State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDS 18145-18

AGENCY DKT. NO. 2019-29055

PENNS GROVE-CARNEYS POINT REGIONAL BOARD OF EDUCATION,

Petitioners,

v.

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

Respondents.

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

Petitioners,

v.

PENNS GROVE-CARNEYS POINT REGIONAL BOARD OF EDUCATION

Respondents.

OAL DKT. NO. EDS 00902-19

AGENCY DKT. NO. 2019-29172

(CONSOLIDATED)

Alexandra A. Stulpin, Esq., for petitioner/respondent Penns Grove-Carneys Point Regional Board of Education (Comegno Law Group, P.C., attorneys)

Jamie Epstein, Esq., for respondents/petitioners J.B. and C.B.

Record Closed: March 28, 2019 Decided: April 9, 2019

BEFORE TAMA B. HUGHES, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Penns Grove-Carneys Point Regional Board of Education ("Board" or "District") filed a Due Process Petition with the Office of Special Education, Department of Education, on November 21, 2018. By this petition, the Board sought to deny J.B. and C.B.'s (the "Parents") request for independent evaluations of their child J.B., asserting that the evaluations that had been performed were appropriate. (Alexandra A. Stulpin (Stulpin) Certification, Exhibit F.) The matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 to 13, where it was filed on December 21, 2018 under OAL Docket No. EDS 18145-18.

On December 18, 2018, the Parents, pro se, filed a Due Process Petition with the Office of Special Education, Department of Education. (Stulpin Certification, Exhibit K.) By this petition, the Parents assert that the District failed to provide J.B. with a Free and Appropriate Public Education (FAPE) by not providing J.B. with the requested Independent Evaluations (Neurologist, Psychiatrist, Neuro-Psychologist, Reading Specialist and Behavior Analyst) of their (the Parents) choosing. The Parents also assert that the District withheld their son's student records. The relief requested was the finding that the District failed to provide FAPE and to order the District to pay for the requested independent evaluations. Additionally, the Parents sought the immediate release/copy of J.B.'s student records.

On December 21, 2018, a "Corrected" petition was filed by the Parents, pro se, which amended the relief requested as it related to the student records. (Jamie Epstein (Epstein) Certification, APX 15.) Specifically, in addition to the immediate release/copy of J.B.'s student records, the Parents sought copies of all students records "within ten days of any future requests." The matter was transmitted to the OAL as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 to 13, where it was filed on January 17, 2019 under OAL Docket No. EDS 00902-19.

On January 3, 2019, a settlement conference was held before the Honorable Joseph F. Martone, ALJ (Retired, on recall) on OAL Dkt. No. EDS 18145-18. Notice of the settlement conference was sent to the Parents on or about December 21, 2018. At

the time of notification, the Parents did not have an attorney of record. On January 3, 2019, Jamie Epstein, Esq. attended the settlement conference on behalf of the Parents. Counsel for the Board objected to his appearance as no formal entry of appearance had been provided. The matter did not settle and was assigned to the Honorable Tama B. Hughes, ALJ and scheduled for a status call on January 4, 2019. Mr. Epstein was on the service list for the call. On January 4, 2019, Mr. Epstein appeared on behalf of the Parents and subsequently provided a formal entry of appearance the following day, January 5, 2019.

A Prehearing Order was entered on January 14, 2019 under OAL Docket No. EDS 18145-18.

On January 31, 2019, a settlement conference was held before the Honorable John S. Kennedy, ALJ for OAL Dkt. No. EDS 00902-19. Mr. Epstein appeared on behalf of the Parents. The matter did not settle and was assigned to the Honorable Tama B. Hughes, ALJ. On the same date of January 31, 2019, a status call was held with the parties at which time the parties requested the consolidation of the two matters (EDS 18145-18 and EDS 00902-19).

A number of status calls were held in the matters (January 24, 2019, January 31, 2019 and February 7, 2019). Multiple correspondences from both parties were received throughout this time and into March 2019.

On March 5, 2019, the Board filed a Motion to Dismiss the Parents' petition asserting that the relief sought by the Parents had either been provided or agreed upon therefore, a controversy no longer existed between the parties.

On March 8, 2019, an Amended Prehearing Order was entered as well as an Order of Consolidation.

On March 13, 2019, a status call was held wherein a briefing schedule was provided to the parties as it relates to the Board's Motion to Dismiss as well as the Parents' issue regarding discovery.[1]

On March 18, 2019, the Parents' opposition to the Board's Motion to Dismiss was received. The Board's reply was received on March 27, 2019. Thereafter, on March 28, 2019, the Parents filed a motion seeking, inter alia, to compel discovery as demanded and other appropriate relief that the Tribunal may deem appropriate.

FINDINGS OF FACT

Based on the papers submitted and arguments of counsel therein, I make the following findings of **FACT**.

J.B. is presently in eighth grade at the Penns Grove Middle School. He is eligible to receive special education and related services under the classification of "Multiply Disabled." (Stulpin Certification, Exhibit A.)

On September 27, 2018, the parties attended J.B.'s triannual Reevaluation Planning Meeting. During this meeting, the Parents waived J.B.'s triannual evaluation testing. (Stulpin Certification, Exhibits A and B.)

The Parents were also provided written notice of the District's proposal that no additional assessments were required at that time. The Parents had until October 12, 2018—fifteen days after they were provided notice—to disagree with the proposal after which time the proposal would become effective.

On November 5, 2018, the Parents sent the District a written request to fund Independent Educational Evaluations (IEE) for J.B. The IEEs requested were for Neurologist, Psychiatrist, Neuropsychological, Reading, and a Behavior Assessment.

[1] Over the objection of the Board's counsel, the Parents was provided until March 18, 2019 to file their opposition to the Board's Motion to Dismiss and any cross-motion. The Board's reply to the Parents' opposition and opposition to any cross-motion filed was due by March 29, 2019. The Parents' reply to the Board's opposition was due by April 5, 2019.

(Stulpin Certification, Exhibit C.) Additionally, the Parents requested a copy of all the general and special education records for J.B. The Parents requested that the documents be provided via email in PDF format. (Stulpin Certification, Exhibit G.)

By letter dated November 13, 2018, the District informed the Parents that the requested documents were in the process of being prepared. The Parents were also informed that they could go to the school and have immediate access to the records in question should they choose to do so during the pendency of the document preparation. (Stulpin Certification, Exhibit H.)

By letter dated November 16, 2018, the District sent the Parents correspondence requesting an explanation for their request of IEEs. (Stulpin Certification, Exhibit E.)

Thereafter, on November 21, 2018, the Board filed a Petition for Due Process. The relief sought by the Board was an Order declaring that the Parents were not entitled to IEEs at the Board's expense. (Stulpin Certification, Exhibit F.)

On December 18, 2018, in accordance with their request, a PDF copies of J.B.'s student records were emailed to the Parents.

On this same date of December 18, 2018, the Parents, pro se, filed a Due Process Petition seeking IEEs and their son's student records. A "Corrected" petition was filed on December 21, 2018, the only change being the additional added relief of copies of all J.B.'s student records within ten days of any future request.

On January 4, 2019, the Board reached out to the Parents agreeing to obtain IEEs for J.B. (Stulpin Certification, Exhibit O.) This position was reiterated on the status call later that day when both counsel were on the line.

By letter dated January 4, 2019 but received on January 5, 2019 by the OAL, Parent's counsel, Mr. Epstein, acknowledged that the Board agreed to obtain the requested IEEs. (Stulpin Certification, Exhibit P.) The letter went on to state that the

relief requested as to complete and timely access to J.B.'s student records was still in issue despite the Parents having been provided access to the records since November 2018 and hard copies since December 2018.

On January 17, 2019, Mr. Epstein sent the Board's attorney a letter reiterating that the Board had agreed to the relief requested by the Parents and providing a settlement agreement. Attached to the settlement agreement was a Demand for Discovery and a Prior Written Notice (PWN). The Demand for Discovery demanded a response within fifteen days. (Stulpin Certification, Exhibit T.)

On January 24, 2019, during a status call, the Board's counsel, Ms. Stulpin, again reiterated the Board's intention to fund the requested IEEs. By letter dated January 30, 2019, this point was again confirmed. (Stulpin Certification, Exhibit W.)

Another status call was held on February 7, 2019, at which time the issue of the "Corrected" petition and relief requested therein came into question. Mr. Epstein forwarded the "Corrected" petition to this Tribunal who, after review, determined that it was filed through the appropriate channels and no amended petition was required by the Parents.

By letters dated January 24, 2019 and February 21, 2019, and multiple emails thereafter, Mr. Epstein raised the issue of the Board's failure to provide the demanded discovery in accordance with his January 17, 2019 letter and requested a conference call to address the same. (Stulpin Certification, Exhibits V, BB, and DD.)

LEGAL DISCUSSION

N.J.A.C. 1:1-12.5 provides that summary decision should 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." Our regulation mirrors R. 4:46-2(c), which provides that "the judgment or order sought shall be rendered if the pleadings,

depositions, answers to interrogatories and admissions on file, 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 a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to 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 allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby at 252, 106 S. Ct. at 2512, 91 L. Ed.2d at 214. Petitioners have chosen not to contest the facts shared by the Board; there are thus no facts in dispute, and I **CONCLUDE** that this matter is ripe for summary decision.

Here, the Parents seek independent evaluations for J.B. – specifically, Neurologist, Psychiatrist, Neuro-Psychologist, Reading Specialist and Behavior Analyst of their choosing. The Board has agreed to fund those evaluations. The Parents also seek copies of J.B.'s school records. Within ten days of their original request in November 2018, the Parents were notified that they could have immediate access to their son's records at the school during the pendency of fulfilling their request for the student records. While it was their prerogative, the Parents did not avail themselves of that opportunity. Thereafter, on December 18, 2018, as requested, the physical

documents were sent in PDF format to the Parents via email. As such the Parents requested relief for their son's student records was addressed.

The Parents also requested relief in the form of copies of J.B.'s school records within ten days of any future request. This raises the issue of ripeness for consideration.

> A claim is "ripe" when the facts of the case have matured into an existing substantial controversy warranting judicial intervention. Article III, Section 2, Clause 1, of the U.S. Constitution requires federal courts to decide only actual cases and controversies. The requirement that a claim be ripe for judicial review is an issue of subject matter jurisdiction closely related to the "standing" requirement.
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> The question of ripeness often arises in cases where the harm asserted by the plaintiff has not yet occurred. Because courts are not permitted to decide merely hypothetical questions or possibilities, the court must determine whether the issues are fit for judicial review. A case is typically considered ripe if it presents a purely legal issue, or if further development of the facts will not render the issue more concrete. See https://www.law.cornell.edu/wex/ripe.

I **CONCLUDE** that the Parents requested relief for future records is not ripe for consideration by this Tribunal.

An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint it is appropriate to refrain from decision-making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, Comm'r (May 3, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>; J.L. and K.D. o/b/o J.L. v. Harrison Twp. Bd. of Educ., EDS 13858-13, Final Decision (January 28, 2014) <http://lawlibrary.rutgers.edu/oal/search.html>.

The Parents assert that the matter is not moot as the Board has failed to meet its burden to show that the parties have agreed to material terms of the proposed settlement agreement which include among other things, classroom placement, access to future records, and attorneys fees. To force the Parents to accept the Board's offer would require this Tribunal to violate contract law, state and federal special education law and the Tribunal's parens patraie duty to J.B.

This position is without merit. The issue here is one of mootness, not whether a settlement agreement has been reached by the parties. The relief sought by the Parents has either been provided or has been agreed upon by the Board. By the Board voluntarily agreeing to provide all of the relief sought in the petition, there no longer exists a controversy upon which this Tribunal can rule upon.

Once a case does become moot prior to judicial resolution, it is appropriate to dismiss the petition. Oxfeld v. N.J. State Bd. Of Educ., 68 N.J. 301 (1975) (distinguished on other grounds, In re Camden County Police Dep't Pilot Program 2014 N.J. Super. Unpub. LEXIS 2008), Nini v. Mercer County Comm. College, 202 N.J. 98, 117-118 (2010).

For the foregoing reasons, I **CONCLUDE** that the Parents' petition is moot.

The Parents also filed a separate motion on March 26, 2019 seeking, inter alia, to compel production of the discovery previously demanded pursuant to N.J.A.C. 1:1-10.4, dismissal of the Board's answer, and other appropriate relief that the Tribunal may deem appropriate.[2] Discovery demands were propounded on the Board along with a proposed settlement agreement on January 17, 2019. This was after the Board had already informed counsel on January 4, 2019 of their agreement to fund the requested IEEs with the evaluators whom the Parents preferred and after the records that had

[2] While this motion is being decided on separate grounds, it is noted that the parties were provided strict deadlines for filing of motions and cross-motions. The Parents' Motion to Compel Discovery is out of time, premature, and unsupported by law. See Prehearing Order OAL Dkt. No. EDS 18145-2018; Amended Prehearing Order, EDS 18145-2018 and 00902-2019; J.L. v. Harrison Twp. Bd. of Educ., 2014 U.S. Dist. LEXIS 175383 (D.N.J., Dec. 19, 2014)(citing to Judge Kerins' Order dated December 2, 2013 under OAL Dkt. No. EDS 13858-13).

been requested had been provided to the Parents. Given this fact and the determination set forth above, that the Parents' petition is moot, this issue is also moot.

For the foregoing reasons, the Parents' Motion to Compel Discovery is **DENIED.**

CONCLUSION

Based on the finding that the Parents have been provided the relief by the Board or the Board is willing to provide the requested relief responsive to the Parents' demand in their petition, I **CONCLUDE** that a controversy no longer exists, meaning this case has become moot and therefore the Parents' petition should be **DISMISSED**.

ORDER

I hereby **ORDER** that the Board's Motion for Summary Decision is **GRANTED** and that the Parents' petition be and is hereby **DISMISSED.** It is further **ORDERED** that the Board shall provide to the Parents all the relief offered in satisfaction of the demands set forth in their petition. I further **ORDER** that an IEP meeting be scheduled at the earliest opportunity for the purpose of incorporating the offers of services made in this matter. I further **ORDER** those services to commence as soon as practicable after parental consent is received.

It is further **ORDERED** that the Parents Motion to Compel Discovery 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.

April 9, 2019
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency

Date Mailed to Parties:

cmo