State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 10942-15

AGENCY DKT. NO. 2015-22911

A.L. and R.L. ON BEHALF OF K.L.,

Petitioners,

v.

ENGLEWOOD BOARD OF EDUCATION,

Respondent.

Sandra L. Lascari, Esq., for Petitioners (Law Offices of Sandra L. Lascari, attorneys)

Margaret Miller, Esq., and **Joy B. Tolliver**, Esq., for Englewood Board of Education (Weiner Lesniak, attorneys)

Record Closed: September 20, 2016 Decided: December 7, 2016

BEFORE **CARIDAD F. RIGO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner's filed for due process on or about June 15, 2015, claiming that the respondent failed to recognize or properly address their child's learning disabilities and failed to provide a free and appropriate public education (FAPE) in accordance with 20 U.S.C.A. § 1412(a)(1)(A) and N.J.A.C. 6A:14-1.1(b)(1), and reimbursement for tuition

for their unilateral placement for the 2012-2013, 2013-2014, and 2014-2015 school years.

The matter was transmitted to the Office of Administrative law (OAL) for a hearing as a contested matter pursuant to N.J.S.A. 52:14B-1-15 and N.J.S.A. 52: 14F-1-13. After mediation and settlement negotiations were attempted and failed the matter was assigned to the herein judge. Subsequently, the parties agreed that cross-motions for summary decision would be the best approach for resolution. The parties submitted written briefs and oral arguments were heard on September 21, 2016, the record closed on September 21, 2016.

ISSUES

Whether the IDEA's two-year statute of limitations prevent Petitioner's from claiming tuition reimbursement for the 2012-13 school year?

Must a public school district develop an IEP each year for a student who has been unilaterally placed out-of-district?

Did Petitioners provide the District adequate notice of their intent to place K.L. in an out-of-district school at public expense? And, whether the initial IEP for the 2012-13 school year was appropriate to provide K.L. a FAPE?

FACTUAL DISCUSSION

Based upon a review of the pleadings, the parties' written submissions and the attached exhibits for purposes of this summary decision only, I **FIND as FACT** the following:

K.L. is a seventeen-year-old student residing in Englewood, New Jersey. K.L. attended the Englewood City Board of Education Schools' (District) "Pre-School Handicapped Program" until the end of kindergarten. She attended the Ben Yosef School, a private school, for first grade; for second grade she attended the Moriah School in Englewood, another private school, where she was found eligible for special

education and related services. During third grade, the Moriah School notified Petitioners that K.L. required a more restrictive environment and assistive technology and that the school did not have the ability to meet K.L.'s needs. In January 2007, Petitioners contacted the District to determine an appropriate placement for K.L. On March 15, 2007, Petitioners registered K.L. in the District and requested an Individualized Education Program (IEP) to meet her needs.

The District classified K.L. as having a Specific Learning Disability and developed a plan for the 2007-08 school year placing K.L. in mainstream classes with support. Petitioners did not believe the District's program was sufficient to accommodate K.L.'s needs so they unilaterally placed K.L. in the American Christian School for the 2007-08 school year. Petitioners then placed K.L. in the Brukiah School for the 2008-09 (5th grade), 2009-10 (6th grade), 2010-11 (7th grade), and 2011-12 (8th grade) school years.

In March 2012, while K.L. was in 8th grade, Petitioners contacted the District requesting an IEP and placement for the 2012-23 school year. On May 25, 2012, the District held an IEP meeting. At this meeting, the Child Study Team (CST) proposed an IEP placing K.L. in the District's public high school in an "In-Class Support/Resource Program" for her core academic subjects and providing "Speech and Language therapy" in a group twice per week.

On June 20, 2012, Petitioners sent the District a letter rejecting the proposed IEP and requesting that the District consider sending K.L. to an out-of-district placement at Leonia Public High School (Leonia). Petitioners' reason for preferring Leonia was because K.L. was coming from a private school with less than 100 children currently enrolled and they felt that the District's high school was too large of a setting and would overwhelming for her. The District did not respond to this letter.

After not receiving a response, Petitioners unilaterally placed K.L. at Leonia. They did not contest the District's IEP, nor did they retain any expert to review the proposed IEP or to support the claim that the District's high school was too large or overwhelming for K.L.

On August 17, 2012, Leonia's Business Administrator signed a tuition contract between Petitioner and Leonia for K.L.'s attendance for the 2012-13 school year. On September 7, 2012, Petitioners and Leonia developed an IEP for the 2012-13 school year. Petitioners continued K.L.'s placement at Leonia for the 2013-14 school year and developed an IEP for that year on June 6, 2013. By letter dated August 30, 2013, Petitioners notified the District that they were continuing K.L.'s unilateral placement at Leonia for the 2013-14 school year and that they would seek reimbursement for costs associated with the placement, but did not request an IEP meeting or new evaluation and did not suggest that they wished to re-enroll K.L. in the District.

On May 30, 2014, Petitioners and Leonia developed an IEP for the K.L. for the 2014-15 school year and Petitioners signed a tuition contract for the 2014-15 school year on June 2, 2014. Petitioners notified the District of their decision to continue K.L.'s unilateral placement at Leonia by letter dated August 11, 2014. The letter stated that Petitioners would seek reimbursement for all costs associated with K.L.'s placement but did not request an IEP meeting or new evaluation and did not suggest that they wished to re-enroll K.L. in the District.

On June 1, 2015, Petitioners filed a Petition for Due Process seeking reimbursement for tuition for K.L.'s placement at Leonia for the 2012-13, 2013-14, and 2014-15 school years. Both parties filed Motions for Summary Decision agreeing that there are no genuine issues of material fact in dispute.

LEGAL ANALYSIS AND CONCLUSION

Under N.J.A.C. 1:1-12.5(b) a motion for summary decision shall be served with briefs and with or without supporting affidavits. A summary decision may 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." Ibid.

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that

there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995). The Supreme Court of New Jersey has adopted a standard that requires judges to "engage in an analytical process to decide whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533.

A court should deny a motion for summary decision when the party opposing the motion has produced evidence that creates a genuine issue as to any material fact challenged. Brill, supra, 142 N.J. at 528-29. When making a summary decision, the "judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 540. In this case the parties agreed that a summary decision in this case was appropriate.

With respect to the first issue of whether the IDEA's two-year statute of limitations prevents Petitioner's claim for tuition reimbursement for the 2012-13 school year the District claims that Petitioners' request should be dismissed. The district argues that because the petition was filed outside of the IDEA, 20 U.S.C.A. §§ 1400 to 1487, two-year statute of limitations this claim should be dismissed.

Under the IDEA, a due process hearing request under the IDEA, "shall be filed within two years of the date the party knew or should have known about the alleged action that forms the basis for the due process petition." N.J.A.C. 6A:14-2.7(a)(1); 20 U.S.C.A. § 1415(f)(3)(C). An Administrative Law Judge (ALJ) may extend the two-year filing period if (1) "[a] district board of education specifically misrepresented to the parent that the subject matter of the dispute was resolved to the satisfaction of the parent" or (2) "[t]he district board of education withheld information that was required by law to be provided to the parent." N.J.A.C. 6A:14-2.7(a)(1)(i) and (ii); 20 U.S.C.A. § 1415(f)(3)(D)(i) and (ii) (stating the exceptions as specific misrepresentations by the Local Educational Agency (LEA) that it had resolved the problem forming the basis of the complaint or the LEA's withholding of information from the parent that was required under this part 20 U.S.C.A. § 1411 et seq. to be provided to the parent.

Also, the IDEA statute of limitations is not subject to equitable tolling doctrines recognized under State law such as the continuing violation doctrine. D.K. v. Abington Sch. Dist., 696 F.3d 233, 248 (3d Cir. 2012). IDEA plaintiffs "can argue only for the application of one of the statutory exceptions." Ibid.

Here, the District proposed an IEP for the 2012-13 school year on May 25, 2012. On June 20, 2012, Petitioners sent a letter to the District rejecting the IEP and subsequently placed K.L. in Leonia. Thus, Petitioners knew or should have known about their claims against the District for reimbursement for the 2012-13 school year when the IEP was created or, at the latest, when they rejected the IEP. However, Petitioners did not file their petition seeking reimbursement for the 2012-13 school year until June 1, 2015. Because Petitioners filed their petition more than two years after they knew or should have known about the basis for their complaint, the claim for reimbursement for the 2012-13 school year is barred by the two-year statute of limitations unless one of the two exceptions in the IDEA applies.

Petitioners do not allege that the District misrepresented that it had solved the problem forming the basis of their complaint. Petitioners also do not allege that the District withheld information from the Petitioners that it was required to provide. There is no evidence in the record that the District misrepresented that it had solved the problem forming the basis of the complaint or that it withheld information that it was required to provide. Thus, neither exception to the IDEA's statute of limitations applies and the claim for reimbursement for the 2012-13 school year should be dismissed as untimely filed.

The primary purpose of the IDEA, 20 U.S.C.A. §§ 1400 to 1487, is to ensure that all disabled children will be provided a FAPE. 20 U.S.C.A. § 1400(d)(1)(A). New Jersey has also enacted legislation and adopted regulations that assure all disabled children the right to a FAPE. See N.J.S.A. 18A:46-1 to -46.

On the second issue, I **FIND** that the District did not have to develop an IEP for K.L. each year that she was unilaterally placed out of District.

Once a student is enrolled at a private school due to a parent's unilateral decision, a district has no obligation to develop an IEP. 20 U.S.C.A. § 1412(a)(10)(A)(i) (requiring a school to provide "for such children special education and related services in accordance with [certain] requirements," but not an IEP). Once a student has been unilaterally placed, the district is not required to offer an IEP unless the parent: (1) requests that the district develop an IEP, conduct an evaluation, or both; or (2) seeks to return the student to public school. Moorestown Bd. of Educ. v. M.D., 811 F. Supp. 2d 1057, 1068, 1072 (2011) districts "need not have in place an IEP for a child who has unilaterally enrolled in private school and thereby rejected the district's offer of a FAPE" unless the parent subsequently requests that the district provide an evaluation and/or IEP in connection with a return to the district; I.H. ex rel. D.S. v. Cumberland Valley Sch. Dist., 842 F. Supp. 2d 762, 772 (M.D. Pa 2012) in the absence of reenrollment or a request for an IEP or evaluation, IDEA does not require districts to provide FAPE to unenrolled students.

The statutory scheme indicates that, while a district need not continue developing IEPs for a child who has unilaterally withdrawn from the public school, if a parent requests an offer of services because they would like to re-enroll a special education student in the district, the district's obligation to develop a new IEP is renewed. See Moorestown Twp. Bd. of Educ. v. S.D., 811 F. Supp. 2d 1057, 1076 (D.N.J. 2011). In Moorestown, though the parents unilaterally withdrew their child from the public school, the district's obligation to develop a new IEP was renewed when the parents asked for the district's proposed program in order to determine if the child could return to the district. Ibid.

The Third Circuit has held that a "district is only required to continue developing IEPs for a disabled child no longer attending its schools when a prior year's IEP for the child is under administrative or judicial review." D.P. ex rel. Maria P. v. Council Rock Sch. Dist., 482 F. App'x 669, 673 (3d Cir. 2012) (quoting M.M. ex rel. D.M. v. Sch. Dist. Of Greenville Cnty., 303 F.3d 523, 536 (4th Cir. 2002). However, in order to trigger the duty to prepare an IEP, a parent must also communicate their intent to re-enroll their child in the District's schools. Council Rock, supra, 482 F. App'x at 672-73. "A parent is entitled to request a re-evaluation of the student's IEP at any time . . . [b]ut this

obligation is contingent on the parent's request." Id. at 673. The Council Rock court ultimately determined that "without notification of an intent to re-enroll in public school, the school district was under no obligation to update [Petitioner's] IEP . . ." Ibid.; see also M.M., supra, 303 F.3d at 536-36 (finding that where parents withdrew their child from the District in 1996, but did not request due process until 1998, the District had no duty to develop an IEP for the 1997 year.

Here, Petitioners requested the District create an IEP for K.L. in March 2012. The District created an IEP for K.L. on May 25, 2012. Petitioners did not file a petition to challenge the IEP for the 2012-13 school year. Instead, Petitioners sent a letter to the District rejecting the IEP and requested the District consider placing K.L. in Leonia. After rejecting the IEP, Petitioners unilaterally withdrew K.L. from the District and placed her in Leonia for the 2012-13, 2013-14, and 2014-15 school years.

On August 17, 2012, a tuition contract between Petitioners and Leonia was signed for the 2012-13 school year. Before the start of each of the 2013-14 and the 2014-15 school years, Petitioners sent a letter to the District notifying the District that K.L. was remaining in Leonia. These letters did not request an IEP meeting or an evaluation; nor did they suggest that Petitioners had any intent to re-enroll K.L. in the District.

Petitioners were entitled to request an IEP meeting or evaluation at any time. However, Petitioners never requested either. Petitioners also never contacted the District about potentially re-enrolling K.L. in the District. Additionally, K.L.'s prior IEP from 2012-13 was not under administrative or judicial review when it expired. Thus, the District did not have a duty to develop an IEP for K.L. for the 2013-14 or 2014-15 school years. Because the District did not have a duty to create an IEP for K.L. for the 2013-14 or the 2014-15 school years, the District did not fail in its responsibility to provide K.L. a FAPE and Petitioners are not entitled to tuition reimbursement for those years.

With respect to the third question I note that a board of education is not required to pay for the cost of education of a "student with a disability if the district made

available a free, appropriate public education and the parents elected to enroll the student in a nonpublic school for students with disabilities." N.J.A.C. 6A:14-2.10(a).

> If the parents of a student with a disability, who previously received special education and related services from the district of residence, enroll the student in a nonpublic school, an early childhood program, or approved private school for students with disabilities without the consent of or referral by the district board of education, an administrative law judge may require the district to reimburse the parents for the cost of that enrollment if the administrative law judge finds that the district had not made a free, appropriate public education available to that student in a timely manner prior to that enrollment and that the private placement is appropriate . . . .
>
> [N.J.A.C. 6A:14-2.10(b).]

However, "the parents must provide notice to the district board of education of their concerns and their intent to enroll their child in a nonpublic school at public expense." N.J.A.C. 6A:14-2.10(c). The cost of reimbursement may be reduced or denied:

> If at the most recent IEP meeting that the parents attended prior to the removal of the student from the public school, the parents did not inform the IEP team that they were rejecting the IEP proposed by the district;
>
> Or at least 10 business days (including any holidays that occur on a business day) prior to the removal of the student from the public school, the parents did not give written notice to the district board of education of their concerns or intent to enroll their child in a nonpublic school;
>
> . . .
>
> Or, upon a judicial finding of unreasonableness with respect to actions taken by the parents.
>
> [N.J.A.C. 6A:14-2.10(c)(1), (2), and (4).]

If a public school "fails to provide a FAPE, it must reimburse parents for resulting private school costs." L. E. v. Ramsey Bd. of Educ., 435 F.3d 384, 389 (3d Cir. 2006). To recover expenses Plaintiffs must show both: (1) that the district failed to provide a free and appropriate education in the least restrictive environment, and (2) that the

parents' private placement was appropriate. See T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 582 (3d Cir. 2000). However, "the regulations do not relieve the parents of the [notice] requirements because of their unexpressed perceived belief that the District cannot produce an appropriate IEP." D.A. and A.A. ex rel. R.A. v. Hawthorn Bd. of Educ., EDS 12450-07, Final Decision (February 15, 2008), <http://njlaw.rutgers.edu/collections/oal/>. The district must be given the opportunity to decide whether a placement outside the District is appropriate or if it can formulate a different educational program. Ibid.

In W.D. ex rel. W.D. v. Watchung Hills Regional Board of Education, EDS 15092-12 Final Decision (March 5, 2013), <http://njlaw.rutgers.edu/collections/oal/>, the ALJ found that a district was not responsible for tuition reimbursement because, although "[P]etitioner expressed concerns over his son's progress at the March 28, 2012, IEP meeting, he did not make a definitive statement that he was rejecting the proposed IEP, as required by N.J.A.C. 6A:14-2.10(c)(1)." W.D. supra, EDS 15092-12. Additionally, Petitioner failed to notify the respondent in writing of his intent to seek private school tuition reimbursement until after he was already enrolled at the private school in contrast to the requirements of N.J.A.C. 6A:14-2.10(c)(2)." W.D., supra, EDS 15092-12. Petitioners executed an enrollment agreement with a private school on August 6, 2012. Ibid. However, Petitioners did not notify the Board of their intent to remove until August 24, 2012. Ibid. The student did not attend the first day of classes at the district school, scheduled to begin on September 11, 2012, but rather, began classes at the private school. Ibid. The ALJ determined that "removal" means the date a student is enrolled in private school. Ibid. The ALJ also determined that a parent's refusal to sign an IEP is not sufficient to give notice that they are rejecting the IEP. Ibid.

"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. and M.S. ex rel. A.S. v. Summit City Bd. of Educ., EDS 09012-12, Initial Decision (November 5, 2012), <http://njlaw.rutgers.edu/collections/oal/>; 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. Upon finding that the parents are not entitled to reimbursement due to their own unilateral action and failure to provide notice of their intent to take such action, the court need not reach the issue of whether the district has provided FAPE. Summit, supra, EDS 09012-12.

Petitioners claim that they met the notice requirements because they sent a letter to the District before each school year that notified the District of Petitioners' intent to send K.L. to Leonia and seek tuition reimbursement. However, to comply with the notice requirements, Petitioners must have given the District notice at least ten business days before the removal of K.L. from the District. The purpose of this ten-day notice requirement is to give the District and Petitioners an opportunity to resolve their issues without the need for a unilateral placement.

Here, the Parents have not offered any expert testimony or evidence that the information that the District considered in creating the IEP was incomplete. Petitioners have also not shown any evidence that the IEP would not have enabled K.L. to receive meaningful educational benefits in light of her potential.

As in W.D., supra, Petitioners only gave notice of their intent to seek tuition reimbursement for the 2014-15 school years after K.L. was already enrolled in Leonia. Petitioners and Leonia entered into a tuition contract for the 2014-15 school year on June 2, 2014. I **CONCLUDE** that Petitioners in effect enrolled K.L. in Leonia on June 2, 2014, and failed to provide the District with the appropriate notice that they were not re-enrolling K.L. in the District.

Petitioners further contend they are entitled to tuition reimbursement for the 2012-13, 2013-14, and 2014-15 school years because of the Board's failure to offer an IEP during that time period. However, as discussed above, the Board had no duty to offer an IEP, because the parents did not request an IEP meeting or an evaluation and did not express intent to re-enroll K.L. in the District.

Upon finding that the parents are not entitled to reimbursement due to their own unilateral action and failure to provide notice of their intent to take such action, the court need not reach the issue of whether the district has provided FAPE. Summit, supra, EDS 09012-12.

CONCLUSION

Based upon all of the herein I **CONCLUDE** that the claim for tuition reimbursement for the 2012-2013 school year is not timely under the IDEA's two-year statute of limitations. I **CONCLUDE** that the District had no duty to offer an IEP for the 2013-14 and 2014-15 school years because the parents did not request an IEP meeting or an evaluation and did not expressly intend to re-enroll K.L. in the District. Thus, tuition reimbursement for the 2013-14 and 2014-15 school years is denied. I further **CONCLUDE** that Petitioners failed to meet the notice requirements designed to allow the District and Petitioners to collaborate and resolve their issues without the need for a unilateral placement.

ORDER

Accordingly, I hereby **ORDER** that the District's motion for summary decision is **GRANTED**; that Petitioner's cross-motion for summary decision is **DENIED**; and that the due-process petition is hereby **DISMISSED**.

This decision is final under 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2012) and is appealable by filing a complaint and bringing a civil action in the Law Division of the Superior Court of New Jersey or in a district court of the United States. See 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2012). If the parent or adult student believes that this decision is not being fully implemented with respect to a program or services, this concern should be communicated in writing to the Director of the Office of Special Education.

December 7, 2016 _____

DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency December 7, 2016

Date Mailed to Parties: _____

CFR/lr