

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 14176-18

AGENCY DKT. NO. 2019/28725

J.C. AND S.C. ON BEHALF OF J.C.,

Petitioners,

v.

SCHOOL DISTRICT OF THE CHATHAMS

BOARD OF EDUCATION,

Respondent.

Beth A. Callahan, Esq., for Petitioners (Callahan & Fusco, LLC, attorneys)

Elesia L. James, Esq., for Respondent (Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys)

Record Closed: November 7, 2018

Decided: November 14, 2018

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a Due Process Petition on August 29, 2018, with Office of Special Education Policy and Procedure (OSEP) in the New Jersey Department of Education (DOE) seeking, inter alia, reimbursement for a unilateral placement of J.C. at the Winston School, and transportation to the same, along with compensatory education services. OSEP 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 September 28, 2018.

A prehearing Order was entered on October 22, 2018.

Respondent filed a motion on September 28, 2018, to dismiss the petitioners' due process petition for petitioner's failure to engage in either the resolution process or mediation as set forth in N.J.A.C. 6A:14-2.7(h), 34 C.F.R. § 300.510(a)(3)(ii) and U.S.C. § 1415(f)(1)(B)(i). Petitioners filed their reply thereto on November 5, 2018. Respondent filed its sur-reply brief on November 7, 2018.

FACTUAL DISCUSSION

Petitioners filed for due process seeking mediation only and requesting an out of district placement for J.C. on March 30, 2018. This was done by petitioners' advocate Gail Libertucci. The District filed its answer thereto On April 12, 2018. Mediation was scheduled for May 16, 2018. The Board appeared for said mediation. Neither petitioners nor their advocate appeared for the scheduled mediation. Also, there was no communication to OSEP from either petitioners or their advocate.

The assigned mediator contacted Ms. Libertucci who advised that Beth Callahan was now representing petitioners. OSEP than contacted Ms. Callahan who confirmed she was retained. No mention was made in response to the OSEP query as to how petitioners wished to proceed. OSEP advised that the matter would be closed. Ms. Callahan responded requesting the matter be transmitted to the OAL. OSEP advised that the due process petition was for mediation only and closed the file on May 30, 2018.

Ms. Callahan corresponded with Board counsel on June 15, 2018 advising that J.C. would be unilaterally placed at the Winston School. The District responded and stated its willingness to engage

On August 29, 2018 the current due process petition was filed by Ms. Callahan on behalf of petitioners. That due process petition checked the Due Process Hearing box.ⁱ The District filed its answer thereto on September 7, 2018. Also on September 7, 2018 OSEP corresponded with the parties regarding mediation and seeking proposed dates for the same. The District responded on September 12, 2018 that it was willing to engage in mediation. The District followed up with emails on September 17, 2018 and September 20, 2018 regarding mediation. There was no response from Ms. Callahan's office. On September 25, 2018 OSEP informed the parties that the thirty day resolution period would expire on September 28, 2018. Ms. Callahan responded by stating she wished the matter be transmitted to the OAL.

The matter was transmitted to the OAL as a contested case where it was filed on September 28, 2018. A settlement conference before the Honorable Barry Moskowitz, ALJ, was scheduled for October 4, 2018. The District requested that the settlement conference be adjourned in order to file the within motion.

LEGAL ANALYSIS

The Individuals with Disabilities Education Act (IDEA) requires that petitioners and the District make an effort to resolve the issues set forth in a due process petition by resolution conference or mediation. This is contained in both state and federal law and regulation. It is not optional. Only when the parties agree in writing that settlement would be futile can a due process petition proceed to hearing.

The IDEA states in pertinent part, “[p]rior to the opportunity for an impartial due process hearing...the local educational agency shall convene a meeting with the parents...unless the parent and the local educational agency agree in writing to waive such meeting...” 20 U.S.C. § 1415(f)(1)(B)(i).

Likewise, 34 CFR. § 300.510(a) mandates that within fifteen days of receiving notice of the parent's due process complaint, “the LEA must convene a meeting with the parent...” New Jersey regulations are in accord and N.J.A.C. 6A:14-2.7(h) provides that,

ⁱ There are three boxes to check on the Parental Request for Mediation/Due Process Hearing/Expedited Due Process Hearing form: Mediation Only; Due Process Hearing; and, Expedited Due Process Hearing.

“[w]hen a parent requests a due process hearing or expedited due process hearing, the district board of education shall have an opportunity to resolve the matter before proceeding to a due process hearing in a resolution meeting.” Our regulation thus unequivocally grants the Board an opportunity to attempt to resolve the matter prior to its transfer to the OAL.

Further, New Jersey regulations likewise makes it plain that the resolution session can be waived, but only by agreement by both parties in writing. N.J.A.C. 6A:14-2.7(h)(9). That clearly did not happen here. The District communicated at least twice with OSEP of their willingness to engage in mediation with an OSEP mediator. Further, the Districts counsel communicated with petitioners’ counsel by email and telephone of its intention to engage in mediation.

Petitioners’ argument that the District failed to schedule a resolution conference is not convincing. Petitioners’ counsel advised OSEP that petitioners requested a mediation in lieu of a local resolution session. The District clearly indicated its willingness to engage in mediation.

I also disagree with petitioners’ argument that the Board refused to participate in good faith with the settlement discussions scheduled at the OAL by filing this motion to dismiss. The IDEA, and New Jersey regulations, make it plain that the parties must meet prior to transmittal to the OAL, unless both parties agree to waive resolution and mediation. Having failed to secure the petitioners’ cooperation, the Board was well entitled to assert its right to seek dismissal pursuant to 34 CFR. § 300.510(b)(4).

See S.Z. and J.Z. o/b/o G.Z. v. School District of the Chathams Board of Education, 2016 WL 3974367, OAL Dkt. No. EDS 08680-16 (July 15, 2016).

Lastly, petitioners’ argument that this within motion is a waste of time and money as petitioners will merely refile, go through the motions of a mediation or resolution, and then transmit the case to the OAL, clearly indicate that it is petitioners who did not want to engage in mediation or resolution. The regulations regarding local resolution conference or mediation are in place for a sound reason: to resolve matters prior to

expensive litigation. In the instant matter it seems very clear that petitioners only want to engage in the same, and not seek to resolve the matter prior to such expensive litigation.

For the foregoing reasons, I **CONCLUDE** that the Respondent's motion to dismiss be **GRANTED**, without prejudice.

ORDER

It is hereby **ORDERED** that Respondent's motion to dismiss is **GRANTED** without prejudice.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2017) 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 (2017). 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.

November 14, 2018

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

Db

APPENDIX

List of Moving Papers

For Petitioner:

Motion to Dismiss

Brief in Support of Motion to Dismiss

Certification of Counsel with Exhibits 1 - 9

Sur-reply Brief

For Respondent:

Reply Brief

Certification of Counsel with Exhibits A - F