State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
OAL DKT. NO. EDS 03304-23
AGENCY DKT. NO. 2023-35627

K.P. ON BEHALF OF D.W.,
Petitioners,
v.
MONTVILLE TOWNSHIP BOARD OF EDUCATION,
Respondents.

Andrew Meltzer, Esq. for petitioners (Sussan, Greenwald & Wesler, attorneys)

Nathanya Simon, Esq., for respondent (Scarinci Hollenbeck, attorneys)

Record Closed: August 9, 2023 Decided: September 21, 2023,

BEFORE **ANDREW M. BARON,** ALJ:

STATEMENT OF THE CASE

Petitioner, K.P. on behalf of D.W., brings a motion for summary decision against respondent Montville Township School District Board of Education ("the District"), based on stipulated facts. seeking relief to have D.W. attend and be transported to the Montville Extended Day Learning Center, (hereinafter referred to as "MEDLC") after-school program.

Petitioner argues that as a resident of Montville, even though he is attending an out-of-district placement, as a student with an ("IEP"), he is entitled to attend any afterschool, extracurricular and non-academic activities offered within the public school district.

Prior to his placement at the Banyan School, DW was a participant in the MEDLC program during the 2021-22 and part of the 2022-23 school years, respectively.

Once D.W. started his placement at Banyan, the family was told he would no longer be eligible to participate in MEDLC after school because he was not attending school within the district, and it was not a component of DW's ("FAPE").

PROCEDURAL HISTORY

Petitioner filed a due process petition on April 21, 2023, seeking relief for participation in the district's non-academic afterschool program together with transportation from his out of district placement. Efforts to resolve the matter were unsuccessful, and the matter was transferred as a contested case to the Office of Administrative Law.

In lieu of a hearing, the parties through their counsel agreed to stipulated facts thereby requesting the matter be decided by a motion for summary disposition. There are no other outstanding requests for relief in the petition.

DISCUSSION and UNDISPUTED FACTS

D.W. is eleven years old and has been diagnosed with Autism Spectrum Disorder, Cerebral Palsy Mixed Expressive Receptive Language Disorder and Epilepsy. None of these conditions are disputed, and, as such D.W. has been eligible since first grade to receive special education services.

Petitioner contends that placing D.W. in an out of district placement, without allowing him to participate in the district's aftercare program, the District is not meeting its

obligations to D.W and is discriminating against him. under FAPE, ("IDEA") and Section 504 of the Rehabilitation Act. Petitioner further contends that by not permitting D.W. to participate in MEDLEC, it is also violating its obligation to allow him to learn in the Least Restrictive Environment. (LRE).

The District contends that participation in the MEDLEC after school program is for in district students only and particularly for students who are already enrolled in the building where the program is offered, It is undisputed that the program is not of an academic nature. As such, the district has a written policy, also referred to as the "latchkey Program" which memorializes the fact that only students in district can avail themselves of the program. The policy also states that "pupils will attend the program at their school of enrollment, emphasis added.

Other than the dispute about whether or not D.W. should be able to participate in the program, most of the facts related to this petition are stipulated.

Among other things, there is no dispute about residency and the district being responsible for his education. Further, there is no dispute that he is eligible for special education services, and has been since the 2018-19 school year.

In January 2023, following receipt of some current evaluations, the parties reached an agreement to have D.W. enrolled as an out of district student at the Banyan School. D.W. started to attend Banyan in February 2023. It is undisputed that pursuant to N.J.S.A. 18:39-1 et. seq., the District provides transportation for D.W. to and from the Banyan school, and pays for the tuition.

It is undisputed that when D.W.'s IEP was changed to allow him to enroll in an out of district placement at Banyan, continued participation in MEDLEC was not included in the IEP revision. It is also undisputed and stipulated that D.W.'s IEP states that he can participate in any extracurricular and non-academic activities that he is eligible for. (emphasis added).

Accordingly, it is undisputed that his IEP was revised to reflect this change. It is undisputed that for the two years prior to his placement at Banyan, D.W. was a student at the Valley View Elementary School, in its Special Class, Mild/Moderate Learning or Language Disabilities Program (LLD). While enrolled there, D.W. also participated in the after school MEDLEC program, which was housed at the same school.

It is undisputed that MEDLEC is the District's latchkey/day care program that provides adult supervision to students after school to accommodate parents who work late or are unable to either pick up children from school when the school day ends or be home when students arise. The program is not designed to serve as a continuation of the District's obligations under FAPE, IDEA or Section 504 of the Rehabilitation Act.

MEDLEC employees are hired by the District, and parents of students who attend the program are charged $300.00 a month in order for their child to be able to attend the program.

Also undisputed is the fact that the District implemented policy number 5843 regarding MEDLEC that it is open to pupils enrolled in the district who are toilet trained (emphasis added) and students enrolled in the program will attend in the school of their enrollment. (emphasis added).

Finally, it is also undisputed that the District "will not transport pupils to or from the MEDLEC program" and that MEDLEC "is not an extension of the school day and not intended to serve the purpose of enrichment or remedial education."

It is also undisputed that no student who is attending an out of district placement can participate in MEDLEC.

The district contends that the transfer of D.W. out of district to the Banyan School was done in his best interests by agreement between the parties, but there is nothing about the afterschool MEDLEC ("latchkey)" program that invokes the special education law pursuant to D.W.'s revised IEP.

LEGAL ANALYSIS AND CONCLUSIONS

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1482, ensures 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 further education, employment, and independent living, and ensures that the rights of children with disabilities and parents of such children are protected. 20 U.S.C. § 1400(d)(1)(A), (B); N.J.A.C. 6A:14-1.1. A "child with a disability" means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3)(A). N.H. has been diagnosed with autism and classified as a preschool child with a disability.

States qualifying for federal funds under the IDEA must assure all children with disabilities the right to a free "appropriate public education." 20 U.S.C. § 1412(a)(1); Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Each district board of education is responsible for providing a system of free, appropriate special education and related services. N.J.A.C. 6A:14-1.1(d). A "free appropriate public education" (FAPE) means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under 20 U.S.C. § 1414(d). 20 U.S.C. § 1401(9); Rowley, 458 U.S. 176. 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. § 1412(a)(1)(A), (B).

In a due process hearing in New Jersey, the district bears the burden of proof under N.J.S.A. 18A:46-1.1 to demonstrate that it is providing a free, appropriate public

education in the least restrictive environment to a student whose family is pursuing a due process petition.

An individualized education program (IEP) is a written statement for each child with a disability that is developed, reviewed and revised in accordance with 20 U.S.C. § 1414(d); 20 U.S.C. § 1401(14); 20 U.S.C. § 1412(a)(4). When a student is determined to be eligible for special education, an IEP must be developed to establish the rationale for the student's educational placement and to serve as a basis for program implementation. N.J.A.C. 6A:14-1.3, -3.7. At the beginning of each school year, the District must have an IEP in effect for every student who is receiving special education and related services from the District. N.J.A.C. 6A:14-3.7(a)(1). Annually, or more often, if necessary, the IEP team shall meet to review and revise the IEP and determine placement. N.J.A.C. 6A:14-3.7(i). FAPE requires that the education offered to the child must be sufficient to "confer some educational benefit upon the handicapped child," but it does not require that the school district maximize the potential of disabled students commensurate with the opportunity provided to non-disabled students. Rowley, 458 U.S. at 200. Hence, a satisfactory IEP must provide "significant learning" and confer "meaningful benefit." T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577-78 (3d Cir. 2000).

The Supreme Court discussed Rowley in Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988 (2017), noting that Rowley did not "establish any one test for determining the adequacy of educational benefits" and concluding that the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." Id. at 996, 1001. Endrew F. warns against courts substituting their own notions of sound education policy for those of school authorities and notes that deference is based upon application of expertise and the exercise of judgment by those authorities. Id. at 1001. However, the school authorities are expected to offer "a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." Id. at 1002.

In Lascari v. Ramapo Indian Hills Reg'l Sch. Dist., 116 N.J. 30, 46 (1989), the New Jersey Supreme Court concluded that "in determining whether an IEP was appropriate,

the focus should be on the IEP actually offered and not on one that the school board could have provided if it had been so inclined." Further, the New Jersey Supreme Court stated:

> As previously indicated, the purpose of the IEP is to guide teachers and to ensure that the child receives the necessary education. Without an adequately drafted IEP, it would be difficult, if not impossible, to measure a child's progress, a measurement that is necessary to determine changes to be made in the next IEP. Furthermore, an IEP that is incapable of review denies parents the opportunity to help shape their child's education and hinders their ability to assure that their child will receive the education to which he or she is entitled.
>
> [Id. at 48-9. (citations omitted).]

In accordance with the IDEA, children with disabilities are to be educated in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(5); N.J.A.C. 6A:14-1.1(b)(5). To that end, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are to be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A); N.J.A.C. 6A:14-4.2. The Third Circuit has interpreted this to require that a disabled child be placed in the LRE that will provide the child with a "meaningful educational benefit." T.R., 205 F.3d at 578. Consideration is given to whether the student can be educated in a regular classroom with supplementary aids and services, a comparison of benefits provided in a regular education class versus a special education class, and the potentially beneficial or harmful effects which placement may have on the student with disabilities or other students in the class. N.J.A.C. 6A:14-4.2(a)(8).

The creation of an adequate IEP under the IDEA requires that a school district consider positive behavioral interventions where a student's behavior impedes his learning. See M.H. v. New York City Dept. of Education, 712 F. Supp. 2nd 125 (S.D.N.Y.) and A.C. ex rel. M.C. v. Bd. of Ed. of Chappaqua School District, 553 F 3rd. 165, (2nd Cir.

2009) wherein an IEP was still deemed adequate even if no behavior management strategies were included. The sufficiency of chosen strategies for dealing with behavioral issues requires deference to the expertise of school officials. Grim v. Rhinebeck Cent. School Dist. 346 F3rd 377 (2nd Cir. 2003).

The standard for entering summary decision is when a party seeking such an order is able to demonstrate that there are no outstanding material facts, and the moving party is entitled to prevail as a matter of law. Brill v. Guardian Life.

A court must dismiss a complaint if there is no legal basis for entering the requested relief. Holmin v. TRW, Inc. 330 N.J. Super 30, (App. Div. 2000) aff'd 167 N.J. 2005 (2001). A dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted. Rieder v. State 221 N.J. Super 547 (App. Div. 1987).

Based on the joint undisputed facts, and the record of evidence presented, I **FIND** that giving every favorable inference to petitioners, the District is meeting its burden to D.W. under IDEA, FAPE and Section 504 of the Rehabilitation Act. **I FURTHER FIND** that the lack of access to MEDLEC for D.W. who is now enrolled as out of district student while attending the Banyan School, with the District assuming responsibility for his education and transportation costs for attending Banyan, does not constitute a violation of any of its statutory and/or regulatory obligation as set forth above. **I ALSO FIND** that District Policy 5843 which only permits students enrolled in the same in District school they are attending to participate in MEDLEC does not discriminate against D.W. who is enrolled in an out of district placement. Simply put, although MEDLEC is provided in an educational setting, **I FIND** that by its definition as a "latchkey" program, it does not constitute an educational program subject to the auspices of FAPE, IDEA or Section 504 of the Rehabilitation Act.

CONCLUSION

Based on a review of the pleadings, the submissions, and the documents attached by both sides, and giving every favorable inference to petitioners, for the reasons set forth herein, I **CONCLUDE** that the respondent Montville Township Board of Education is fulfilling its obligations to D.W. under FAPE, IDEA and Section 504 of the Rehabilitation Act. **I FURTHER CONCLUDE** that the determination that D.W. is not eligible to participate in the MEDLEC after school program now that he is enrolled as an out of district student does not constitute a violation of any of the District's statutory or regulatory responsibilities to D.W. Finally, **I ALSO CONCLUDE** that District Policy 5843 that limits participation in MEDLEC to students who are enrolled in the same in district school is not discriminatory against pupils like D.W. who are attending and are transported to an out of district placement.

ORDER

Based on the foregoing, it is hereby **ORDERED** that certain relief sought by petitioner is **DENIED,** and the determination that D.W. is not permitted to participate in MEDLEC due to his status as an out of district student is hereby **AFFIRMED.** With this being the only issue brought before me, the petition is hereby **DISMISSED.**

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) 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 (2022). 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.

September 21, 2023
DATE

ANDREW M. BARON, ALJ

lr

Date Received at Agency: September 21, 2023

Date E-Mailed to Parties: September 21, 2023

APPENDIX

Witnesses

For Petitioners:

None

For Respondent:

None

Exhibits

For Petitioners:

P-1 Page 24 of D.W.'s IEP

P-2 Misc. District information regarding MEDLEC

For Respondent:

R-1 District Policy 5843 Latchkey Program