State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDS 18493-13

AGENCY DKT. NO. 2014 20527

M.P. AND K.P. ON BEHALF OF T.P.,

Petitioners,

v.

JACKSON TOWNSHIP BOARD OF EDUCATION,

Respondent.

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M.P., petitioner pro se[1]

Joanne Butler, Esq., appearing for respondent (Schenck, Price, Smith and King, attorneys)

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

The petitioners, M.P. and K.P., as the parents of their son T.P., who is classified as eligible for special education and related services under the category of emotionally disturbed, seek reimbursement from respondent Jackson Township Board of Education ("Jackson") for the unilateral placement of him at the Calvary Academy, an unapproved, sectarian school, for the 2013–2014 school year.[2]

[1] M.P. is a member of the New Jersey Bar, as is K.P.

[2] The due-process petition is not clear as to whether the petitioners seek reimbursement only for school year 2013–2014, or if they are seeking reimbursement for future years as well. The petition states,

PROCEDURAL HISTORY

On or about August 29, 2013, the petitioners filed a due-process petition seeking reimbursement for the unilateral placement of T.P. at Calvary Academy for the 2013–2014 school year. On December 20, 2013, the matter was transmitted to the Office of Administrative Law as a contested case.

On September 26, 2014, Jackson filed a "motion to dismiss" the petition because it "seeks Board-funded placement at Calvary Academy, a school which is not approved by the Department of Education for the provision of special education and related services to disabled students and which is a sectarian school."[3] On October 14, 2014, the parents filed a motion for summary decision seeking reimbursement for the unilateral placement of T.P at Calvary Academy. The motions were argued on the record on December 15, 2014.

FACTUAL DISCUSSION

T.P. is an intelligent twelve-year-old boy with a history of anxiety and panic attacks. In November 2011, while a fourth-grade student at a Jackson elementary school, T.P.'s anxiety issues led to his placement on homebound instruction for three months. T.P. was then evaluated by a Jackson child study team ("CST"), and at a meeting on February 7, 2012, the CST determined that T.P. was eligible for special education and related services as "emotionally disturbed." The CST developed an individualized education plan ("IEP") for him for the period from February 2012 to February 2013. The IEP included several supports and services to address T.P.'s anxiety in the school setting. T.P. returned to school on a full-time basis in the latter part of the 2011–2012 school year, and remained a full-time student at the elementary

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"Placement in a small private school, i.e. Calvary Academy, is appropriate, and this cost should be the responsibility of [respondent]."

[3] As Jackson's motion seeks to resolve this case on the papers and without a plenary hearing, its motion is being treated as a "motion for summary decision" in accordance with N.J.A.C. 1:1-12.5.

school for the 2012–2013 school year. The IEP accommodations helped, but T.P. continued to experience anxiety issues at school.

On January 10, 2013, the petitioners and the CST met to discuss T.P.'s transition to middle school. The parties agreed to an IEP for the remainder of the school year, and agreed to discuss T.P.'s middle-school placement at Goetz Middle School ("Goetz") after the petitioners had had a chance to visit it. In or around February 2013, the petitioners visited both Goetz and the Calvary Academy, an unapproved, sectarian school located in Lakewood, New Jersey.

In March 2013, the petitioners requested that a program be proposed for T.P. at Goetz. On March 12, 2013, the CST proposed an IEP at Goetz for the 2013–2014 school year. The IEP included in-class support for literacy, math, science, and social studies; one counseling session per week with the school psychologist or social worker; and the companionship of a classroom paraprofessional during lunch, band or chorus, unified arts, and transitions from one activity to the next. The IEP also gave T.P. the option of eating lunch in the lunchroom or in the office of the CST or guidance counselor; access to his iPod throughout the day; and, occupational therapy sessions on a consultative basis.

On April 24, 2013, M.P. sent a letter to T.P.'s case manager requesting an independent psychological evaluation at district expense and notifying the district of the petitioners' intention to unilaterally place T.P. in a non-public school for the 2013–2014 school year. In the letter, M.P. stated, "I realize that I have not been given a copy of [the proposed 2013–2014] IEP, but we did have discussions in January, and I am aware of what is being proposed." And, with regard to a unilateral placement, M.P. stated, "[i]t is [the petitioners'] belief due to [T.P.'s] anxiety condition, and the spikes in anxiety he suffers in loud, chaotic situations, that an appropriate education must come in a smaller school setting. We seek reimbursement for the cost of this placement." Finally, M.P. stated that it was his belief that he had to formally reject the IEP and request an "out-of-district" placement at an IEP meeting, and asked that the district either waive the need for an IEP meeting to do so or schedule an IEP meeting forthwith.

On May 21, 2013, the CST and petitioners met to discuss T.P.'s placement for the 2013–2014 school year. The CST again recommended a placement at Goetz, while the petitioners urged a placement at Calvary Academy, which the CST rejected. The same day, M.P. sent another letter to T.P.'s case manager requesting reimbursement for a unilateral placement at Calvary Academy for the 2013–2014 school year.

On or about August 29, 2013, the petitioners filed a due-process petition seeking reimbursement for the unilateral placement of T.P. at Calvary Academy for the 2013–2014 school year. According to the petition, T.P. "needs to be put in an environment where his anxiety will remain at tolerable levels; the sixth-grade class at Calvary Academy has 'approximately 23 students, as opposed to the over 300 students at the public middle school'; and, as such, 'a public middle [school] does not constitute a free and appropriate education' and '[p]lacement in a small private school, i.e., Calvary Academy, is appropriate, and this cost should be the responsibility of [Jackson.]'"

On September 26, 2014, Jackson filed a "motion to dismiss" the petition because "it seeks Board-funded placement at Calvary Academy, a school which is not approved by the Department of Education for the provision of special education and related services to disabled students and which is a sectarian school."[4] In its motion, Jackson asserts that its "proposed placement and program were wholly appropriate, thus negating any potential claims for reimbursement, and . . . the equitable considerations mandate a finding that Petitioners did not work collaboratively with [Jackson], deciding to unilaterally place their son at Calvary Academy before even discussing the issue with District staff."

On October 14, 2014, the petitioners filed a motion for summary decision seeking reimbursement for the unilateral placement of T.P at Calvary Academy. The petitioners assert that Jackson's proposed IEP was inappropriate, that Calvary Academy was appropriate for T.P., and that the petitioners did not act unreasonably in unilaterally placing T.P. at Calvary Academy.

[4] See note 3.

LEGAL ANALYSIS AND CONCLUSION

Under N.J.A.C. 1:1-12.5(a), "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." A motion for summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). And, if "a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. In determining whether a genuine issue exists, the appropriate test is "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995).

Under the IDEA, "[p]arents who withdraw their child from public school and unilaterally place him or her in private school while challenging the IEP may be entitled to reimbursement of their tuition costs if the [administrative law judge] finds that the [local educational agency's] proposed IEP was inappropriate, and that the parents' unilateral placement was appropriate." L.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290, 292 (D.N.J. 2003) (citing Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 12, 126 L. Ed. 2d 284, 291, 114 S. Ct. 361, 364 (1993)). And, the Supreme Court's decision in "Florence precludes a LEA from relying on a state law [N.J.S.A. 18A:46-14 ("Naples Act")] that bans payment to sectarian institutions as a basis for denying parental reimbursement when the LEA has failed to provide a [free appropriate public education] and the unilateral parental placement is deemed appropriate under the IDEA." Id. at 298. Nonetheless, reimbursement for a unilateral placement may be reduced or denied if the parents failed to provide adequate notice to the school district prior to removing the student or the parents otherwise acted unreasonably in unilaterally placing their child. 20 U.S.C.A. § 1412(a)(10)(C)(iii); N.J.A.C. 6A:14-2.10(c).

In this matter, there are genuine issues of material fact with respect to (1) the appropriateness of the IEP proposed by Jackson for the 2013–2014 school year; (2) the appropriateness of Calvary Academy for T.P.; and, (3) the reasonableness with which the parents acted in unilaterally placing T.P. at Calvary Academy. These issues can only be determined at an evidentiary hearing with fact and expert witnesses. Accordingly, the parties' cross-motions for summary decision are **DENIED** and the matter shall proceed to hearing.

December 23, 2014
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency

Date Mailed to Parties:

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