

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING
RESPONDENT'S MOTION FOR
SUMMARY DECISION AND
DENYING PETITIONER'S CROSS-
MOTION FOR SUMMARY
DISPOSITION
(CONSOLIDATED)

K.K.¹ ON BEHALF OF MINOR CHILD A.W.,
Petitioner,
v.

OAL DKT. NO. EDS 08360-18
AGENCY DKT. NO. 2018-28026

GLOUCESTER CITY BOARD OF EDUCATION,
Respondent.

K.K. ON BEHALF OF MINOR CHILD R.M.,
Petitioner,
v.

OAL DKT. NO. EDS 08361-18
AGENCY DKT. NO. 2018-28027

GLOUCESTER CITY BOARD OF EDUCATION,
Respondent.

K.K. ON BEHALF OF MINOR CHILD R.M.,
Petitioner,

OAL DKT. NO. EDS 09245-18
AGENCY DKT. NO. 2018-28147

¹ Respondent-counsel refers to petitioner as "K.K.M" but these matters were transmitted to OAL with petitioner listed as "K.K." These four docketed matters are hereby consolidated.

v.

GLOUCESTER CITY BOARD OF EDUCATION,

Respondent.

K.K. ON BEHALF OF MINOR CHILD A.W.,

Petitioner,

v.

GLOUCESTER CITY BOARD OF EDUCATION,

Respondent.

OAL DKT. NO. EDS 09247-18

AGENCY DKT. NO. 2018-28146

Robert C. Thurston, Esq. (Thurston Law Offices, LLC), for petitioner

Victoria S. Beck, Esq. (Parker McCay, P.A.), for respondent

Record Closed: June 7, 2019

Decided: June 25, 2019

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

Petitioner, K.K., on behalf of minor child, A.A., has appealed the findings by respondent, Gloucester City Board of Education (Board), with petitioner claiming that the Board had denied students A.W. and R.M. a free appropriate public education (FAPE) and failed to produce student records. Petitioner seeks compensatory education for A.W. and R.M.

PROCEDURAL HISTORY

On November 19, 2017, petitioner filed two due process petitions on behalf of A.W. and R.M.²

On June 13, 2018, petitioner filed petitions docketed as EDS 8360-18 and EDS 8361-18, which were transmitted to the Office of Administrative Law (“OAL”) and filed on June 13, 2018, as contested cases. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On June 29, 2018, petitioner filed petitions docketed as EDS 9245-18 and EDS 9247-18, which were transmitted to the Office of Administrative Law (“OAL”) and filed on June 29, 2018, as contested cases. Ibid.

On September 5, 2018, respondent filed a Notice of Motion for Summary Decision for EDS 8360-18, EDS 8361-18, EDS 9245-18 and EDS 9247-18, with accompanying briefs. On September 24, 2018, petitioner submitted a responsive brief to respondent’s motions, and filed a Notice of Cross-motion for Summary Disposition. Respondent filed a reply brief on October 2, 2018.³

Oral argument on the motions for summary decision was held on October 30, 2018. Telephone hearings were held on January 17, February 11 and April 3, 2019, and the record remained open for the submission of additional documentation. No additional documentation was received, and the record closed on May 30, 2019.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Based upon the parties’ briefs and oral arguments, and for the purpose of deciding the motion to dismiss, I **FIND** the following:

² Both of these petitions, docket numbers EDS 18462-17 and EDS 18461-17, remain pending before the Honorable Judge Lisa James-Beavers, ALJ.

³ Petitioner briefs refer to “petitioner’s motion for Summary Disposition” and respondent’s “cross-motion for Summary Decision.” The first motion was filed by respondent, and therefore petitioner’s motion for Summary Decision has been considered the cross-motion in this matter.

1. A.W. and R.M. lived with their birth mother, B.W., and were domiciled in her home town of Gloucester City, NJ, and were registered in the Gloucester City School District for the 2013-14 school year. The children were subsequently entered into the foster care system, and continued attending school in Gloucester City.
2. Petitioner, K.K., obtained Kinship Legal Guardianship over A.W. and R.M. on May 16, 2017. K.K. was not a resident of Gloucester City, and was advised by the Board that the children needed to be transferred to petitioner's district of residence.
3. Petitioner appealed the Board's decision, and the Honorable Lisa James-Beavers granted respondent's cross-motion for Summary Decision in OAL Dkt. no. EDU 02505-18, holding that A.W. and R.M. were not entitled to attend school in the Gloucester City School District because they had become domiciled with petitioner K.K., who was not domiciled in Gloucester City. The Commissioner of Education upheld Judge James-Beavers' decision.

LEGAL ANALYSIS AND CONCLUSION OF LAW

The issue is whether either party is entitled to a summary decision in the within matter, or whether a full hearing should be held.

Summary decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). No evidentiary hearing need be held if there are no disputed issues of material fact. Frank v. Ivy Club, 120 N.J. 73, 98, cert. denied, 498 U.S. 1073 (1991). "When the evidence is so one-sided that one party must prevail as a matter of law, the [tribunal] should not hesitate to grant summary [decision]." Della Vella v. Bureau of Homeowner Protection, OAL Dkt. No. CAF 17020-13, 2014 WL 1383908 (N.J.Adm. 2014)(quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)).

Further, the non-moving party has the burden “to make an affirmative demonstration . . . that the facts are not as the movant alleges.” Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App.Div. 1962). This requirement, however, does not relieve the moving party from having to initially establish in its moving papers that there was no genuine issue of fact and that they were entitled to prevail as a matter of law. It is the “movant’s burden to exclude any reasonable doubt as to the existence of any genuine issue of fact.” Conti v. Board of Education, 286 N.J. Super. 106 (App. Div. 1995) (quoting Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954)).

Both parties have filed motions for a summary disposition in this matter, and therefore both parties are in agreement that there are no genuine issues of fact which would require a full due process hearing. As there are no genuine issues of fact, this matter is ripe for a summary decision. Additionally, there is still an open underlying due process matter involving the same issues and the same two students that remains before Judge Beavers.

Petitioner has asserted that petitioner’s residency is irrelevant, and that the two minor children are entitled to remain in the Gloucester City School District as a result of “stay-put.” Petitioner further asserts that Judge Beavers’ residency ruling does not remove respondent’s obligation to provide the children with a FAPE, and that respondent must still fulfill petitioner’s document requests. Respondent has asserted that A.W. and R.M. have not been entitled to attend school in the Gloucester City School District since the date that petitioner became the legal guardian of the children.

Petitioner, however, has failed to make a case that “stay-put” is applicable in the within matter. Petitioner has provided no information as to where A.W. and R.M. currently go to school, or information regarding the current IEP, if there is one, or in which school the most recent IEP stated that A.W. and R.M. must be schooled. Petitioner failed to provide any evidence that the Board has attempted to move A.W. and/or R.M. to another school during the pendency of her underlying due process petition before Judge Beavers. Accordingly, even if “stay-put” is applicable, petitioner has not made an assertion as to where she believes these minor students should be schooled, nor what terms and conditions are applicable to that education pursuant to any IEP. Additionally, these are

issues that are still available for adjudication in the underlying due process matter which remains open at OAL before Judge Beavers.

Further, the relief sought by petitioner is for the Board to produce certain records requested by petitioner. This does not fall under one of the enumerated topics for requesting a due process hearing, as set out in 20 U.S.C. §1415(b)(1) and N.J.A.C. 6A:14.2.7(a). Those statutes allow a due process hearing “when there is a disagreement regarding identification, evaluation, reevaluation, classification, educational placement, the provision of a free and appropriate public education, or disciplinary action.” N.J.A.C. 6A:14.2.7(a). As set forth in 34 C.F.R. 300.507, due process petitions may be filed on matters “relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.”

Respondent correctly argues that petitioner did not file this matter under one of these categories, but rather has asserted a cause of action claiming a violation of the Family Education Rights and Privacy Act (FERPA). Despite petitioner attempting to characterize her petition as a violation of the Individuals with Disabilities Education Act (IDEA), her seeking of special service charges for failure to produce certain documents does not fall under the topics for requesting a due process hearing. See D.O. and M.O. v. Jackson Township Board of Education, EDS 14390-15 (March 21, 2016), in which the Honorable Judge John Kennedy ruled that “[n]either N.J.A.C. 6A:14-2.7(a) nor 34 C.F.R. 300.507 provide that a demand for providing copies of student’s records may be the subject of a due process hearing.”

The proper course of action for a challenge of an alleged denial of a document request made pursuant to FERPA would be filing a complaint with the Family Policy Compliance Office (FPCO) at the United States Department of Education. Petitioner has acknowledged that this is the proper course of action, and apparently sought relief from the FPCO. It is clear that petitioner is unhappy with the long delays she is experiencing from FPCO, and thus has chosen to recharacterize the within due process petition as a challenge under IDEA for denial of FAPE. Similarly, it appears that petitioner is unhappy with the response of Judge Beavers and the speed at which discovery was being

delivered by respondent, and therefore has chosen to file duplicative petitions with OAL, despite these issues being addressed in petitioner's underlying due process petition.

The determinative factor in the within matter is that on August 28, 2018, it was determined in the related residency appeal, K.K.M. o/b/o R.M. and A.W. v. Gloucester City Board of Education, Dkt. No. EDU 2505-18, that petitioner was not domiciled in the Gloucester City School District, and had not been since May 16, 2017, when petitioner obtained Kinship Legal Guardianship over A.W. and R.M. As the claims in the within matter post-dated May 16, 2017, petitioner's claims cannot be sustained. Because petitioner was no longer domiciled in the Gloucester City School District, and therefore A.W. and R.M. were not domiciled in the Gloucester City School District, respondent Board was not responsible for providing FAPE to A.W. and R.M. See N.J.A.C. 6A:14-1.3, which held that the district board of education for a child is the school district of residence. If a child is not domiciled within a district for residency purposes, that school district is not responsible for providing FAPE. See Moorestown Twp. Bd. of Educ. v. S.D., 811 F. Supp. 2d 1057, 1068-70 (D.N.J. 2011); Lawrence Twp. Bd. of Educ. v. New Jersey, 417 F.3d 368, 370 (3d Cir. 2005).

Because these four cases filed by petitioner were duplicative of the underlying due process petition still before Judge Beavers, and because A.W. and R.M. were not domiciled in Gloucester City as of May 16, 2017, and therefore were not owed FAPE by respondent, summary disposition of this case in favor of respondent is proper. As stated herein, "When the evidence is so one-sided that one party must prevail as a matter of law, the [tribunal] should not hesitate to grant summary [decision]." Della Vella, ibid.

Accordingly, I **FIND** that there are no genuine issues of fact which would require a due process hearing, and that this matter is ripe for a summary decision. I **FIND** that petitioner failed to show that "stay-put" was applicable to the within set of circumstances. I **FIND** that petitioner's claims for relief post-dated May 16, 2017, when petitioner became legal guardian of A.W. and R.M., and that as of that date respondent was no longer responsible for providing A.W. and R.M. with FAPE.

Therefore, I **CONCLUDE** that respondent must prevail as a matter of law, and that respondent's motion for summary decision must be **GRANTED**, and that petitioner's cross-motion for summary disposition must be **DENIED**.

ORDER

I hereby **ORDER** that respondent's motion for summary decision is **GRANTED**, and this matter is hereby **DISMISSED**. Petitioner's motion for summary disposition is **DENIED**.

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 25, 2019

DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency

Date Mailed to Parties:

JNR/dw

APPENDIX

EXHIBITS

For petitioner:

1. Responsive brief and cross-motion, dated September 24, 2018

For respondent:

1. Motion and brief, dated September 5, 2019
2. Reply brief, dated October 2, 2018