State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

EMERGENT RELIEF

OAL DKT. NO. EDS 01583-15

AGENCY DKT.NO. 2015-22248

M.W. ON BEHALF OF M.W.,

Petitioners,

v.

GARFIELD BOARD OF EDUCATION,

Respondent.

Darsi D. Beauchamp, Ph.D., Advocate, for petitioner M.W., in accordance with N.J.A.C. 1:1-5.5(a)(7).

Cherie Adams, Esq., for respondent Garfield Board of Education (Adams, Gutierrez & Lattiboudere, attorneys)

Record Closed: February 6, 2015 Decided: February 9, 2015

BEFORE **GAIL M. COOKSON**, ALJ:

Petitioner M.W. filed this petition on or about January 22, 2015, on behalf of her son M.W., who is six (6) years old, requesting an emergency interim placement at the Learning Center for Exceptional Children (LCEC) in Clifton, New Jersey, and related services, in addition to other non-emergent relief, against respondent Garfield Board of Education (District). More specifically, petitioner alleges that the District has failed to develop a proper Individualized Education Plan (IEP) for her son, or concluded necessary evaluations of him. It is not disputed that M.W. is entitled to special educational services

under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §1400 et seq. M.W. has a rare genetic disorder – Trisomy 1 – which results in global developmental delays.

The Office of Special Education Programs (OSEP) transmitted the emergency petition to the Office of Administrative Law (OAL) on February 4, 2015. On February 6, 2015, oral argument was heard and the record closed. For the reasons set forth on the record and after due consideration of the papers and oral argument received, I **CONCLUDE** that petitioner's request for emergent relief must be **DENIED**.

An important consideration is that these parties have previously been before the OAL on the same proposed IEP for M.W. on October 6, 2014, under OAL Docket EDS-9376-14. At that time, the parties entered into a settlement agreement that provided, in pertinent part, for completion of a functional neurodevelopmental evaluation by Dr. Barbara Couvadelli, and an observation and report by Dr. Michele Havens of programs at both LCEC and the District. Significantly, the parties agreed to abide by the determination of Dr. Havens with respect to the appropriateness of both the current placement at LCEC and the proposed placement in-district. The agreement also provided for interim placement pending Dr. Haven's observation and report, as well as a mechanism for "stay put" under any of the alternative results. Now, petitioner essentially seeks to set aside the settlement agreement, although her petition is not phrased as such.

For the reasons set forth herein, I **CONCLUDE** that OSEP improvidently transmitted this petition to the OAL as a request for new emergent relief when it really is a motion to either enforce the settlement or to set it aside. Petitioner attempts to argue that M.W. must be allowed to remain at LCEC because (1) Dr. Havens never actually stated that LCEC was an "inappropriate" placement; and/or (2) Dr. Couvadelli has opined that Garfield is an inappropriate placement and that M.W. should be at LCEC; and/or (3) the Settlement Agreement allowed for an alternative placement to either Garfield or LCEC; and/or (4) the Settlement Agreement allowed for a new petition to be filed seeking a

different "stay put" placement than the ones articulated in the Agreement; and/or (5) petitioner never agreed under any circumstances to allow M.W. to attend Garfield.

In this case, petitioner must meet a very high standard of obtaining the relief she seeks because the courts are loath to set aside the voluntary agreement of the parties. It is well-settled that a settlement is in the nature of a binding contract:

> Moreover, "a settlement agreement between parties to a lawsuit is a contract." Nolan [v. Lee Ho, 120 N.J. 465, 472, 577 A.2d 143, 186 (1990)] (citing Pascarella v. Bruck, 190 N.J.Super. 118, 124, 462 A.2d 186 (App. Div. 1983), certif. denied, 94 N.J. 600, 468 A.2d 233 (1983)). We noted in Pascarella that "an agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into and which a court, absent a demonstration of fraud or other compelling circumstances, should honor and enforce as it does other contracts." Pascarella, supra, 190 N.J.Super. at 124-25
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> [Zuccarelli v. State, Dept. of Environmental Protection, 326 N.J. Super. 372, 380 (App. Div. 1999)]

Here, petitioner has not presented any evidence, let alone persuasive evidence, that she was coerced into the October 6, 2014, Settlement Agreement. Petitioner apparently just does not like the outcome of the bargain she struck.

At the oral argument convened this date, I re-played the colloquy entered on the record on October 6, 2014, by the Honorable Jeffrey Gerson, A.L.J. At that time, as heard by all the parties hereto, the terms of the Settlement Agreement were read into the record. Judge Gerson then asked petitioner specifically to put those terms into her own words to demonstrate she understood what she was agreeing to; namely, that if Dr. Havens found LCEC to be good for M.W., he could stay there; but if Dr. Havens found that LCEC was not good but that Garfield's proposed placement was good for him, he would go in-district. Petitioner acknowledged that she had received satisfactory advice from her advocate. I **FIND** that petitioner knowingly and voluntarily entered into the Settlement Agreement.

As such, I **CONCLUDE** that the terms of the Settlement Agreement must be enforced. There is no need or allowance to go back to the "hallway discussions" of October 6, 2014, which pre-dated the writing up of the Agreement and entering it on the record. Unless the terms of the Agreement are ambiguous, the facial reading of the document binds all parties. In this case, I **CONCLUDE** that the terms are plain. Dr. Havens was to conduct an observation and write a report of her opinion as to the appropriateness of each program for M.W. Dr. Havens did so under cover of November 30, 2014. The report was conveyed to petitioner no later than December 19, 2014. No meeting was held but the District advised petitioner that pursuant to the Agreement, M.W. should commence attendance in-district no later than January 19, 2015. Petitioner has not allowed M.W. to attend the Garfield program.

The other contingencies written into the Settlement Agreement were clearly placed there "just in case" Dr. Havens found neither LCEC nor the District's program as appropriate for M.W. Then, and only then, would the parties have to seek to agree on an alternative placement, to which end they both agreed to send M.W.'s records to a list of potential out-of-district placements. If, but only if, the parties could not agree on an alternative, would the parties be free to return to the OAL for an order on an appropriate placement. Even then, the "stay put" alternatives were clearly spelled out in order to obviate confusion and unnecessary litigation. Thus, I **CONCLUDE** that the parties clearly and unambiguously spelled out their agreement as to the possible courses of action that would follow and each of the consequences of those courses of action.

The only remaining question then is whether the Settlement Agreement has been implemented properly, or instead, needs enforcement by either party. Petitioner argued that Dr. Haven conducted a perfunctory observation of LCEC and that her report failed to use the phrasing "inappropriate placement" with respect to her conclusions about LCEC. Respondent argued that petitioner failed to present any certifications or evidence to support her claim of a cursory observation. Moreover, the respondent presented a Certification of Dr. Haven as well as a clarifying addendum to her report. I note that Dr. Haven's report set forth in some detail a fair amount and variety of classroom activity observed during her visit to LCEC. It also contained supporting reasons for why and how

LCEC was not providing M.W. an appropriate education. Even without the Certification and addendum, I **FIND** that it was obvious enough so as to be implicit that she was concluding that LCEC was not a good placement for M.W. Certainly, the addendum did serve to clarify her meaning.

In sum, petitioner agreed with respondent in the Settlement Agreement that Dr. Haven would be the only person[1] deciding the appropriateness of either LCEC or Garfield as a placement for M.W. Having done so, and having found that LCEC is not appropriate and that Garfield is appropriate, the other provisions of the Settlement Agreement regarding contingent "stay put" and other out-of-district placements are not triggered. Petitioner is required to cooperate in the implementation of the Settlement Agreement to which she affixed her signature and assent.

ACCORDINGLY, it is on this 15th day of February 2015, **ORDERED** that petitioner's application for emergent relief and due process is and the same is hereby **DENIED** as resolved by the prior Settlement Agreement. M.W. should commence attendance at the in-District placement with appropriate transitional supports.

This decision on application for emergency relief resolves all of the issues raised in the due process complaint; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2). If the parent or adult student feels

[1] Any evaluations undertaken by Dr. Couvadelli can certainly be presented to the Child Study Team in order to inform his program but Dr. Couvadelli was not given a voice on placement by these parties at this time.

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.

February 9, 2015

DATE

GAIL M. COOKSON, ALJ

Date Mailed to Parties: 2/9/15

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