***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.

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

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

Record Closed: April 18, 2018 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