



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 06733-20

AGENCY DKT. NO. 2020-31765

E.K. ON BEHALF OF O.K.,

Petitioner,

v.

BAYONNE CITY BOARD OF EDUCATION,

Respondent.

David Giles, Esq. for petitioner (Law Offices of David Giles, attorneys)

Robert J. Merryman, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy attorneys)

Record Closed: November 13, 2020

Decided: November 16, 2020

BEFORE **DANIELLE PASQUALE**, ALJ:

STATEMENT OF THE CASE

In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415, E.K. has requested a due-process hearing on behalf of her daughter, O.K, who is classified as eligible for special education and related services. She contends that the Bayonne City Board of Education (the Board), failed to provide O.K. with an appropriate

program in an out-of-district placement, and as agreed upon via a settlement approved by the Office of Administrative Law (OAL) on November 14, 2019. She seeks an out-of-district placement now. O.K. also seeks compensatory education. The Board replies that its actions throughout were consistent with the settlement agreement, and with applicable law and regulation.¹

PROCEDURAL HISTORY

The request for due process was received by the Office of Special Education Programs (OSEP) on June 23, 2020. The contested case was transmitted to the OAL, where it was filed on July 27, 2020. During a telephonic pre-hearing conference, counsel for the District advised that there were no facts in dispute and asked that the matter be resolved on Cross-Motions for Summary Decision. The motions and accompanying certifications and briefs were filed on or about October 16, 2020. Questions were received by my chambers regarding the status of this matter on or about November 2 and November 13, 2020 requiring my attention, once those were answered I closed the record accordingly.

FINDINGS OF FACT

The salient facts are undisputed, and I **FIND**:

O.K. is an eleven-year-old student who is classified as eligible for special education services under the category “Intellectually Disabled-Mild” and is currently placed in an in-district, Multiply Disabled, self-contained class at Washington Elementary School. She resides in Bayonne and receives educational programming via an Individualized Education Program (IEP) designed by the school district. Concerned about the appropriateness of O.K.’s program, her mother, through counsel filed a due process petitioner seeking an order for an out of district placement of O.K. to a private School. The parties’ dispute was ultimately settled via a written settlement agreement, signed by

¹It appears the petition also named the Department of Education (the Department) and alleged that the Department failed to fulfill its duty to investigate and correct the alleged violations of petitioner’s rights. As I have no jurisdiction to consider these claims, they were not transmitted by the Department.

E.K. on October 8, 2019, and by the Board on October 29, 2019. The settlement was approved by Judge Ellen Bass, A.L.J., via a Final Decision on November 14, 2019. An eleven-page detailed settlement provided for much will be explored below in the undisputed statement of facts.

STATEMENT OF FACTS

As is set forth in the due process petition, O.K. is an eleven-year old girl who is a classified student in the Bayonne School District. In March 2019, E.K., the mother of O.K., filed a due process petition seeking an order for an out of district placement of O.K. to a private school. (Movant's Exhibit A attached to Certification of Robert J. Merryman, Esq.) ("RJM Cert.") By way of decision dated August 6, 2019, the Honorable Ellen Bass, limited the scope of that petition based on the applicable statute of limitations. (Movant's Exhibit B attached to RJM Cert.)

Thereafter in October 2020 the parties entered into a settlement agreement fully resolving the due process petition filed on behalf of O.K. (Movant's Exhibit C attached to RJM Cert.) The dispute over O.K.'s IEP for 2019-20 was fully resolved by the parties by way of the settlement agreement and the decision of the Honorable Ellen Bass, A.L.J. on November 14, 2019 formally approving the settlement agreement and providing the agreement with the force of a final decision. (Movant's Exhibit C)

The parties' agreement, which is very detailed, specifically required that fourteen (14) separate provisions regarding services, assessments, and goals be added to the student's IEP. As is noted in the settlement agreement, it was agreed that an IEP would be developed by the end of November 2019, for the 2019-20 school year, that would incorporate the terms of the settlement agreement.

Judge Bass' Order approving the settlement specifically provides that **"If the parents or adult student felt 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."** (emphasis added) It must also be noted that Petitioner did in fact file a complaint with the Office of Special Education

Programs (“OSEP”) on January 30, 2020. (Movant’s Exhibit D attached to RJM Cert.) In that complaint, Petitioner alleged that the terms of the settlement were not being complied with respect to two (2) specific issues:

- (1) The District failed to properly implement after school supplemental instruction agreed to in the settlement agreement; and
- (2) The District failed to implement the student’s Home Program as required by her IEP and Settlement Agreement.

(Id.)

A decision from OSEP was issued in June 2020 (Movant’s Exhibit E attached to RJM Cert.) concluding that the District met its requirements with respect to the after school supplemental instruction and has provided the Home Program for O.K. It was determined, and the District acknowledged, that due to staff availability, some sessions of the after-school instruction and the home program were missed or cancelled and will need to be made up. No appeal was taken from the decision of OSEP. Further, Petitioners did not file with OSEP challenging their findings or conclusions.

In June 2020, Petitioners filed the Due Process Petition in the instant matter. In that petition it is alleged, in pertinent part as follows:

1. O.K. is an eleven-year-old (DOB: 10-11-08), fifth grade, classified student who is eligible for special education and related services under the category, Intellectually disabled-Mild, and is currently placed in an in-district, Multiply Disabled, self-contained class at Washington Elementary School.
2. On or about October 8, 2019, E.W.² and the Board executed a Settlement Agreement and Release (“the Settlement”) that

² It should be noted that the Petitioner’s attorney refers to O.K.’s mother as E.K. and E.W. interchangeably. As this appears to be a ministerial error; after a careful review of the motion papers and the entire file, I have used the Petition verbatim as filed by counsel for Petitioner but where E.W. is noted in my order; it should be considered to represent E.K. the mother’s proper initials.

resolve claims set forth in a due process hearing petition filed by E.W. on March 21, 2019.

3. Pursuant to the Settlement, the Board agreed to develop and implement an IEP with certain provisions specified in the Settlement as well as additional provisions that were to be developed through processes set forth in the Settlement.
4. In consideration for this agreement, E.W. waived any rights to tuition or compensatory education through October 29, 2019.
5. After that date, the Board failed to fully comply with the terms of the Settlement.
6. It also failed to adopt or properly implement an IEP that was reasonably calculated to enable her to make appropriate progress toward an individualized and appropriately challenging and ambitious set of goals and objective that address her academic achievement, social skills and daily living skills.
7. As a result of COVID-19 state of emergency in New Jersey, on or about March 19, 2020, the Board closed its school and implemented a program of virtual learning for O.K., but this program, which is ongoing, has not afforded her a “free appropriate public education” (“FAPE”).
8. On May 19, 2020, the Board convened an IEP team meeting to review and revise O.K.’s IEP.

9. On June 8, 2020, O.K.'s Case Manager emailed to E.W. a copy of an IEP with proposed changes.
10. That IEP includes inappropriate reductions in the level of 1:1 instruction and consulting services.
11. In addition, the program and placement described in that IEP are otherwise inappropriate because they are not reasonably calculated to enable her to make appropriate progress toward an individualized and appropriately challenging and ambitious set of goals and objectives that address her academic achievement, social skills and daily living skills.
12. By its failure to provide or implement for O.K. an appropriate IEP from October 29, 2019 until March 18, 2020, its ongoing failure to provide O.K. FAPE during the COVID-19 school closure, and its development of an inappropriate IEP for the future, the Board has violated O.K.'s right to FAPE to which she is entitled under the Individuals with Disabilities Education Act (IDEA), the Americans with Disabilities Education Act (the ADA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and New Jersey's special education laws.

(Movant's Exhibit F attached to RJM Cert.)

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The parties seek relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall

be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.”

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that “if the opposing party [in a summary judgment motion] offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, ‘[f]anciful, frivolous, gauzy or merely suspicious,’ he will not be heard to complain if the court grants summary judgment.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

The “judge’s function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence “is so one-sided that one party must prevail as a matter of law,” the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 251–52. I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts that require a plenary hearing, and the Board is entitled to judgment as a matter of law.

The due process petition asks that I determine whether the Board complied with its obligations to provide O.K. with the provisions enumerated in the detailed settlement agreement.

Moreover, petitioner’s claims should have been pursued as a Request for Enforcement and not as a Petition for Due Process. For this reason, I **CONCLUDE** the petition must be dismissed. The controverted IEP took place pursuant to a settlement agreement. While the parent has a right to request Child Study team meetings and other

relief noted specifically in the settlement agreement, notably OSEP's review and subsequent decision as they availed themselves here, the Board also has a right to Summary Decision when the terms disputed are covered in the settlement agreement. The Board did so here, and its ultimate compromise with the parent was reduced to a Final Decision by Judge Bass on November 19, 2019. If E.K. feels that the Board has not complied with Judge Bass's decision, N.J.A.C. 6A:14-2.7(t) provides

If either party fails to comply with any provision of a final decision in a due process hearing, either party may seek enforcement of the decision in a court of appropriate jurisdiction. If the public agency responsible for implementing the IEP fails to implement a hearing decision of the Office of Administrative Law with respect to the student's program or services, a request for enforcement may be made by the parent or the parent's attorney on behalf of the student. The request shall be made in writing to the State Director of the Office of Special Education Programs, Department of Education no later than the 90th calendar day from the date that the action directed in the hearing decision that is the subject of the enforcement request was required to have occurred. The request shall include a copy of the decision issued by the Office of Administrative Law...The Office of Special Education Programs shall determine the implementation of the decision. If it is determined that the district has failed to implement the decision or part of the decision, the Office of Special Education Programs shall order the district to implement the decision or part of the decision, as appropriate...

I anticipate counsel for O.K. will argue that he tried to seek the Department's assistance, but to no avail, as the Department entertained, but declined to rule completely in his favor after a thorough Complaint Investigation. Any such assertions would be in vain. Firstly, a Complaint Investigation is a different procedural course than a Request for Enforcement. And secondly, to the extent that petitioner did not receive satisfaction from the Department, her recourse lies elsewhere. The decision on a Complaint Investigation is a final agency decision. See: *Lenape Reg. Bd of Ed. v New Jersey Dept of Educ*, 399 N.J. Super. 595 (App. Div., 2008). The OAL conducts fact-finding hearings and issues an Initial Decision (and the agency then issues a Final Decision) or conducts a fact-finding hearing and issues a Final Decision (as here, when a case is filed under the

IDEA). The OAL does not review final agency decisions, to include decisions by the Department of Education. See: N.J.S.A. 52:14F-1 et seq.

It should be noted that in its Motion for Summary Decision, the Board asked that all claims be dismissed with the exception of the challenge to the IEP for the 2020-21 school year. As there is no mention of the 2020-21 school year in the Petition, as noted in lengthy telephonic conferences prior to the filing of this Motion, this Tribunal is not considering 2020-21 as a justiciable issue for the instant Due Process Petition noting it was not plead independently or with particularity. In addition, Petitioner decided not to Amend the Petition to include 2020-21 even after this Tribunal noted it as an option in this matter. In short, it makes it plainer that the instant Due Process Petition is merely an enforcement action for the 2019-20 school year covered by the lengthy settlement approved by Judge Bass wherein the undersigned and this Tribunal lacks jurisdiction.

ORDER

Based on the foregoing, the due-process petition is **DISMISSED** in its entirety. The hearing date of **December 14, 2020**, thus will not be needed, and is adjourned.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) 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 (2018). 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.

November 16, 2020
DATE



DANIELLE PASQUALE, ALJ

Date Received at Agency

November 16, 2020

Date E-Mailed to Parties:
DP/lr

November 16, 2020