State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 13657-19

AGENCY DKT. NO. 2020-30594

N.C. ON BEHALF OF M.B.,

Petitioner,

v.

EAST ORANGE BOARD EDUCATION,

Respondents.

N.C., petitioner, pro se

Alyssa K. Weinstein, for respondents (Scarinci Hollenbeck, attorneys)

Record Closed: January 31, 2020 Decided: March 13, 2020,

BEFORE **ANDREW M. BARON,** ALJ:

STATEMENT OF THE CASE

Petitioner, East Orange Board of Education, brings a motion for summary decision against petitioner and petitioner's child M.B. seeking an Order dismissing the petition based on undisputed facts as well as lack of evidence that would support petitioner's claims.

PROCEDURAL HISTORY

Petitioner filed a due process petition on August 26, 2019, alleging among other things that the District sent M.B. to an alternative school before the completion of her evaluations, and failed to put an IEP in place. Efforts to resolve the matter were unsuccessful, and the matter was transferred as a contested case to the Office of Administrative Law on September 30, 2019.

Petitioner was not available for several pre-hearing conference calls, and in the interim, respondent ultimately filed a Motion for Summary Decision on October 11, 2019.

Petitioner did not file opposition to the motion, and oral argument was scheduled and hear via on the record telephone conference call on January 31, 2020.

DISCUSSION

Petitioner contends that placing N.B. in an alternative school, without completion of all assessments and without an appropriate IEP, the District is not meeting its obligations to M.B. under FAPE, IDEA and Section 504 of the Rehabilitation Act.

The District contends that on April 9, 2019, at petitioner's request, an identification meeting was held among Petitioner and Child Study team members, at which time the District proposed to conduct educational, social, psychological psychiatric neurological and functional behavioral assessment tests. Petitioner gave the District written consent to conduct these tests.

All but the functional behavioral analysis were completed prior to the June 2019 end of school year, the reason for which was the child was transferred to an alternative school for behavioral reasons. When school resumed in September 2019, the functional behavioral analysis was completed. Petitioner objected to the setting in which the FBA

was conducted, as she believed this assessment should be conducted in a general education classroom.

Upon completion of all six assessments, the District determined that M.B. was not eligible for special education services. On October 10, 2019, petitioner signed a form confirming her approval of the outcome of the tests, and the motion ensued.

The district contends that the transfer of M.B. to Fresh Start Academy was done in a general education context for behavior reasons only, and does not involve the special education law.

LEGAL ANALYSIS AND CONCLUSIONS

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482, ensures that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and ensures that the rights of children with disabilities and parents of such children are protected. 20 U.S.C. § 1400(d)(1)(A), (B); N.J.A.C. 6A:14-1.1. A "child with a disability" means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A). N.H. has been diagnosed with autism and classified as a preschool child with a disability.

States qualifying for federal funds under the IDEA must assure all children with disabilities the right to a free "appropriate public education." 20 U.S.C. § 1412(a)(1); Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, forty-five8 U.S. 176 (1982). Each district board of education is responsible for providing a system of free, appropriate special education and related services. N.J.A.C. 6A:14-1.1(d). A "free appropriate public education" (FAPE) means special education and related services that (A) have been

provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under 20 U.S.C. § 1414(d). 20 U.S.C. § 1401(9); Rowley, forty-five8 U.S. 176. Subject to certain limitations, FAPE is available to all children with disabilities residing in the State between the ages of three and twenty-one, inclusive. 20 U.S.C. § 1412(a)(1)(A), (B).

In a due process hearing in New Jersey, the district bears the burden of proof under N.J.S.A. 18A:46-1.1 to demonstrate that it is providing a free, appropriate public education in the least restrictive environment to a student whose family is pursuing a due process petition.

An individualized education program (IEP) is a written statement for each child with a disability that is developed, reviewed and revised in accordance with 20 U.S.C. § 1414(d); 20 U.S.C. § 1401(14); 20 U.S.C. § 1412(a)(4). When a student is determined to be eligible for special education, an IEP must be developed to establish the rationale for the student's educational placement and to serve as a basis for program implementation. N.J.A.C. 6A:14-1.3, -3.7. At the beginning of each school year, the District must have an IEP in effect for every student who is receiving special education and related services from the District. N.J.A.C. 6A:14-3.7(a)(1). Annually, or more often, if necessary, the IEP team shall meet to review and revise the IEP and determine placement. N.J.A.C. 6A:14-3.7(i). FAPE requires that the education offered to the child must be sufficient to "confer some educational benefit upon the handicapped child," but it does not require that the school district maximize the potential of disabled students commensurate with the opportunity provided to non-disabled students. Rowley, forty-five8 U.S. at 200. Hence, a satisfactory IEP must provide "significant learning" and confer "meaningful benefit." T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577-78 (3d Cir. 2000).

The Supreme Court discussed Rowley in Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988 (2017), noting that Rowley did not "establish any one test

for determining the adequacy of educational benefits" and concluding that the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." Id. at 996, 1001. Endrew F. warns against courts substituting their own notions of sound education policy for those of school authorities and notes that deference is based upon application of expertise and the exercise of judgment by those authorities. Id. at 1001. However, the school authorities are expected to offer "a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." Id. at 1002.

In Lascari v. Ramapo Indian Hills Reg'l Sch. Dist., 116 N.J. 30, 46 (1989), the New Jersey Supreme Court concluded that "in determining whether an IEP was appropriate, the focus should be on the IEP actually offered and not on one that the school board could have provided if it had been so inclined." Further, the New Jersey Supreme Court stated:

> As previously indicated, the purpose of the IEP is to guide teachers and to ensure that the child receives the necessary education. Without an adequately drafted IEP, it would be difficult, if not impossible, to measure a child's progress, a measurement that is necessary to determine changes to be made in the next IEP. Furthermore, an IEP that is incapable of review denies parents the opportunity to help shape their child's education and hinders their ability to assure that their child will receive the education to which he or she is entitled.
>
> [Id. at 48-9. (citations omitted).]

In accordance with the IDEA, children with disabilities are to be educated in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(5); N.J.A.C. 6A:14-1.1(b)(5). To that end, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A); N.J.A.C. 6A:14-4.2. The Third Circuit has interpreted this to

require that a disabled child be placed in the LRE that will provide the child with a "meaningful educational benefit." T.R., 205 F.3d at 578. Consideration is given to whether the student can be educated in a regular classroom with supplementary aids and services, a comparison of benefits provided in a regular education class versus a special education class, and the potentially beneficial or harmful effects which placement may have on the student with disabilities or other students in the class. N.J.A.C. 6A:14-4.2(a)(8).

The creation of an adequate IEP under the IDEA requires that a school district consider positive behavioral interventions where a student's behavior impedes his learning. See M.H. v. New York City Dept. of Education, 712 F. Supp. 2nd 125 (S.D.N.Y.) and A.C. ex rel. M.C. v. Bd. of Ed. Of Chappaqua School District, 553 F 3rd. 165, (2nd Cir. 2009) wherein an IEP was still deemed adequate even if no behavior management strategies were included. The sufficiency of chosen strategies for dealing with behavioral issues requires deference to the expertise of school officials. Grim v. Rhinebeck Cent. School Dist. 346 F3rd 377 (2nd Cir. 2003).

The standard for entering summary decision is when a party seeking such an order is able to demonstrate that there are no outstanding material facts, and the moving party is entitled to prevail as a matter of law. Brill v. Guardian Life 142 N.J. 520 (1995).

A court must dismiss a complaint if there is no legal basis for entering the requested relief. Holmin v. TRW Inc. 330 N.J. Super 30, (App. Div. 2000) aff'd 167 N.J. 2005 (2001). A dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted. Rieder v. State 221 N.J. Super 547 (App. Div. 1987).

Simply put, with no opposition being filed to the motion on behalf of the petitioner, together with her written acknowledgement that no need for special education was found at this time, there are no facts in dispute that would warrant a full plenary hearing.

Based on the testimony of the witnesses, and the record of evidence presented, I **FIND** the following **FACTS** in this case:

1. By way of background, M.B. is a twelve year old girl who is a student at Fresh Start Academy in East Orange, New Jersey.
2. In spring 2019, petitioner requested M.B. be evaluated for the possibility of being eligible for special education services.
3. Prior to the end of the school year, all but one of the assessments were completed, the last one being the behavioral function assessment, which was completed one week after school commenced in September 2019.
4. The outcome of the tests was that M.B. was not eligible for special education services, a determination which petitioner agreed.
5. M.B. is in an alternate school for behavior issues only.

I therefore **FIND** that giving every favorable inference to petitioners under IDEA, FAPE and Section 504 of the Rehabilitation Act, petitioner has met its burden under Crowe v. DeGioia that the district and Sparta High School will suffer irreparable harm as a result of actions of C.M., unless he is temporarily placed on home instruction, with permission to participate with the Golf team as an outside activity

CONCLUSION

Based on a review of the pleadings, the submissions, and the documents attached by both sides, and giving every favorable inference to petitioners, for the reasons set forth herein, I **CONCLUDE** that the petitioner, East Orange Board of Education. is entitled to summary decision dismissing the due process petition.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the respondent's motion for summary decision is **GRANTED,**

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) 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 (2019).

March 13, 2020

DATE

ANDREW M. BARON, ALJ

mm

APPENDIX

Witnesses

Exhibits

For Petitioners:

None

For Respondent: (attached to motion)

A- Petition

B- Evaluation Determination plan

C- Social assessment

D- Psychiatric evaluation

E- Education evaluation

F- Neurological evaluation

G- Psychological evaluation

H- FBA

I- 6/7/19 letter

J- Fresh start Academy website

K- Petitioner consent to assessment outcomes