State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING MOTION TO DISMISS

EAST BRUNSWICK TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
I.A. AND I.A. AND HATIKVAH INTERNATIONAL ACADEMY CHARTER, ON BEHALF OF B.A.,
Respondents.

OAL DKT. NO. EDS 17692-18
AGENCY DKT. NO. 2019-29115

Jodi Howlett, Esq., for petitioner (Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys)

Thomas O. Johnston, Esq., for respondent Hatikvah International Academy Charter (Johnston Law Firm, LLC, attorneys)

I.A. and I.A., respondents, pro se

Record Closed: November 4, 2019 Decided: December 16, 2019

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400-1485, and N.J.S.A. 18A:36A-11(b), and N.J.A.C. 6A:23A-15.4. Petitioner East Brunswick Township Board of Education (Board) seeks a finding that the Individualized Education Program (IEP) implemented by respondent Hatikvah International Academy Charter (Hatikvah) for B.A.,

son of I.A. and I.A. (parents), which placed B.A. at the Bridge Academy, did not provide B.A. with a free and appropriate public education (FAPE) in the least restrictive environment; an order granting the Board the opportunity to develop an IEP for B.A.; and an order directing Hatikvah to assume the costs associated with the IEP developed by Hatikvah, specifically the tuition charged by the Bridge Academy.

PROCEDURAL HISTORY

On December 6, 2018, the Board filed a petition of appeal with the Department of Education's Office of Special Education Policy and Dispute Resolution (OSEP) disputing the proposed out-of-district placement of B.A. by Hatikvah. The matter was transmitted by OSEP to the Office of Administrative Law (OAL), where it was filed on December 11, 2018, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was assigned to the Honorable Jeffrey R. Wilson, Administrative Law Judge (ALJ), and scheduled for a settlement hearing on December 20, 2018. This hearing was adjourned at the joint request of the Board and Hatikvah.

This matter was reassigned to the Honorable Joseph Martone, ALJ, and scheduled for a settlement hearing on January 3, 2019. The matter did not settle, was reassigned to the undersigned on January 3, 2019, and scheduled for a telephonic hearing on January 9, 2019. On January 9, 2019, the parties appeared for the hearing but respondents I.A. and I.A. stated that they were interviewing counsel. The hearing was then concluded and rescheduled for February 11, 2019. During the February 11, 2019, telephonic hearing, I.A. and I.A. stated that they would not retain counsel.[1] The plenary hearings were scheduled for March 27 and April 24, 2019, and a telephonic hearing was scheduled for March 4, 2019.

[1] During the February 11, 2019, telephone hearing, I.A. and I.A. stated that they did not need counsel as the dispute in this matter concerned payment of the costs of B.A.'s education at the Bridge Academy, for which they would not be responsible. Following a review of the file, I notified I.A. and I.A. by letter of July 25, 2019, that the file was missing their answer to the Board's due process petition. In this letter, I advised them of their obligation to submit an answer, provided them a deadline for doing so, and notified them of their opportunity to be heard on the then-pending motion for summary decision. I.A. and I.A. made no written submission in response.

During the March 4, 2019, telephonic hearing, the Board and Hatikvah stated that they had yet to complete discovery and, therefore, jointly requested adjournment and rescheduling of the plenary hearing. I granted the adjournment request, rescheduled the plenary hearing for June 3 and 5, 2019, and directed the parties to complete discovery by May 1, 2019, to ensure adequate time for them to consider and submit dispositive motions. On May 10, 2019, I issued a prehearing order.

On May 21, 2019, Hatikvah filed a motion for summary decision in its favor. On May 22, 2019, I convened a telephonic conference with the parties to discuss discovery issues and to reschedule the plenary hearings to allow for consideration of the motion for summary decision. On May 29, 2019, the Board requested an adjournment of the filing deadline for its response in opposition to the motion for summary decision on the grounds that Hatikvah had not responded to the Board's discovery requests in violation of the verbal direction of the undersigned to complete discovery on or before May 1, 2019. Hatikvah responded by letter of May 31, 2019. On June 3, 2019, I issued a letter order directing Hatikvah to respond to discovery requests and setting a schedule for additional briefing on the motion for summary decision. On June 18, 2019, Hatikvah filed a supplemental letter brief in support of its motion for summary decision.

At the request of the Board, I convened a second telephonic conference on discovery issues on June 27, 2019. During this call, and documented in a letter dated July 2, 2019, I directed the Board and Hatikvah to respond to each other's outstanding discovery requests on or before July 12, 2019, or to file motions to compel discovery or to object to discovery requests by July 12, 2019.[2] The Board was further directed to respond to the motion for summary decision within thirty days of its receipt of discovery responses. On August 14, 2019, the Board filed its response in opposition to Hatikvah's motion for summary decision and cross-motion for summary decision in its favor. Hatikvah filed a reply brief on September 3, 2019.

[2] On July 12, 2019, the Board filed a motion to object to discovery demands of Hatikvah. On July 12, 2019, Hatikvah filed a motion objecting to discovery requests of the Board and to compel discovery. A ruling on these motions is unnecessary given this final decision.

On August 12, 2019, Hatikvah filed a letter in further support of its motion for summary decision, specifically requesting dismissal of the Board's petition on the grounds that the dispute raised by the petition is now moot. The Board responded to this supplemental filing on September 4, 2019. After reviewing the exhibits submitted by the parties in support of their motions, I convened a final telephonic hearing on October 9, 2019, to address an apparent discrepancy between documentary evidence and the position of the Board. Specifically, counsel for Hatikvah provided a copy of his March 6, 2019 letter to the Board requesting information regarding whether the Board would make tuition payments to the Bridge Academy for the 2018-2019 school year, to which the Board did not reply. One month later, Hatikvah filed an Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA), request for any tuition contract and proof of payment by the Board to the Bridge Academy, as a result of which counsel obtained the tuition contract, effective November 15, 2018, by which the Board agreed to pay for B.A. to attend the Bridge Academy from November 19, 2018, through the end of the 2018-2019 school year, documents. See, Ltr. Br. of Resp't Hatikvah International Charter in Support of Motion for Summary Decision (May 17, 2019), at 3-4; Johnston Cert., Exs. C, D.

I granted the parties additional time to supplement their filings in response to my inquiry. The Board submitted a supplemental brief on October 21, 2019; Hatikvah replied on November 4, 2019, and the motion to dismiss is now ripe for decision.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. B.A. is a nine-year old boy who has been enrolled at Hatikvah since kindergarten.

2. During the 2017-2018 school year, when B.A. was in second grade, he was referred for a child study team (CST) evaluation due to academic concerns related to his ability to read and write. Certification of Thomas O. Johnston (May 17, 2019), Ex. A at 3.

3. B.A. was classified with a Specific Learning Disability in Basic Reading Skills and an IEP was developed for him in February 2018. Id. at 1.

4. On or about October 18, 2018, the Hatikvah CST and B.A.'s parents participated in an IEP meeting at which they decided that B.A., who was then in third grade, needed a more specialized program. Following that meeting, representatives of the CST and the parents visited the East Brunswick District (District) schools and out-of-district private schools. Id. at 5-7.

5. On Friday, November 2, 2018, at 3:48 p.m., Hatikvah notified the Board of a change-of-placement meeting for B.A. at 8:30 a.m., on Tuesday, November 6, 2019, and that this meeting was expedited at the parents' request. On Monday, November 5, 2019, the Board responded that reasonable notice of the meeting had not been provided. The Board did not participate in the change-of-placement meeting.

6. On or about November 6, 2018, Hatikvah modified B.A.'s IEP to provide, among other things, for placement at the Bridge Academy, where B.A. had been accepted, rather than an in-district placement. Id. at 7.

7. By letter of November 6, 2018, Hatikvah notified the Board of B.A.'s new IEP and placement at Bridge Academy.

8. On or about November 19, 2018, B.A. began attending the Bridge Academy.

9. On December 6, 2018, the Board filed a due process petition to challenge B.A.'s placement at Bridge Academy on the grounds that a less-restrictive alternative was available within the District schools.

10. On December 20, 2018, the Board President and Secretary (both of whose names are redacted) signed a standard tuition contract, effective November 15, 2018, by which the Board agreed to pay for B.A. to attend the Bridge Academy from November 19, 2018, through the end of the 2018-2019 school year, 129 total days. Id., Ex. D.

11. The Board has paid all amounts due to the Bridge Academy related to B.A.'s placement. Ibid.

12. On August 12, 2019, I.A. confirmed in writing that B.A. was transferred to the District. B.A. currently attends school in the District under an IEP developed by the District CST.

There is no dispute as to the foregoing; accordingly, I **FIND** the preceding as **FACTS.**

ISSUES IN DISPUTE

The main issue raised by the Board's petition is whether in November 2018, the Board offered a program to B.A. which would have met his educational needs as described in the November 6, 2018 IEP. Hatikvah contends that Board programs "did not offer appropriate reading instruction among peers with cognitive functioning and behaviors at B.A.'s level, and [did not offer] access to age appropriate reading content." Ltr. Br. of Resp't Hatikvah, at 2. Petitioner, however, disagrees with this characterization. Request for Due Process Hearing, East Brunswick Bd. of Educ. v. I.A. and I.A. o/b/o B.A. and Hatikvah Intl. Academy Charter Sch. (September 6, 2018), at 2.

Three additional issues were raised by the petition and by the parties in numerous telephonic hearings in this matter:

1. Whether Hatikvah violated N.J.S.A. 18A:36A-11(b), and N.J.A.C. 6A:23A-15.4, by moving B.A. prior to the deadline for the Board to file a notice of appeal of the placement at the Bridge Academy.

2. Once B.A. was enrolled at the Bridge Academy, whether the stay-put provision of the IDEA mandates that he remain at the Bridge Academy during the pendency of this matter.

3. Whether the Board may challenge its obligation to pay for B.A.'s placement under his IEP at the Bridge Academy.[3]

MOTION TO DISMISS/POSITIONS OF THE PARTIES

On August 12, 2019, Hatikvah notified the undersigned that B.A.'s parents transferred his enrollment from Hatikvah to the District. Supplemental Letter Br. of Resp't Hatikvah in Support of Motion to Dismiss (August 12, 2019), at 1 (with attachment). For this reason, Hatikvah asked that the Board's petition be dismissed with prejudice on the grounds that the controversy raised by the petition is now moot. There is no longer a need for the Board to challenge B.A.'s placement under the November 6, 2018 IEP as the District has assumed responsibility for formulating and implementing an IEP for B.A. Id. at 2. According to Hatikvah, dismissal of the Board's petition is mandated by N.J.A.C. 6A:23a-15.4(b), which provides that "[t]he due process hearing shall be limited in scope to a determination by an [ALJ] as to whether there is a less-restrictive placement that will meet the student's educational needs and, if so, whether Hatikvah school must place the student in the program." Ibid. citing N.J.A.C. 6A:23A-15.4(b).

In response, the Board argues that two issues remain "that demonstrate concrete adversity of interest between the parties and a favorable judgement would grant the Board effective relief." Reply of Pet'r to Supplemental Motion to Dismiss (September 4, 2019), at 2. While the Board agrees that B.A.'s placement for the current school year is no longer in dispute, making the question of stay-put moot, the Board contends that an active dispute remains as to whether Hatikvah violated the regulations by moving B.A. to an out-of-district placement prior to the deadline for the Board to challenge the placement, and if so, whether the Board has an obligation to pay for B.A.'s placement at the Bridge Academy for the 2018-2019 school year. Ibid.

[3] Though the Board did not include in its original petition the request for reimbursement of monies paid to the Bridge Academy on B.A.'s behalf, in each telephonic proceeding in this matter, all three parties made clear they disputed which of them was responsible for payment to the Bridge Academy. On more than one occasion, each party was heard during telephone hearings to state that the issue of responsibility for payment would remain even were B.A. to enroll in the District for the 2019-2020 school year. Therefore, I asked the parties to present arguments on the issue of whether the Board was obligated to pay for B.A.'s placement at the Bridge Academy as that placement began prior to the expiration of the thirty-days within which the Board was permitted by regulation to challenge the change of placement.

When clarifying its position on the remaining issues in light of the contract the Board entered with the Bridge Academy for tuition services dated November 15, 2018, four days before B.A. enrolled in the Bridge Academy, the Board stated:

> [I]t is clear that the [New Jersey] Legislature intended to vest the Board with a right to challenge Hatikvah's placement of B.A. at the Bridge Academy, while simultaneously obligating the Board to compensate Bridge Academy during the pendency of due process. . . . As the Board has asserted since the inception of this matter . . . [it] seeks reimbursement from Hatikvah for its improper placement of B.A. at the Bridge Academy. Not only does the tuition agreement not moot the present controversy, but it accurately represents the monetary damage incurred as a result of Hatikvah's failure to provide B.A. with a FAPE in the least restrictive environment.
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> Supplemental Ltr. Br. of Pet'r (October 21, 2019), at 4.

The Board goes on to argue that had it refused to sign the tuition agreement, presumably on the grounds that it was challenging the placement covered by the agreement, the Bridge Academy likely would have refused admission to B.A. and the Legislature could not have intended for B.A. to go without appropriate services during the pendency of the due process proceeding.[4] Id. at 4-5. On this point, Hatikvah agrees, stating that the immediate placement of B.A. in the private school was mandatory even though challenged by the District. Ltr. Br. of Resp't Hatikvah in Reply to Supp. Br. of Pet'r (November 4, 2019), at 2. The parties then dispute whether the District can pursue a cause of action for money damages against Hatikvah. For the reasons set forth below, it is not necessary to describe these arguments in detail.

LEGAL ANALYSIS AND CONCLUSIONS

The primary purpose of the IDEA is to ensure that all disabled children will be provided a FAPE. 20 U.S.C. 1400(d)(1)(A). New Jersey has also enacted legislation and adopted regulations

[4] This argument fails to consider that respondents could have filed for emergent relief to compel the Board to pay for B.A.'s placement to the Bridge Academy. Further, it is contrary to the Board's initial filing in opposition to Hatikvah's motion for summary decision, in which the Board stated that "there is no statutory or regulatory requirement that a charter school implement an out-of-district placement prior to expiration of the thirty (30) day appeal deadline." Ltr. Br. of Pet'r in Opposition to Hatikvah's Motion for Summary Decision (August 14, 2019), at 7.

that assure all disabled children the right to a FAPE. N.J.S.A. 18A:46-1 to -46; N.J.A.C. 6A:14-1.1 et seq. "At the beginning of each school year, each local educational agency . . . shall have in effect, for each child with a disability in the agency's jurisdiction, an [IEP]." 20 U.S.C. 1414(d)(2)(A). The IEP is the "'centerpiece' of the IDEA's system for delivering education to disabled children," ensuring that each child receives a "basic floor of opportunity." D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010); see also, N.J.A.C. 6A:14-3.7.

Under New Jersey law, when a disabled student attends a charter school, the charter school is the local educational agency "responsible for providing special education services to that student, including working with a child's parents to develop an IEP." L.Y. ex rel. J.Y. v. Bayonne Bd. of Educ., 384 Fed. Appx. 58, 61 (3d Cir. 2010) [citing N.J.S.A. 18A:36A-11(b)]. "The school district where the child resides, however, bears fiscal responsibility for a child's special education services when the IEP requires placement at a private school," and therefore, N.J.S.A. 18A:36A-11(b), and its implementing regulations, N.J.A.C. 6A:23A-15.4, requires notice to the district of residence of the new IEP within fifteen days of signing, and allows the district of residence thirty days to challenge the out-of-district placement. Ibid.

Hatikvah contends that it could not have violated the laws providing the District with thirty days to challenge the out-of-district placement under B.A.'s revised IEP as those laws do not provide for a waiting period. Supp. Ltr. Br. of Resp't Hatikvah (June 24, 2019), at 2. Though the statute and regulations require a charter school to provide notice to the resident district of the new placement within fifteen days of signing the new (or revised) IEP, and then provide the district thirty days to challenge the placement, there is no specific requirement that the charter delay implementation of the placement during that thirty-day period. Id. at 3, citing N.J.S.A. 18A:36A-11(b) and N.J.A.C. 6A:23A-15.4(a)(1).

Hatikvah contends that the statute permitting the Board to challenge B.A.'s out-of-district placement within thirty days did not require Hatikvah to delay that placement pending the expiration of the thirty-day period; rather, the law required the implementation of the IEP "without delay." Ltr. Br. of Resp't Hatikvah (June 18, 2019), at 3 citing N.J.A.C. 6A:14-2.3(d) and 34 C.F.R. To find a waiting period in the regulations would, according to Hatikvah, "lead to an absurd result," as B.A.'s CST already found that his prior IEP was inappropriate and any delay would deprive

him of FAPE during the period while the Board decided whether to challenge the new placement. Id. at 3-4. In response, the Board argued that adopting Hatikvah's position would be tantamount to encouraging charter schools to move to place a student in a private school "presumably at the expense of the district" without providing the district any notice. Ltr. Br. of Pet'r Opposing Motion for Summary Dec., at 8. Rather, as the Third Circuit explained in L.Y. v. Bayonne, "all statutes relating to the same subject matter should be construed harmoniously," and the right of a district to object to "private placement determinations made by charter schools . . . would be illusory" if the revised IEP were implemented immediately. 384 Fed. Appx. at 62 (resolving dispute over stay-put in favor of district).

I agree with the Board that L.Y. v. Bayonne supports the Board's claim that the enrollment of B.A. at Bridge Academy would have been premature as it took place prior to the expiration of the time allowed the Board to dispute that placement except that the Board signed a contract to allow this placement and the effective date of the contract was prior to the date of B.A.'s enrollment. It is worth noting that while the Hatikvah CST recommended the placement, Hatikvah was apparently unaware of the contract between the Board and Bridge Academy until April 26, 2019, five months later. There is no reason to speculate on whether it was the decision of the Board or its counsel to force Hatikvah to resort to an OPRA request to get this contract; clearly it was withheld for some reason, possibly to avoid this result.

An action is moot when the decision sought "can have no practical effect on the existing controversy." Redd v. Bowman, 223 N.J. 87, 104 (2015). For reasons of judicial economy and restraint, it is appropriate to refrain from decision-making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd., Comm'r (May 3, 1999); J.L. and K.D. ex rel. J.L. v. Harrison Twp. Bd. of Educ., EDS 13858-13, Final Decision (January 28, 2014).

In P.S. ex rel. I.S. v. Edgewater Park Twp. Bd. of Educ., EDS 10418-04, Final Decision (October 31, 2005), http://njlaw.rutgers.edu/collections/oal/, a parent filed for due process due to a disagreement over a district's proposed placement of her child, and requested a different, approved private school. The district had agreed to the parent's placement request and moved

to dismiss the petition as moot. The parent wanted to continue the hearing to resolve other related disagreements, but the ALJ concluded that the relief sought by the parent had already been granted by the district through their agreement to place the child at her requested school. The ALJ dismissed the petition as moot and reasoned that the parents had the right to file a new due process petition regarding other issues with the district.

Despite the interesting and somewhat novel issues raised by the parties here, a review of the facts leads to the conclusion that no issue remains as to which judgement can grant effective relief. Although the parties appear to disagree, the Third Circuit decision in L.Y. v. Bayonne endorsed the Board's ability to decline to sign a tuition agreement with the Bridge Academy. Had the Board so declined, the result may have been a unilateral placement of B.A. at the Bridge Academy by his parents, I.A. and I.A., after which the parents may have answered the Board's petition with a cross-claim for reimbursement from the District.[5] It is also possible that the parents and Hatikvah may have filed for emergent relief to move B.A. to the Bridge Academy pending the results of the due process proceeding. No matter, as the Board did enter into a contract dated four days prior to B.A.'s enrollment at the Bridge Academy by which the Board agreed to purchase special education services for B.A. through the end of the 2018-2019 school year. B.A. is no longer enrolled in the Bridge Academy, so there is no question of financial responsibility going forward.

The only reason for the Board to claim that Hatikvah violated the laws governing private placements by charter schools by moving B.A. to the Bridge Academy on November 19, 2018, in advance of the expiration of the thirty-day appeal period, was because the Board simultaneously claimed that the question of financial responsibility was at issue. To paraphrase the Third Circuit, Hatikvah and the parents "cannot dictate placement of [the student] over [the Board's] objections." L.Y. v. Bayonne, 384 Fed. Appx. at 63. Had the Board not accepted financial responsibility by signing the tuition agreement, Hatikvah would not have been able to move B.A. to the Bridge

[5] If this matter involved an action by the parents to recover the costs of unilaterally placing their son in an out-of-district private school during the pendency of the due process proceeding, the issues would not be moot and we would proceed to hearing on the question of whether the District offered a FAPE to B.A. in the least restrictive environment in November 2018.

Academy absent other legal proceedings in which the Board would have been afforded full opportunity to be heard.

When B.A. disenrolled from Hatikvah and enrolled in the District for the 2019-2020 school year, the Board obtained the relief it originally sought: to provide B.A. with a FAPE in the least restrictive environment. A due process hearing on the question of whether the District offered a FAPE to B.A. a year ago would be a hypothetical exercise and would have no practical effect as the remaining issues are also moot.

Based on the foregoing, I **CONCLUDE** that Hatikvah's motion to dismiss this matter with prejudice should be granted because all issues raised are now moot.

ORDER

For the reasons set forth above, I **ORDER** that the issues raised by the petition of East Brunswick Board of Education against respondents I.A. AND I.A. and Hatikvah International Academy Charter are moot and, therefore, the petition is **DISMISSED WITH PREJUDICE.**

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2009) 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 (2009).

December 16, 2019 

DATE **TRICIA M. CALIGUIRE,** ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nd