One of those items was outlined in paragraph 15 of the Settlement Agreement, and required the parties to attempt to reach agreement on an alternative program and placement if E.J.'s attendance at Montessori was discontinued due to circumstances beyond the control of petitioners. Paragraph 15 provided a solution in the event such an agreement could not be reached, and it allowed the parties to expressly reserve all legal rights and remedies they may have at that time, including the right of the parents to challenge the appropriateness of the proposed alternative placement or file a due process petition in connection with the same. Petitioners urge that the language of paragraph 15 allowed petitioners the right to challenge the proposed alternate placement or file a due process petition in connection with the proposed alternate placement.

I **CONCLUDE** that the claims the District seeks to have dismissed are barred under the terms of the Agreement. In J.K. and C.K. ex rel. P.K. v. Voorhees Twp. Bd. of Educ., EDS 12382-11, Final Decision (February 10, 2012) <http://njlaw.rutgers.edu/collections/oal/>, ALJ Patricia Kerins granted a school district's motion to dismiss the parents' due process petition because the parties had previously entered a settlement agreement in which the parents waived any claim or cause of action relating to their child's education. In dismissing the petition, ALJ Kerins also noted that "[t]he OAL is 'without authority or jurisdiction to either enforce or set aside an enforceable contract. Such enforcement (or set aside) is within the purview and jurisdiction of our State's Superior Court or the United States District Court, not the OAL.'" A.P. v. Dennis Twp. Bd. Of Educ., EDS 2599-98, Final Decision (May 13, 1998) <http://njlaw.rutgers.edu/collections/oal/>.

Here, like in J.K., the parents' claims regarding the denial of a FAPE during E.J.'s time at Montessori Academy must be dismissed because the parents waived such claims through the Agreement. The parents' claims that Montessori Academy's refusal to allow E.J. to use an Augmentative Communication Device and to implement a Behavior Services Plan violated the ADA and Section 504 must likewise be dismissed as such claims also relate to the provision of educational services to E.J. at Montessori Academy before June 30, 2014. With respect to the claim regarding the communication

device, such claim was not reserved under Paragraph 10 of the Agreement because the parents are not disputing the recommendations of the Assistive Technology Evaluation, but rather Montessori Academy's failure to implement certain such recommendations included in E.J.'s IEP. The District also correctly argues that, to the extent that the parents seek to enforce any provision of the Agreement, the OAL is not the proper forum for such action. The Agreement does not bar due process claims regarding the appropriateness of an alternative placement proposed by the District in the event E.J. should no longer attend Montessori Academy.

In reviewing petitioner's amended complaint, petitioners request this tribunal order the following eight prayers for relief: (1) finding that the District and Montessori did not properly implement E.J.'s IEP for the 2013 ESY and the 2013-2014 school year, thus depriving him of a FAPE, and awarding compensatory education associated therewith; (2) finding that the District and Montessori violated Section 504 and the ADA and awarding compensatory damages therefor; (3) finding that the District's proposed IEP placing E.J. in the New Albany Next Steps program for the 2013-2014 was not an offer of FAPE consistent with IDEA; (4) finding that the appropriate placement is at Bancroft Early Education Program or another appropriate approved in-state private school for students with disabilities, with all appropriate related services, including the use of a augmentative communication device; (5) finding that the behavior that resulted in Montessori Academy's termination of E.J. as a student was a manifestation of his disability; (6) awarding expert fees as permitted under Section 504; (7) awarding counsel fees and costs; and (8) granting such other relief as the Court may deem proper and just.

The amended complaint of petitioners incorporates the requested relief sought by the parents in their pro se complaint. The District has requested that two of the parents' requests for relief in their original pro se petition be dismissed, and they have asked for dismissal of a request for relief in the amended petition. More particularly, the District requests that this tribunal dismiss the parents original pro se petition claims for compensatory education from the District 'equal to the monetary amount that was or would have been spent on tuition and support services for all extended school and regular school year days that Montessori Academy refused to allow E.J. to use his

Augmentative Communication Device,' and petitioners' original pro se claim for compensatory education 'equal to the monetary amount that would have been spent on tuition and support services for all days on and after November 4, 2013, the date of his expulsion, that E.J. was denied a free and appropriate public education at Montessori Academy.' These claims correspond to the first request in petitioner's amended petition request for relief as set forth above. That claim is dismissed.

As a result of the dismissal of petitioners' claim for relief under the ADA and Section 504 from the District which are based upon Montessori's alleged refusal to allow E.J. access to the Speak for Yourself application and alleged failure to implement the Behavior Services Plan in E.J.'s IEP, the second request in petitioner's amended petition request for relief as set forth above is also dismissed. In addition, as claim number five of the request for relief in petitioner's amended petition, requesting a finding that the behavior that resulted in Montessori Academy's termination of E.J. as a student was a manifestation of his disability, relates to E.J.'s program during the 2013-2014 school year, this claim must also be dismissed. This claim was also waived by agreement of the parties in the Settlement Agreement entered before ALJ Kerins.

Therefore, for clarification purposes, requests three, four, and six through eight of the request for relief in petitioner's amended petition survive and remain for purposes of this hearing. As such, partial summary decision should be granted in favor of the District on petitioners' claims relating to the 2013 extended school year and the 2013-2014 school year, in particular items one, two and five of the request for relief in petitioner's amended petition.

CONCLUSION

The District's Motion for Partial Summary Decision is **GRANTED**.

ORDER

It is hereby **ORDERED** that the District's Motion for Partial Summary Decision is **GRANTED**.

The hearing in these matters will proceed as scheduled on July 10, 2014.

July 3, 2014
DATE

EDWARD J. DELANOY, JR., ALJ

Date Mailed to Parties:

EJD/cb