State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

DISMISSING PETITION

OAL DKT. NO. EDS 18493-13

AGENCY DKT. NO. 2014 20527

M.P. AND K.P. ON BEHALF OF T.P.,

Petitioners,

v.

JACKSON TOWNSHIP BOARD OF EDUCATION,

Respondent.

M.P. and K.P., petitioners, appearing pro se

Joanne Butler, Esq., appearing for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: November 30, 2015 Decided: December 10, 2015

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Petitioners M.P. and K.P. ("parents" or "petitioners") filed a due-process petition under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. §§ 1400 to 1482, seeking reimbursement from respondent Jackson Township Board of Education

("Board") for the unilateral placement of their son, T.P., at the Calvary Academy ("Calvary"), an unapproved, sectarian school, for the 2013–2014 school year.[1]

PROCEDURAL HISTORY

On January 6, 2014, the parents filed a due-process petition seeking reimbursement from the Board for the unilateral placement of their son, T.P., at Calvary for the 2013–2014 school year.

On November 13, 2014, prior to the first hearing date of December 15, 2014, the Board requested the parents' consent to observe T.P. and to interview staff at Calvary. (Board Br., March 3, 2015, Ex. 3.) However, the parties could not agree on the scope of the Board's observations. On November 23, 2014, M.P. informed the Board, "I will consent to unrecorded staff interviews, however, I cannot consent to observations of [T.P.] while at Calvary." (Ibid.)

At the December 15, 2014, hearing, the Board raised the issue regarding the observations. (Butler Cert. ¶ 5.) After the hearing, M.P. asked the Board to send him the names and dates for the observations. (Butler Cert. ¶ 7.) On December 19, 2014, the Board wrote to M.P.:

> The District offers the following schedule for observations and interviews:
>
> Alyson Defort—Thursday, January 15 in the a.m.
>
> Scott Levine—Tuesday, January 20 in the p.m.
>
> Marisa Di Stassi-Kissam—Monday, January 26 mid-day.
>
> [Board Br., February 11, 2015, Ex. B.]

[1] There is no question that T.P. is eligible for special education and related services under the category of emotionally disturbed. The child continued in the school for the 2014–2015 and 2015–2016 school years.

In response, M.P. wrote:

> No,
>
> One person (an individual he doesn't know), for part of the day, that's it. Your request for 3 people (2 of whom he knows) is absurd. This is not what we discussed with the Judge. The Judge specifically said T.P. wouldn't know the individual, so my concern about the observation leading to anxiety was unfounded. In addition, we discussed an observation, not multiple observations.
>
> If you are not in agreement, file your motion.
>
> [Ibid.]

In response the Board filed a motion to dismiss the petition. On December 23, 2014, the following ruling was made:

> Under the IDEA,
>
> > [p]arents who withdraw their child from public school and unilaterally place him or her in private school while challenging the IEP may be entitled to reimbursement of their tuition costs if the [administrative law judge] finds that the [local education agency's] proposed IEP was inappropriate, and that the parents' unilateral placement was appropriate.
> >
> > [L.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290, 292 (D.N.J. 2003) (citing Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 12, 126 L. Ed. 2d 284, 291, 114 S. Ct. 361, 364 (1993)).]
>
> And, the Supreme Court's decision in "Florence precludes a [local education agency] from relying on a state law [N.J.S.A. 18A:46-14 ("Naples Act")] that bans payment to sectarian institutions as a basis for denying parental reimbursement when the [local education agency] has failed to provide a [free appropriate public education] and the unilateral parental placement is deemed appropriate under the IDEA." Id. at 298. Nonetheless, reimbursement for a unilateral placement

> may be reduced or denied if the parents failed to provide adequate notice to the school district prior to removing the student or the parents otherwise acted unreasonably in unilaterally placing their child. 20 U.S.C.A. § 1412(a)(10)(C)(iii); N.J.A.C. 6A:14-2.10(c).
>
> In this matter, there are genuine issues of material fact with respect to (1) the appropriateness of the IEP proposed by Jackson for the 2013–2014 school year; (2) the appropriateness of Calvary Academy for T.P.; and, (3) the reasonableness with which the parents acted in unilaterally placing T.P. at Calvary Academy. These issues can only be determined at an evidentiary hearing with fact and expert witnesses.

The motion to dismiss was denied.

On February 11, 2015, the Board filed a motion to dismiss the due-process petition as a result of the parents' unreasonableness in withholding consent to the Board's request to observe T.P., or, alternatively, because the parents' unreasonableness should result in the exclusion of any evidence regarding the appropriateness of Calvary, and without such evidence the parents could not prevail.

In opposition, M.P. asserted that the Board's motion should be denied because (1) the Board's motion was more appropriately characterized as a motion to compel discovery, but the time for discovery had passed; and (2) the parents had not acted unreasonably, but the Board's request for observations was unreasonable.

On April 7, 2015, the Board's motion to dismiss was denied without prejudice for the following reasons:

> First, the Board has not shown that the parents have acted unreasonably, because the Board has not shown that its request to observe the child is reasonable. However, it is clear that the Board needs to gather information regarding the appropriateness of the unilateral placement in order to present its case, and that a motion to compel discovery should have been filed first in order to gather such information. The Board should now be given the opportunity to file a motion to compel discovery, which must include

> specific information about the proposed observations. The appropriate scope of any observations can then be determined and ordered. If M.P. does not comply with the discovery order, the Board may then renew its motion to dismiss or to exclude evidence.

On August 28, 2015, the Board moved for an Order to permit it to conduct three observations at the Calvary School, which was opposed by the parents on the basis that this was a request for discovery filed out-of-time. N.J.A.C. 1:1-10.4(e).

On September 15, 2015, in response to respondent's motion to compel, a Letter Order was issued requiring petitioners to arrange for three district employees, Alyson Defort, Scott Levine, and Marisa DiStasi-Kissam, to each conduct a one-hour observation of T.P. at his unilateral placement, Calvary Academy, and to speak with Calvary staff before the next hearing date.[2] The order stated:

> As the appropriateness of the placement at Calvary is the ultimate issue to be decided if it is concluded that FAPE has not been provided to the child within the district, the motion shall be **GRANTED**. It is imperative for the district to be able to present its case and it is necessary for me to be able to make findings as to whether the parents acted reasonably in placing the child there.

[2] The specific terms were as follows:

> 1. Petitioners are required to arrange for Alyson Defort to conduct a one hour observation of T.P. in his unilateral program at Calvary Academy, in both the academic setting and a less structured period such as lunch or gym, and interview T.P.'s counselor at Calvary during September 2015, on a date and time selected by respondent; and
>
> 2. Petitioners are required to arrange for Scott Levine to conduct a one hour classroom observation of T.P. in his unilateral program at Calvary Academy, with an additional 30 minutes to speak with T.P.'s teachers during September 2015 on a date and time selected by respondent; and
>
> 3. Petitioners are required to arrange for Marisa DiStasi-Kissam to conduct a one hour classroom observation of T.P. in his unilateral program at Calvary Academy, with an additional 30 minutes to speak with T.P.'s teachers during September 2015 on a date and time selected by respondent.

Following receipt of the Order, the Board's counsel emailed M.P. requesting that he notify Calvary that the named district employees' observations and interviews must be accommodated by the school. (See Email from Joanne Butler to M.P., dated September 15, 2015, attached to Butler Cert. as Exhibit A.) On the same date, M.P. notified counsel that he refused to arrange the observations despite the Order. (See Email from M.P. to Joanne Butler, dated September 15, 2015, attached to Butler Cert. as Exhibit B.)

On September 28, 2015, the Board filed a motion for sanctions to be imposed on the petitioners, including exclusion of testimony and dismissal of the complaint.

LEGAL ARGUMENT

1. Sanctions

> For unreasonable failure to comply with any order of a judge . . . the judge may:
>
> 1. Dismiss or grant the motion or application;
>
> 2. Suppress a defense or claim;
>
> 3. Exclude evidence;
>
> 4. Order costs or reasonable expenses, including attorney's fees, to be paid to . . . an aggrieved representative or party; or
>
> 5. Take other appropriate case-related action.
>
> [N.J.A.C. 1:1-14.14(a).]

Pursuant to N.J.A.C. 1:6A-1.1(a), this provision of the Uniform Administrative Procedure Rules applies to the pending special-education dispute, as N.J.A.C. 1:6A does not address a party's failure to adhere to a court order. See A.D. ex rel. A.J. v. Camden City Bd. of Educ., EDS 8733-09, Decision (October 28, 2009), <http://njlaw.rutgers.edu/collections/oal/> (dismissing a special-education matter in

accordance with N.J.A.C. 1:1-14.14 due to the petitioner's failure to comply with a prehearing order).

In this matter, the petitioners have stated that they are refusing to comply with the Order because they "disagree [that] the Respondent should be allowed to conduct discovery in the middle of the trial." On its face, this amounts to an unreasonable failure to comply with a court order. However, when viewed in light of respondent's repeated attempts to obtain petitioners' consent to observe prior to the completion of discovery, one can only conclude that petitioners' actions have been designed to prevent the Board from having access to Calvary Academy. Therefore, in accordance with N.J.A.C. 1:1-14.14, petitioners may be sanctioned for their unreasonable failure to comply with the Order.

2. Petitioners' Testimony and Exhibits Regarding Calvary Academy

Petitioners' refusal to comply with the ordered observations and interviews must result in the exclusion of all evidence concerning the alleged appropriateness of T.P.'s placement at Calvary Academy.

A similar situation arose in S.B. and K.B. ex rel. P.B. v. Park Ridge Board of Education, EDS 13813-08, Order (April 21, 2009), <http://njlaw.rutgers.edu/collections/oal/>. In that matter, the school district had proposed to place the student at Sullivan Center, an out-of-district program operated by another board of education. The Sullivan Center refused to allow the parents' expert to observe the proposed program. The judge ordered that the parents' expert be permitted a three-and-a-half-hour observation in the proposed classroom, additional time to observe related services, and up to an hour and a half to question staff about the proposed program. When the board of education failed to comply with the order, the parents filed a motion to suppress the respondent's evidence regarding Sullivan Center. Relying on N.J.A.C. 1:1-14.14, the judge excluded the board from introducing any evidence concerning the proposed placement.

As discussed in detail below, because petitioners here are seeking reimbursement for their unilateral placement of T.P. at Calvary Academy, the appropriateness of Calvary Academy is at issue. Without the Board having the opportunity to observe T.P. in this placement and speak with Calvary staff, any testimony by respondent regarding Calvary Academy would be unsupported by factual evidence and thus inadmissible. S.B., supra, EDS 13813-08, Order, <http://njlaw.rutgers.edu/collections/oal/> (citing Buckelew v. Grossbard, 87 N.J. 512, 524 (1981)).

Petitioners state that they are refusing to comply with the Order because discovery must be completed prior to the commencement of the hearing. However, as discussed above, respondent made multiple, timely requests to observe T.P. at Calvary Academy prior to the close of discovery. Moreover, pursuant to N.J.A.C. 1:6A-10.1(c), evidence may be admitted if it "could not reasonably have been disclosed" five days prior to the commencement of a special-education hearing. As it is solely petitioners' actions that have prevented the Board from gathering factual evidence as to the appropriateness of the placement at Calvary Academy, petitioners' testimony and exhibits regarding Calvary Academy must be excluded.

3. Dismissal of the Petition

For petitioners to be awarded reimbursement for their unilateral placement of T.P. at Calvary Academy, it must be found that: (1) the Board failed to offer T.P. a free appropriate public education ("FAPE"); and (2) the unilateral placement at Calvary Academy was appropriate for T.P. See J.A. and J.A. ex rel. B.A. v. Mountain Lakes Bd. of Educ., EDS 9732-04, Decision (September 27, 2005), <http://njlaw.rutgers.edu/collections/oal/> (citing Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993)). As indicated above, petitioners' evidence with regard to the appropriateness of Calvary Academy must be excluded. If such testimony and exhibits are excluded, petitioners cannot show that the unilateral placement was appropriate for T.P., and therefore reimbursement cannot be awarded, hence the issue of whether the Board offered FAPE becomes moot. Therefore, in the interest of judicial efficiency, the pending matter should be dismissed.

Moreover, even if it is determined that a board of education failed to offer a student FAPE, the cost of reimbursement may be denied "[u]pon a judicial finding of unreasonableness with respect to actions taken by the parents." N.J.A.C. 6A:14-2.10(c)(4); 20 U.S.C.A. § 1412(a)(10)(C)(iii). "[A] school program at public expense may be obtained only through teamwork with school personnel." G.R. and K.R. ex rel. J.R. v. Montclair Bd. of Educ., 2010 N.J. AGEN LEXIS 459 (June 2, 2010). Here, petitioners unreasonably denied the Board's request to observe T.P. at Calvary Academy, and now refuse to comply with the Order regarding same. As the requested award for reimbursement should be denied due to the unreasonableness of the actions taken by petitioners, the issue of whether the Board offered T.P. a FAPE is moot. The pending matter should be dismissed in its entirety.

CONCLUSION

Based upon the petitioners' failure to comply with the Order permitting the Board to observe T.P. at the Calvary Academy and permitting the Board's staff to speak with staff members of the Calvary Academy, the petition for due process, including reimbursement for tuition and transportation at the Calvary Academy, must be dismissed. The Board cannot present its case due to the intransigence of the petitioners and their failure to cooperate with reasonable orders to allow observation of the child and to permit discussion by the Board staff with Calvary Academy staff. As this information goes to the basis for the petition, which seeks reimbursement for a unilateral sectarian placement, no other remedy exists but dismissal.

ORDER

It is hereby **ORDERED** that the due-process petition filed by the petitioners on January 6, 2014, be and is hereby **DISMISSED**.

December 10, 2015 _____

DATE **SUSAN M. SCAROLA**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/cb