State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION ON

EMERGENT RELIEF

OAL DKT. NO. EDS 11234-19

AGENCY DKT. NO. 2020-30531

J.G. and D.G. ON BEHALF OF D.G.,

Petitioners,

v.

WASHINGTON TOWNSHIP

BOARD OF EDUCATION,

Respondent.

_____

J.G. and D.G., on behalf of D.G., petitioners, pro se

Joseph F. Betley, Esq., for the respondent (Capehart Scatchard)

Record Closed: August 20, 2019 Decided: August 21, 2019

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Petitioners are the parents of minor student D.G., a fifteen-year-old, eighth grade student who was deemed eligible for special education and related services. They seek emergent relief directing stay put placement of D.G. in the general education program of

the public high school for the 2019-2020 school year pending the outcoming of their separate due process hearing.

PROCEDURAL HISTORY

The petitioner requested emergent relief and a due process hearing, pursuant to N.J.A.C. 6A:14-2.6 and N.J.A.C. 6A:14-2.7. The matter was transmitted by the Office of Special Education Programs of the New Jersey Department of Education (OSEP) to the Office of Administrative Law (OAL) where it was filed on August 15, 2019, as a contested case. N.J.S.A. 52:14B-1 to B-15; N.J.S.A. 52:14F-1 to F-13. A hearing was conducted on August 20, 2019, and the record closed that day.

FACTUAL DISCUSSION AND FINDINGS

I **FIND** the following as **FACT**, as it is undisputed:

1. On January 25, 2019, D.G. was fourteen years old and in eighth grade at Orchard Valley Middle School in the Washington Township School District. On that date, he was suspended and assigned to homebound instruction in response to allegations of inappropriate physical contact with other students and other violations of the school's code of conduct.

2. On February 20, 2019, petitioners, D.G.'s parents, filed a due process petition and petition for emergent relief seeking D.G.'s return to a school within the Washington Township School District other than Orchard Valley Middle School.

3. A resolution meeting was conducted on March 8, 2019. The parties, including petitioners, agreed to continue homebound instruction for D.G. The resolution agreement enumerated the education programs and hourly requirements for D.G.'s homebound instruction. It also provided that an IEP would be developed on March 12, 2019, to confirm this placement. The resolution agreement resolved all issues related to the February 20, 2019, due process petition and due process hearing. R-B, C.

4. On March 12, 2019, D.G.'s IEP was amended to provide for homebound instruction through the end of the 2018-2019 school year. R-D.

5. On March 22, 2019, a manifestation determination and evaluation planning meeting was conducted. Petitioners attended the meeting. It was determined that the conduct that led to D.G.'s suspension and homebound instruction was not caused by his disability.

6. During the March 22, 2019, meeting, the District proposed evaluations of D.G. On May 1, 2019, the petitioners consented to the evaluations, which included psychological, social-history, leaning and psychiatric evaluations. The evaluations were completed on May 30, 2019.

7. On May 22, 2019, petitioners filed a second due process petition in which they contested the disciplinary determination and sought placement in D.G.'s prior program per an earlier IEP, as well as additional relief. They referenced a pending Superior Court case relating to the facts underlying D.G.'s discipline, which had not been completed. R-E.

8. A disciplinary hearing before the Board of Education was conducted on May 28, 2019. The Board upheld D.G.'s removal from school effective January 25, 2019, through the end of the 2018-2019 school year. D.G. was to continue to receive homebound instruction for the remainder of the 2018-2019 school year. Out of district placement, at a location to be determined by the Child Study Team, was to be established for the 2019-2020 school year.

9. On June 10, 2019, petitioners and the District appeared before an administrative law judge concerning the petitioner's May 22, 2019, due process petition. Petitioners' interests were discussed during a prehearing settlement conference. Given the pending Superior Court matter involving D.G. and the expectation that they would soon receive evaluation reports and participate in an IEP meeting, petitioners chose to withdraw their petition. R-F.

10. On June 26, 2019, the District convened an eligibility conference/annual review meeting with the petitioners. It was determined D.G. remained eligible for special education and related services under the classification of Emotionally Disturbed.

11. Also on June 26, 2019, the District convened an IEP meeting that J.G. attended. An IEP was developed for the 2019-2020 school year that provided for out of district placement for D.G., in accord with the disciplinary hearing results[1], at the "Ombudsman Alternative School or another suitable out of district placement as determined by the Child Study Team for the 2019/20 school year." R-G at 16.

12. The IEP meeting attendees, including petitioners, discussed the Ombudsman Alternative School and Creative Achievement Academy (CAA). Ibid. Petitioners did not want to pursue the Ombudsman school but expressed interest in "exploring other educational placements[.]" R-G at 18.

13. J.G. agreed to visit CAA. She did not visit CAA.

14. Neither petitioner objected to the June 26, 2019, IEP at the time of the IEP meeting or within fifteen days after receipt of the IEP.

15. District representatives attempted to communicate with petitioners about the need for D.G. to visit CAA. Multiple meetings were scheduled but none occurred.

16. On August 7, 2019, J.G. requested, by way of email, that the District provide for independent evaluations of D.G.

17. On August 7, 2019, Annette Miller, Assistant Superintendent of Student and Special Education, replied to J.G.'s email. She asked J.G. about the types of evaluations she sought. She also noted that petitioners did not object to the June

[1] The IEP noted, "Per the Disciplinary Hearing Results, [D.G.] is not allowed to participate in or attend extra-curricular activities at the Washington Township Public Schools through the end of the 2019/20 school year." R-G at 16.

26, 2019, IEP and that CAA is both the IEP placement and the "stay put" placement.

18. In an August 8, 2019, email, J.G. reiterated her request for independent evaluations conducted by individuals not associated with the District.

19. The District denied J.G.'s request for independent evaluations.

20. On August 13, 2019, petitioners filed a third due process petition and application for emergent relief. Both sought placement of D.G. in the high school general education program.

Testimony

Colleen Cancila, Principal, Orchard Valley Middle School, was the principal while D.G. was a student at the school. After the May 28, 2019, disciplinary hearing, the Board agreed with the school's recommended discipline. D.G. was required to be out of district for one year and remain on homebound instruction pending the Child Study Team's determination concerning an out of district placement for the 2019-2020 school year. He would, thus, not be permitted to attend Washington Township High School.

Cancila attended the June 26, 2019, eligibility meeting/annual review. J.G. was present. It was determined that D.G. continue to be eligible for special education; however, his classification changed from Other Health Impaired to Emotionally Disturbed. J.G. did not object to the change in classification.

Cancila also attended the June 26, 2019, IEP meeting. It was determined that CAA was the best out of district placement for J.G., given the disciplinary determination and J.G.'s revised classification. CAA had a strong therapeutic program; was highly structured; was highly supportive academically; targeted students' social and emotional growth and well-being; and used alternative therapies that are helpful for students who suffered trauma. Cancila noted that petitioners suffered a house fire when D.G. was in fifth grade. She understood that this trauma had a longstanding impact upon D.G.

Cancila noted that other out-of-district placements were considered. However, they did not offer the same therapeutic programming as CAA. Given D.G.'s needs and new eligibility classification, it was determined CAA would offer the best services for D.G. Cancila noted D.G. was a "good kid" but he had "emotional barriers" that caused "many levels of stressful responses" that led to the January 2019, events.

J.G. participated in the June 26, 2016, IEP meeting. She asked some questions about CAA, which social worker Lauren White answered. They agreed that J.G. and White would visit CAA together. The petitioners would then decide if they were in agreement with the IEP.

On cross-examination, Cancila testified that, during the June 26, 2019, IEP meeting, J.G. expressed upset that she had not retained an education attorney to represent her. J.G. also said that she needed to speak with her husband and D.G. before she could sign the IEP. She said she had a lot to consider, including the upcoming criminal[2] case involving D.G. Cancila also recalled that J.G. said she would visit CAA with Ms. White or another staff person before her son visited the school. D.G. would visit and participate in an intake interview if J.G. approved of the school.

J.G. testified that, in March 2019, she agreed to homebound education for D.G. for the 2018-2019 school year. She agreed because there was no other option given the other matters pending at that time. She anticipated that, by the time the IEP meeting concerning D.G.'s placement for the 2019-2020 school year occurred, D.G.'s criminal matter would have been resolved. However, the criminal matter was not done by June 26, 2019. J.G. "panicked." She believed she could not talk about the January 2019, offenses while the criminal matter was pending.

J.G. believed much of the process leading to and after the June 26, 2019, IEP meeting was faulty. She acknowledged that she was "overwhelmed" and did not understand the process.

[2] J.G. referred to a pending Superior Court matter concerning the January 2019, offenses as a "criminal" matter.

With respect to the June 26, 2019, IEP, J.G. did not respond, either in the affirmative or negative, because she was waiting for the criminal matter to be concluded. She believed her "hands were tied." She acknowledged that she agreed to visit CAA but did not do so and did not respond to phone calls from school staff members who attempted to schedule visits. Nonetheless, she believed she conveyed during the June 26, 2019, meeting that she was not necessarily in agreement with CAA; rather, she said she would explore that option but would not do so until after the criminal matter had concluded.

Petitioner **D.G.**, D.G.'s father, testified that he wanted to ensure that his son would receive the programming and supports enumerated in the IEP, as he needs that assistance to thrive. D.G. hopes to become an auto mechanic and has the capacity to succeed with the proper supports. Petitioner D.G. also expressed upset that his son has not been involved with sports since his homebound instruction began.

In response, Cancila advised CAA would be bound by D.G.'s IEP and that CAA offers several sports activities and teams for its students.

When asked if they had a preference for either the home-bound program or out of district placement at CAA, petitioners could not express a preference. They indicated they are pursuing other options for their son, including vocational school. Cancila testified that, as of the date of the hearing, there was an available spot for D.G. at CAA.

Additional Findings

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observations of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. A trier of fact may reject testimony

because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp, 53 N.J. Super. 282, 287 (App. Div. 1958).

As the fact finder, I had the ability to observe the demeanor, tone, and physical actions of petitioner J.G. during the hearing. She was emotional, which is understandable given the nature of the proceedings. She was candid about her failure to properly interact with the District and school staff. She acknowledged that her decision making was influenced by her understanding that she should refrain from discussing the January 2019, incident involving her son, which precipitated the events of 2019. She acknowledged that her approach was likely unwise and hampered her ability to properly participate. Nonetheless, she testified credibly about her motivation and her actions, including her unwillingness to agree to the June 26, 2019, IEP.

Principal Cancila testified credibly about the rationale for the June 26, 2019, recommendation of an out of district placement. She enumerated D.G.'s needs in detail and thoroughly explained how the placement at CAA would be beneficial to him, particularly in comparison to ongoing homebound instruction. She added that, at CAA, the terms of his IEP would remain effective and he would be able to participate in team sports.

Having considered the testimony and documentary evidence, I **FIND** the petitioners did not agree to the June 26, 2019, IEP. I also **FIND** they filed a due process petition on August 13, 2019, in which they challenged the out of district placement and sought placement in the public high school for the 2019-2020 school year. I further **FIND** D.G. was not permitted to attend Washington Township High School during the 2019-2020 school year and an IEP was not prepared that contemplated D.G.'s placement at a public high school during the 2019-2020 school year.

LEGAL ANALYSIS AND CONCLUSION

In their petition for emergent relief, petitioners seek a determination that the stay put placement for D.G., pending the outcome of their due process petition, is the general

education program in the Washington Township District High School. The District contends that the appropriate stay put placement is dictated by the June 26, 2019, IEP. In the alternative, the March 12, 2019, IEP dictates the terms of the stay-put placement.

The IDEA contains procedural safeguards intended to guarantee that parents are entitled to an "impartial due process hearing" before a local educational agency if they object to the decisions of the local school regarding the education of their disabled child. 20 U.S.C. § 1415(c)(2). The Act provides, "[D]uring the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child." 20 U.S.C. § 1415(j). The Supreme Court found this "stay put" provision requires that disabled children remain in their current educational program during the pendency of any proceedings conducted pursuant to the Act. Honig v. Doe, 484 U.S. 305, 311 (1988). The Court stated that this provision was "very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school." Id. at 323. See also Ringwood Bd. of Educ. v. K.H.J., 469 F.Supp.2d 267, 270–71 (D.N.J. 2006).

The Third Circuit has noted that the stay-put provision functions as an "automatic preliminary injunction," which dispenses with the need for a court to weigh the factors for emergent relief such as irreparable harm and likelihood of success on the merits, and removes the court's discretion regarding whether an injunction should be ordered. "Once a court ascertains the student's current educational placement, the movants are entitled to an order without satisfaction of the usual prerequisites to injunctive relief." Drinker v. Colonial School District, 78 F.3d 859, 864 (3d Cir. 1996). Along with maintaining the status quo, a school district is responsible for funding the placement as contemplated in the IEP. Id. at 865 (citing Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982) ("Implicit in the maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent before the parent requested a due process hearing. To cut off public funds would amount to a unilateral change in placement, prohibited by the Act"). The IDEA regulation and New Jersey Administrative Code reinforce that a child remain in his or her current educational placement "during the pendency of any administrative or judicial proceeding

regarding a due process complaint." 34 C.F.R. § 300.518(a). See also N.J.A.C. 6A:14-2.7(u); N.J.A.C. 6A:14-2.6(d)10 (concerning changes in placement pending mediation).

The import of the stay put provision was underscored in R.S. & M.S. v. Somerville Bd. of Educ., No. 10-4215 (MLC), 2011 U.S. Dist. LEXIS 748 (D.N.J. Jan. 4, 2011), in which a school district was required to maintain a disabled child's placement in a sectarian school, notwithstanding that the placement possibly violated N.J.S.A. 18A:46-14. The student was required to remain at that school because it was his "current educational placement" when litigation concerning the placement began. The District Court wrote that, even though the parties "later found out that they had made a mistake[,]" this was "unavailing under IDEA's stay put provision." Id. at *34.

Here, petitioners seek a stay put placement in the public high school. There is no agreed-upon IEP that would permit this result. Rather, the issue is whether the stay put placement should be homebound instruction, as agreed to the March 12, 2019, IEP, or out of district placement, as provided by the June 26, 2019, IEP.

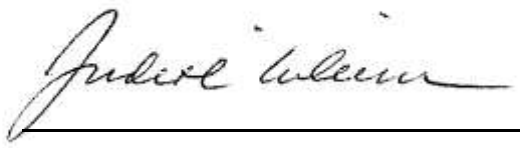
The District contends that the petitioners were bound by the placement in the June 26, 2019, IEP because they did not object to it within fifteen days. The District acknowledged, however, an August 6, 2019, memorandum from the New Jersey Department of Education concerning "Revised Procedures for Determining a Student's Status During a Special Education Due Process Hearing." R-H. In the memorandum, the Department addressed the timing prerequisites for application of a stay put placement pending the filing of a due process petitioner. It noted that a student's current educational placement for the purpose of determining a stay put placement is "the last agreed-upon placement where the student must remain until the resolution of the dispute, unless the [local education agency] and the parent/guardian agree to some other placement." Ibid. The Department then clarified that a "student's right to 'stay put' applies even if the [due process hearing] filing occurs more than fifteen calendar days after the proposed change in the student's program or placement." Ibid.

Here, the petitioners did not consent to the June 26, 2019, IEP and subsequently filed a due process petition challenging the IEP and seeking placement in the public high

school. Thus, although the District contends that an out of district placement is the better option for D.G., as it would provide him with varied services tailored to address his needs, the June 26, 2019, IEP cannot dictate the terms of the stay put placement. Rather, the March 12, 2019, IEP is the last IEP to which both parties agreed. Therefore, the placement provided by that IEP, requiring homebound instruction, is the stay put placement pending the disposition of petitioner's due process petition.

Accordingly, after hearing the arguments of petitioner and respondent and considering all documents submitted, I **CONCLUDE**, in accordance with the standards set forth in Honig v. Doe, 484 U.S. 305 (1988) and Drinker v. Colonial School District, 78 F.3d 859 (3d Cir. 1996), that the petitioner's emergent petition seeking a stay put placement in the public high school is **DENIED**. It is **ORDERED** that the stay put placement pending disposition of the due process petition is homebound instruction, as directed by the March 12, 2019, IEP. The parties are encouraged to continue their dialogue in an effort to resolve this matter.

This decision on application for emergency relief shall remain in effect until the issuance of the decision on the merits in this matter. The hearing having been requested by the parents, this matter is hereby returned to the Department of Education for a local resolution session, pursuant to 20 U.S.C.A. § 1415 (f)(1)(B)(i). 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.



August 21, 2019
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency

Date Mailed to Parties:

vj

APPENDIX

WITNESSES

For petitioner:

J.G.

D.G.

For respondent:

Colleen Cancila

EXHIBITS

For petitioner:

None

For respondent:

R-A February 20, 2019, due process petition

R-B March 8, 2019, resolution meeting attendance sheet and agreement

R-C March 11, 2019, memorandum concerning resolution meeting agreement

R-D March 12, 2019, IEP

R-E March 22, 2019, due process petition

R-F June 13, 2019, Final Decision Withdrawal

R-G June 26, 2019, IEP

R-H August 6, 2019, Department of Education memorandum