State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 15963-16

AGY DKT. NO. 2017-24925

M.I. ON BEHALF OF M.I.,

Petitioner,

v.

NORTH HUNTERDON/VOORHEES REGIONAL HIGH BOARD OF EDUCATION,

Respondent.

_____

Philip E. Stern, Esq., for petitioner (DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, attorneys)

Rita F. Barone, Esq., for respondent (Purcell, Mulcahy, Hawkins & Flanagan, attorneys)

Record Closed: February 14, 2017 Decided: March 8, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

Petitioner requested for a due process petition with the Office of Special Education Programs, New Jersey Department of Education (NJDOE) on or about July 19, 2016. 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 October 20, 2016.

PROCEDURAL HISTORY

Petitioner filed a Due Process Petition on or about July 19, 2016. The respondent filed an Answer to the Petition for Due Process on August 22, 2016. A settlement conference was held on December 15, 2016, and subsequently assigned to the undersigned. A prehearing conference was held on December 21, 2016.

Respondent filed a motion for summary decision on December 20, 2016. Petitioner filed their response thereto on January 9, 2017, and January 11, 2017. Oral argument was held on February 14, 2017, and the record closed.

FINDINGS OF FACT

1. Clinton Public School District does not have its own public high school thus students from the Clinton Public School District are sent to high school at the North Hunterdon-Voorhees Regional High School District (NHVR). Respondent operates the Hunterdon-Voorhees Regional High School District, a school district that provides educational services to students through grade twelve.

2. M.I. (who is eligible for special education and related services under Specific Learning Disability) was enrolled in the Clinton Public School District, which placed M.I. in an out-of-district placement at the Craig School in accordance with an earlier settlement agreement.

3. The Clinton Public Child Study Team met with the petitioner on January 19, 2016, and an IEP was developed as a result of this meeting. The members of the NHVR also attended this meeting, along with the respondent's representative.

4. In the January 19, 2016, IEP it was proposed that M.I. would attend an in-district program in the NHVR starting in the ninth grade for the 2016-2017 school year. The program included resource room replacement for English, given that M.I. had been in a small-class environment at the Craig School. The program also included supplemental reading/writing instruction and supplemental algebra instruction. For the rest of M.I.'s academic classes, she would receive in-class resource support in addition to other modifications.

5. Petitioner had already explored private placement for M.I. for the 2016-2017 school year but did not so inform the respondent. Petitioner was notified of M.I.'s acceptance for the Pennington School in March 2016.

6. On September 1, 2016, petitioner's attorney sent an email to respondent's attorney, stating that petitioner was unilaterally placing M.I. at the Pennington School and that they expected the respondent to reimburse petitioner for the cost of said placement.

7. On September 7, 2016, respondent's Director of Special Services sent correspondence to the petitioner stating, in part, that the email from petitioner's attorney provided insufficient notice and was not within the timeliness of the IDEA.

8. Pursuant to the school calendar for the Pennington School for the 2016-2017 school year, orientation for the ninth grade was held on September 6, 2016.

9. The application deadline for attendance at the Pennington School for the 2016-2017 school year was on or about February 1, 2016.

10. Petitioner submitted a signed enrollment contract and a 10% tuition deposit in May 2016, thereby enrolling M.I. at the Pennington School at that time. On July 30, 2014, petitioner made a payment to the Pennington School.

11. Petitioner did not reject the IEP for the 2016-2017 academic year.

12. Petitioner did not notify respondent that they intended to make a unilateral placement in the Pennington School and seek reimbursement for the costs thereof, until September 1, 2016, via correspondence from their counsel.

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 which may have been filed with the application, show that there is no genuine issue of material fact and 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 fact finder 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.A. § 1412. The Individuals with Disabilities Act (IDEA) is the vehicle Congress has chosen to ensure that states follow this mandate. 20 U.S.C.A. §§ 1400 et seq. "[T]he IDEA specifies that the education the 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.A. § 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.A. § 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, 102 S. Ct. 3034, 3047, 73 L. Ed. 2d 690, 708 (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) (internal citations omitted).

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 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 employment and independent living." 20 U.S.C.A. § 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.A. § 1412(a). These requirements for federal funding include the following conditions: all eligible children must be provided with FAPE, 20 U.S.C.A. § 1412(a)(1), and education agencies and intermediate educational units must develop an IEP for each eligible child before the beginning of each school year. 20 U.S.C.A. § 1412(a)(4).

Although the ultimate obligation to offer a FAPE is borne by the school district, 20 U.S.C.A. §1412(1); 34 C.F.R. § 300.1(a) (2013); N.J.A.C. 6:28-1.1(a), (e), -2.1(a), "the 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. and 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, supra, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690. 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., supra, EDS 6476-03 (citing Sch. Comm. of Burlington v. Mass. Dep't of Educ., 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (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, supra, 471 U.S. at 373-74, 105 S. Ct. at 2004, 85 L. Ed. 2d at 397.

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.A. §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
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> (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, petitioner 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. and M.S. ex rel. A.S. v. Summit City Bd. of Educ., EDS 9012-12, Final Decision (Nov. 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).

In the instant case, petitioner do not rebut respondent's assertion that they failed to provide adequate notice and, in fact, admitted same in their submission. Rather the petitioner's submission in opposition to the motion for summary decision merely states

that this case falls with the "exceptions" regarding the notice requirements as set forth in N.J.A.C. 6A:14-2.10(d). The evidence, including petitioner's certification, demonstrates that notice was not timely provided. Even accepting the facts as presented by the petitioner, there can be no finding that their actions fall within the exceptions to the notice requirements, i.e., "compliance with the notice requirements in (c)(1) and (2) above would likely result in physical or serious emotional harm to the student or that the school prevented the parent from providing such notice." The review of the facts does not support a finding that any of the exceptions to the notice requirements applies in this case. Petitioner misapplied the exceptions so cited under N.J.A.C. 6A:14-2.10(d) as exception (3) requires proof that the student would likely suffer harm by providing requisite notice of their intent to place M.I. at Pennington not placement at NHVR. In addition, there is evidence that the respondent prevented the petitioner from complying with the notice requirements. See W.D. obo W.D. v. Watchung Hills Reg'l Bd. of Educ., EDS 15092-12, Initial Decision (Feb. 27, 2013), <http://njlaw.rutgers.edu/collections/oal/>.

As argued by the respondent, the parents' disregard of their obligations to timely notify the school district of their intent to seek private school tuition reimbursement is "among the unreasonable action taken by the parents that Congress contemplated when it gave courts the authority to equitably reduce or eliminate tuition reimbursement." C.H. v. Cape Henlopen School District, 606 F.3d 59, 72 (3d Cir. 2010) (citing Forest Grove Sch. Dist. V. T.A., 557 U.S. 230, 129 S. Ct. 2484, 174 L. Ed. 2d 168 (2009). "The 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." Ibid. (citing Roland M. v. Concord Sch. Comm., 910 F.2d 983, 995 (1st Cir. 1990)). Particularly problematic is the fact that the petitioner was involved with placing M.I. at Pennington School and, in fact, enrolled M.I. in that school in May 2016. Thus, the notice of placing this child in an out-of-district placement came months after the student's enrollment at the Pennington School. It is clear that when a student is enrolled at a private school when the parent enters into a binding contract with that private school and thus, at that time, the student is disenrolled from the public school. D.D. and N.D. ex rel. A.D. v. Montclair Bd. of Educ., EDS 9295-05, Final Decision

(October 17, 2005), <http://njlaw.rutgers.edu/collections/oal/>; R.G. ex rel. E.G. v. Glen Ridge Bd. of Educ., EDS 3714-04, Final Decision (March 17, 2005), <http://njlaw.rutgers.edu/collections/oal/>; K.S. and M.S. ex rel. A.S. v. Summit City Bd. of Educ., EDS 9012-12, Final Decision (November 5, 2012), <http://njlaw.rutgers.edu/collections/oal/>; R.J. and M.S. ex rel. R.J. v. Millburn Bd. of Educ., EDS 3800-07, Final Decision (July 12, 2007), <http://njlaw.rutgers.edu/collections/oal/>.

I **CONCLUDE** that respondent is entitled to summary decision because petitioner acted unreasonably and made a unilateral placement without giving proper notice.

ORDER

It is hereby **ORDERED** that the respondent's motion for summary decision is **GRANTED**. It is further **ORDERED** that petitioner's due process petition is **DISMISSED WITH PREJUDICE**.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2016) 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.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2016). 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.

March 8, 2017 _____

DATE **MICHAEL ANTONIEWICZ**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

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APPENDIX

List of Moving Papers

For Petitioner:

Brief in opposition to motion for summary decision with exhibits dated January 9, 2017

Supplemental submission, dated January 11, 2017

For Respondent:

Motion for Summary Decision, dated December 20, 2016, with brief and exhibits