State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING
SUMMARY DECISION
OAL DKT. NO. EDS 02712-18
AGY. DKT. NO. 2018-27438

L.K. and K.L. ON BEHALF OF R.L.,
Petitioners,
v.
RANDOLPH TOWNSHIP BOARD OF EDUCATION,
Respondent.

_____

Harriet K. Gordon, Esq., for Petitioners (Law Office of Harriet K. Gordon, attorney)

Robin S. Ballard, Esq., for Respondent (Schenck, Price, Smith & King, attorneys)

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, L.K. and K.L. on behalf of their son R.L., filed a request for a due-process petition seeking a finding that there was a denial of a free and appropriate public education (FAPE) by the Randolph Township Board of Education (Respondent), as well as continued placement at the Craig School. The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A.

52:14F-1 to -13 to the Office of Administrative Law (OAL), where it was filed on February 21, 2018.

Respondent filed a Notice of Motion for Summary Decision on November 9, 2018. Petitioners filed their opposition on November 14, 2018. Respondent filed its reply on November 26, 2018. Oral argument on the Motion for Summary Decision was held on January 25, 2019. Respondent filed a supplemental response on February 9, 2019, having been given the opportunity by the undersigned.

FINDINGS OF FACT

1. R.L. was born on April 28, 2006, and resides within the area served by the Respondent. He currently attends the seventh grade at the Craig School, an independent school in Mountain Lakes, New Jersey.

2. The Board offered R.L. an individualized education program (IEP) on January 17, 2017, for the remainder of the 2016–2017 school year and the 2017–2018 school year, proposing for him to be educated within the Randolph Township public schools.

3. Petitioners did not raise any concern with the placement of R.L. in-district at the IEP meeting. No documentation was provided by Petitioners to support their claim to the contrary.

4. Petitioner L.K. indicated her agreement with the January 17, 2017, IEP for R.L. by signing her consent for the immediate implementation of same.

5. Petitioners did not send any correspondence to the District to express any concerns over R.L.'s educational programming, to request consideration of another placement of R.L. for his education, or to indicate that they were unilaterally placing R.L. at the Craig School to meet his educational needs and

would be seeking reimbursement for the placement. No documentation was provided by Petitioners to support their claim to the contrary.

6. On July 31, 2017, the Petitioners completed a transfer card to indicate that they were enrolling R.L. at the Craig School. There was no indication on the transfer card as to the reason for the transfer other than to indicate that it was for special services. Resp't's Br., Nov. 5, 2018, at Exh. 3.

7. The Petitioners effectuated placement of R.L. at the Craig School for the 2017–2018 school year.

8. On January 22, 2018, Petitioners requested a due-process hearing seeking a determination that R.L. needs to remain at the Craig School for the 2017–2018 school year and an order directing the district to be responsible for all costs at the Craig School commencing in September 2017 and continuing for as long as it shall remain an appropriate placement.

LEGAL ANALYSIS AND CONCLUSION

Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits that may have been filed with the application, show that there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary-judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "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 factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

In the instant matter there is no dispute as to the material facts, and the matter is ripe for summary decision.

Individuals with Disabilities Education Act

Federal funding of state special-education programs is contingent upon the states providing a "free and appropriate education" (FAPE) to all disabled children. 20 U.S.C. § 1412. The Individuals with Disabilities Education Act (IDEA) is the vehicle Congress has chosen to ensure that states follow this mandate. 20 U.S.C. §§ 1400 et seq. "[T]he IDEA specifies that the education that States provide to these children 'specially [be] designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.'" D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010) (citations omitted). The responsibility to provide a FAPE rests with the local public school district. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1(d). 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). The district bears the burden of proving that a FAPE has been offered. N.J.S.A. 18A:46-1.1.

New Jersey follows the federal standard that the education offered "must be 'sufficient to confer some educational benefit' upon the child." Lascari v. Bd. of Educ. of Ramapo Indian Hills Reg'l High Sch. Dist., 116 N.J. 30, 47 (1989) (citations omitted). The IDEA does not require that a school district "maximize the potential" of the student, but requires a school district to provide a "basic floor of opportunity." Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982). In addressing the quantum of educational benefit required, the Third Circuit has made clear that more

than a "trivial" or "de minimis" educational benefit is required, and the appropriate standard is whether the child's education plan provides for "significant learning" and confers "meaningful benefit" to the child. T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (citations omitted).

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401 to 1482, and State statutes, N.J.S.A. 18A:46-1 to -55, are designed "to ensure 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." 20 U.S.C. § 1400(d)(1)(A). A state may qualify for federal funds under the IDEA by adopting "policies and procedures to ensure that [it] meets" several enumerated conditions. 20 U.S.C. § 1412(a). These requirements for federal funding include the following conditions: all eligible children must be provided with FAPE, 20 U.S.C. § 1412(a)(1), and educational agencies and intermediate educational units must develop an IEP for each eligible child before the beginning of each school year, 20 U.S.C. § 1412(a)(4).

Although the ultimate obligation to offer a FAPE is borne by the school district, 20 U.S.C. § 1412(1); 34 C.F.R. § 300.1(a) (2018); N.J.A.C. 6A:14-1.1(d), "[t]he IDEA contemplates a collaborative effort between the parties in the preparation of the IEP and makes available a host of procedural safeguards to counterbalance district bargaining advantages." T.P. & P.P. ex rel. J.P. v. Bernards Twp. Bd. of Educ., EDS 6476-03, Final Decision (March 12, 2004), http://njlaw.rutgers.edu/collections/oal/; Rowley, 458 U.S. 176. A judicially created equitable remedy has been created whereby parents can make a unilateral placement for their child if they are dissatisfied with the actions of the school district. However, this first requires that the parents meaningfully engage in the IEP process. T.P., EDS 6476-03, http://njlaw.rutgers.edu/collections/oal/ (citing Sch. Comm. of Burlington v. Mass. Dep't of Educ., 471 U.S. 359 (1985); Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379 (8th Cir. 1998)). "[T]he IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations." C.H. v. Cape

Henlopen Sch. Dist., 606 F.3d 59, 72 (3d Cir. 2010). "Parents who unilaterally change their child's placement . . . , without the consent of state or local school officials, do so at their own financial risk." Sch. Comm. of Burlington, 471 U.S. at 373–74.

Pursuant to N.J.A.C. 6A:14-2.10(c)(2), the party seeking removal of the child from the school must provide notice of their intent to do so at least ten days in advance of removal. Failure to do so can warrant the denial of a reimbursement claim.

When a parent places a child into private school unilaterally, a court or hearing officer may require reimbursement where there is compliance with standards set forth in 20 U.S.C. § 1412(a)(10)(C)(iii), which states:

> The cost of reimbursement [for unilateral private-school placement] may be reduced or denied--
>
> (I) if--
>
> (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
>
> (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa).

The pertinent New Jersey regulation, N.J.A.C. 6A:14-2.10(c), is consistent with this federal provision.

Under the facts and circumstances presented, Petitioners did not act reasonably. "A commonsense understanding of the basis for the ten-day written-notice requirement

is to afford the parties, in the context of a collaborative effort, an opportunity to resolve the issues of the provision of FAPE without the need for a private placement for which the District had no input." K.S. & M.S. ex rel. A.S. v. Summit City Bd. of Educ., EDS 09012-12, Final Decision (November 5, 2012), http://njlaw.rutgers.edu/collections/oal/, aff'd, 2014 U.S. Dist. Lexis 102672; B.M. ex rel. M.M. v. Livingston Twp. Bd. of Educ., EDS 5503-09, Final Decision (August 5, 2009), http://njlaw.rutgers.edu/collections/oal/ (the notice requirement is meant to give school districts the opportunity to remedy the problem and offer alternatives).

In the A.S. matter cited above, as here, the parents' actions indicated to the District that they were in agreement with the proposed IEP, until they unilaterally placed their child without providing any written notice to the District, never voiced any concerns about the IEP, and failed to give the district an opportunity to have input in placement of the child. A.S., EDS 09012-12, Final Decision (November 5, 2012), http://njlaw.rutgers.edu/collections/oal/, aff'd, 2014 U.S. Dist. Lexis 102672.[1]

In the case at hand, the Petitioners are unable to show, by way of documentary evidence, that they voiced any concerns with the January 17, 2017, IEP or with the placement of R.L. for the 2017–2018 school year. In fact, L.K. signed the IEP. As per Petitioner L.K.'s Affidavit, she admits to signing the IEP. See L.K.'s Affidavit dated November 14, 2018. Further, it is confirmed by way of L.K.'s Affidavit that she merely made a phone call to the school to notify them of her intent to remove her son from the district and place him at the Craig School. Ibid. However there was no evidence presented as to when the call was placed and what individual, if any, she spoke with regarding placement at the Craig School. She alleges that she did not know she could have done it any differently. Ibid. At no time was the Respondent provided an opportunity to be involved with the placement of R.L. at a private placement. It is clear from the documents produced, inclusive of the Affidavit of L.K., that the Petitioners do not dispute that there was no written notice provided to the District of the placement of

[1] The United States District Court affirmed the ALJ's decision, finding that the ALJ did not err in concluding that, as a matter of law, the plaintiffs did not comport with requisite notice requirements and acted unreasonably in their unilateral placement of A.S. at Purnell, a private school of their choosing, and thus granted the defendant's motion for summary decision.

R.L. at the Craig School in compliance with 20 U.S.C. § 1412(a)(10)(c)(iii) and N.J.A.C. 6A:14-2.10(c).

The district was presented with placement of R.L. at the Craig School as a fait accompli, as the district only learned that the Petitioners intended to seek reimbursement for R.L.'s placement at the Craig School when they filed for due process more than five months after they withdrew from the District. Petitioners thus deprived the District of any opportunity to address their concerns regarding R.L.'s education.

I **CONCLUDE** that Respondent is entitled to summary decision because Petitioners acted unreasonably and made a unilateral placement without giving proper notice. Thus, there is no need for the undersigned to determine whether the District provided R.L. with FAPE.

ORDER

It is hereby **ORDERED** that the Respondents' Motion for Summary Decision is **GRANTED**; and

It is further **ORDERED** that Petitioners' due-process petition is **DISMISSED WITH PREJUDICE**.

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 Programs.

June 20, 2019

DATE **ELISSA MIZZONE TESTA**, ALJ

Date Received at Agency: June 20, 2019

Date Mailed to Parties:

sej

APPENDIX

List of Moving Papers

For Petitioner:

Brief in opposition to Motion for Summary Decision with Attached Exhibits 1–4, which include an Affidavit of L.K. and Dr. Jane Brown.

For Respondent:

Motion for Summary Decision, with brief in support of Summary Decision with Attached Exhibits 1–3 and Certification of Walter Curioni, Director of Special Services.

Supplemental Reply Brief to the Petitioners' opposition to Summary Decision.