



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

MOTION TO DISMISS

OAL DKT. NO. EDS 16750-17

AGENCY DKT. NO. 2018 27033

C.C. ON BEHALF OF D.C.,

Petitioner,

v.

HOPE TOWNSHIP BOARD OF EDUCATION,

Respondent.

Bradley Flynn, Esq., for petitioner (Montgomery Law, LLC, attorneys)

John Comegno, Esq., and **Nikita Desai, Esq.,** for respondent (Comegno Law Group, attorneys)

Record Closed: January 2, 2018

Decided: January 8, 2018

BEFORE **ELLEN S. BASS, ALJ:**

STATEMENT OF THE CASE

In accordance with the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1415, C.C. has requested a due-process hearing on behalf of her son, D.C., who is classified as eligible for Special Education and related services. She alleges that the Hope Township Board of Education (Hope), via its Child Study

Team (CST), denied a free and appropriate public education (FAPE) to D.C., who is presently placed residentially by the State of New Jersey at the Bonnie Brae School. Hope replies that the petition fails to state a claim upon which relief can be granted, and seeks its dismissal.

PROCEDURAL HISTORY

C.C.'s request for due process is undated, but was marked received by the Office of Special Education Programs on October 13, 2017. A Motion to Dismiss in Lieu of an Answer was filed by Hope on November 13, 2017. The contested case was transmitted to the Office of Administrative Law on November 13, 2017. C.C. filed a letter opposing the Motion on December 28, 2017. That letter stated that petitioner reserved the right to seek to amend her petition; no Motion to Amend or proposed amended pleading accompanied counsel's submission. The record closed on January 2, 2018, after a status conference with counsel.

FACTUAL DISCUSSION AND FINDINGS OF FACT

The Uniform Procedure Rules, N.J.A.C. 1:1-1.1 et. seq., do not provide for the filing of a Motion to Dismiss, but do indicate that in the absence of an applicable rule, I may proceed in accordance with the New Jersey Court Rules. N.J.A.C. 1:1-1.3. Under R. 4:6-2(e), the inquiry for a Motion to Dismiss is "confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." Rieder v State of N.J. Dept. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). In ruling on the Motion, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v. City of Newark, 136 N.J. Super. 107, 112 (App. Div. 1975).

This case comes in the aftermath of an earlier contested case between these parties; which was heard by me, and decided via Final Decision dated December 21, 2017 (EDS 17825-16). The factual findings and procedural history set forth in my earlier decision are incorporated herein by reference. D.C. was initially enrolled in the Hope Township Schools in September 2016, and the earlier due process petition was

filed on October 21, 2016. The prior case considered claims that arose during that limited time frame. This due process petition picks up the relationship of the parties in September 2017; challenges an Individualized Education Program (IEP) developed that month; and contends that this IEP denied FAPE to D.C.

In her opposition to the Motion, Petitioner states that she is “seeking compensatory education based on deficient programming and IEP’s from October 22, 2016 to October 31, 2017.” But, I **FIND** that the petition only alleges facts pertinent to the development of the September 2017 IEP; challenging both its content and the procedure that led to its creation. There is no mention whatsoever of other IEP’s or other deficiencies in programming.

It is uncontroverted, and I **FIND**, that Hope has had no input into D.C.’s educational placements since in or about May 2017. D.C. was last placed by the Hope CST at the Warren County Special Services School District, in or about March 2017. The petition for due process avers that he left that placement because his mother “had [him] committed to Kids Peace...” But, as found in my earlier decision, in or about May 2017, and in the aftermath of an action in the Superior Court, D.C. was placed by the State of New Jersey at Kids Peace in Pennsylvania, a residential therapeutic setting. From there, in or about July 2017, D.C. was transferred to the Bonnie Brae School, in New Jersey, where he remains enrolled to date. This again is a therapeutic residential placement made by the State of New Jersey.¹

The allegations of the petition center on an IEP meeting that took place on September 28, 2017, at Bonnie Brae. Petitioner alleges that the IEP discussed that day misclassified D.C. as emotionally disturbed; did not appropriately specify related services; did not contain baseline data; did not express parental concerns; and did not contain counseling goals and objectives. But, the petition does not correlate these alleged omissions from the IEP document with D.C.’s actual program and services.

¹During a telephone conference, counsel for petitioner reiterated that it was indeed the State of New Jersey that had placed D.C. at Kids Peace and Bonnie Brae. Moreover, Hope’s submission unequivocally states that these are State-ordered placements, and that Hope has been unable to program for D.C. as a result. In her opposition letter, Petitioner does not dispute that the State has placed her son residentially, nor does she dispute that Hope had no control over these residential placements.

The petition does not even describe the program presently being delivered to D.C.; and if petitioner seeks an alternative program, or changes to the current program, the petition does not say so with any specificity. The petition seeks compensatory education, but offers no inkling into what type of additional services are needed, or how they should be delivered.

The petition also asserts that the presence of counsel for the Board of Education at the IEP meeting made it impossible for Petitioner to meaningfully participate and was intimidating. Petitioner admits that her attorney was notified about the IEP meeting via letter dated September 8, 2017.² But, although the Board attorney contends that she alerted Petitioner, through counsel, that she would be attending the meeting, Petitioner denies that her attorney was ever so notified.

After filing this petition for due process, C.C. relocated from Hope Township to Pennsylvania. She is no longer a domiciliary of either New Jersey or Hope Township. Hope is no longer the LEA for D.C.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Hope asks that the petition for due process be dismissed. N.J.A.C. 6A:14-2.7(c) requires that a request for due process include the specific issues, relevant facts and the relief sought. See also: 20 U.S.C. §1415(b)(7)(A), which requires that a due process petition include “a description of the nature of the problem relating to such proposed initiation or change [of services], including facts relating to such problem, and a proposed resolution of the problem to the extent known and available to the party at the time.” As to any ostensible allegations other than those pertaining to the September 2017 IEP and the meeting convened to discuss it, the petition lacks specificity. To the extent that Petitioner perceives that she has raised more extensive claims, I **CONCLUDE** that those claims must be dismissed simply because they are completely unaddressed in her petition.

² This was erroneously denoted in the petition as September 2018.

As to the allegations pertaining to the September 2017 IEP meeting, I **CONCLUDE** that these too must be dismissed for lack of specificity. The petition's vague demand for "compensatory education" does not sufficiently describe the relief sought, or offer any insight into how Petitioner believes "the problem" can be resolved, as required by the statute. 20 U.S.C. §1415(b)(7)(A). Hope urges that Petitioner has filed this petition only to seek attorney's fees and other damages, and the petition's vagueness gives that argument some appeal. The petition lists alleged errors in the IEP, and simply demands, "compensate me for those errors." But, by not specifying how the alleged omissions from his IEP impacted D.C.'s educational programming, the petition fails make a cognizable claim under the IDEA. A due process petition must correlate alleged omissions from the IEP document to shortcomings in programming that deny FAPE. Our courts have recognized that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of [an] appropriate education." Benjamin A. v Unionville-Chadds Ford Sch. Dist., 2017 U.S. Dist. LEXIS 128552 (E.D. Pa. 2017). This due process petition does not, so much as, mention any specifics about D.C.'s educational program.³

My concerns about the petition's lack of specificity are exacerbated by the fact that the pleading conveniently ignores that Hope had no input in placing D.C. at Bonnie Brae. His education program is being delivered in a State facility and under the auspices of a State agency. When the events recounted in the petition arose, Hope was the Local Educational Agency (LEA) responsible for D.C. But, the petition grossly oversimplifies Hope's role in D.C.'s educational programming once the State of New Jersey had placed him residentially. While Hope was obliged to participate in the IEP meeting, per N.J.A.C. 6A:14-8.3(e), the traditional placement and IEP development process does not govern D.C.'s educational programming at Bonnie Brae. See: N.J.A.C. 6A:17-3.1 and N.J.A.C. 6A:14-8.1. For a child, like D.C., who has been "placed in a State facility by a public agency other than the district board of

³ To the extent the petition seeks damages, it is well-established that the IDEA was enacted to ensure that all students with special needs receive an appropriate education. Compensatory and punitive damages are not available under the IDEA. See: Chambers v Sch. Dist. of Phila. Bd. of Educ., 587 F. 3d 176 (3rd Cir., 2009). Our courts have recognized that the "IDEA's primary purpose is to ensure [a] FAPE, not to serve as a tort-like mechanism for compensating personal injury." Nieves-Marquez v Puerto-Rico, 353 F. 3d 108, 124-6 (1st Cir. 2003).

education...” the regulation clearly stipulates that “the State shall provide a program.” (Emphasis supplied). N.J.A.C. 6A:14-8.1(h). Initially upon placement, “[i]f the student is a student with a disability, an immediate review of the classification and IEP shall be conducted and the student shall be placed in a program consistent with the goals and objectives of the current education program.” N.J.A.C. 6A:14-8.1(h)(1).

Thereafter, N.J.A.C. 6A:17-3.2(a)(1)(i) makes it plain that development of the IEP is the responsibility of the State agency that placed the child residentially, providing that, “[u]pon a student’s placement in the State facility, the State agency shall . . . [p]rovide a program comparable to the Special Education student’s current Individualized Education Program (IEP) . . . and implement the current IEP or develop a new IEP . . .” The regulation makes the school district responsible for development of the IEP only where, “a Special Education student is placed by the school district on a tuition basis.” Ibid.⁴ The complaints raised about the IEP thus have been brought against Hope without any foundation in law or regulation. The due process petition ignores the regulatory scheme now applicable to his programming at Bonnie Brae.

Moreover, at a minimum, the Agency that placed D.C. is a necessary party to this action. R. 4:28-1(a) is instructive:

A person who is subject to service of process shall be joined as a party to the action if (1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person’s absence may . . . as a practical matter impair or impede the person’s ability to protect that interest . . .

The New Jersey Supreme Court has described an indispensable party as one having “an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between litigants without either adjudging or necessarily affecting

⁴ The regulation specifies the responsibilities of the local school district, which include maintaining records sent by the State facility; and facilitating entry of the student into the local school district, “as appropriate.” The local district must send records to the State facility if requested to do so, N.J.A.C. 6A:17-3.6, and has funding obligations relative to the student’s education. See: N.J.A.C. 6A: 17-3.7; N.J.S.A. 18A:7B-2. And, as noted above, its personnel do participate in the IEP meeting.

the absentee's interest." Allen B. DuMont Labs v Marcalus Mfg. Co., 30 N.J. 290, 298 (1959). I cannot direct Hope Township to alter a placement that has been ordered by the State, and cannot render a decision on whether D.C.'s current educational setting is appropriate without the input and participation of the Agency that selected this educational and therapeutic setting for him. The State agency that placed D.C. at Bonnie Brae should have been named as a party to this action. For this additional reason, I **CONCLUDE** that the petition must be dismissed.

Finally, the only fully fleshed out allegations of the petition concern counsel's presence at the September 2017 IEP meeting. These claims fail as a matter of law. The regulatory scheme support's Hope's entitlement to have its attorney attend the IEP meeting. Pursuant to 34 C.F.R. §300.321(a)(6), the IEP Team includes "[a]t the discretion of the parent or the Agency, other individuals who have knowledge or special expertise regarding the child . . ." See also: N.J.A.C. 6A: 14-2.3(k). As to whether the school district's attorney can constitute such an individual, the courts have determined that the "regulations adopted under IDEA extend broad discretion to the parties to have those in attendance whom they desire to have present." Horen v Bd. of Educ. of City of Toledo Pub. Sch., 655 F. Supp. 794, 803 (D. Ohio 2009). The Horen court rejected the contention that the school district there conducted itself improperly by bringing its attorney to an IEP meeting.

In In re Diehl, 22 IDELR 734 (OSEP 1995), the Department of Education confirmed that school districts are not prohibited by law from bringing their attorneys to an IEP meeting, even where "the parent is not represented by counsel and/or had not requested mediation or a due process hearing." Ibid. The guidance document goes on to caution that attendance by attorneys should be discouraged, as it could create an adversarial tone. But, that caution was offered in the context of an unrepresented, non-litigious parent. Not so here. Counsel for Petitioner was, by his own admission, notified about the meeting; and at the time, litigation was actively pending between the parties. Not only was the Board attorney's presence thus unremarkable under the circumstances, it is somewhat surprising that counsel for Petitioner, for whatever reason, chose not to likewise attend the meeting. I **CONCLUDE** that the facts pled

regarding counsel's presence at the September 2017 IEP meeting fail to state a claim against Hope, and must be dismissed.

ORDER

Based on the foregoing, the petition of appeal is **DISMISSED**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2015) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2015). 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.

January 8, 2018



DATE

ELLEN S. BASS, ALJ

Date Received at Agency

January 8, 2018

Date Mailed to Parties:

sej

APPENDIX

Witnesses

None

Exhibits

C-1 Final Decision dated December 21, 2017