SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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THE CENTER FOR DISCOVERY, INC.,

Petitioner,

In a Proceeding Pursuant to CPLR Article 78

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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DECISION, ORDER AND JUDGMENT

INDEX NO.: 160157/2016
MOT SEQ.: 001, 002 AND 003

Present:
Hon. Lynn R. Kotler, J.S.C.

This is an Article 78 proceeding. Petitioner ("CFD") challenges the determination of respondent New York City Department of Education ("DOE") of August 18, 2016 which refused to reimburse CFD for services it is required to provide to child DP at its residential school pursuant to an Individualized Education Plan ("IEP").

As to the procedural history, the First Department remitted this case to the Supreme Court in May 2018 and this court restored the petition (motion sequence number 001) to the active calendar for December 18, 2018 and scheduled motion sequence numbers 002 and 003 for oral argument at that time as well. In motion sequence 002, petitioner moves for a default judgment. Respondent opposes that motion. In motion sequence number 003, petitioner moves for an order "re-noticing this proceeding commenced pursuant to CPLR Article 78 and granting the petitioner the relief sought." In the interim, respondent filed an answer on September 24, 2018.

MOTION SEQUENCE 002 – DEFAULT JUDGMENT

In motion sequence number 2, petitioner moves for a default judgment pursuant to CPLR 3215 directing respondent to reimburse petitioner for all its services rendered to child DP. Petitioner argues that after the Appellate Division remitted the case back to Supreme Court respondent failed to answer within 5 days from service of notice of entry, which date was May 15, 2018. Respondent opposes the motion and argues that its failure to timely respond to the petition was due to inadvertent attorney error, that the parties were engaged in lengthy settlement negotiations, that respondent has a meritorious defense and that courts prefer cases to be decided on the merits.

Respondent also requests that the court grant its application of an extension of time to serve its answer, which was not made by notice of motion.

Here, respondent's failure to serve a timely answer was a result of inadvertent law firm error. Respondent's counsel assumed the defense of the case from his predecessor who was transferred to another unit. The parties were engaged in extensive settlement negotiations and reached resolution on several issues prior to petitioner filing this motion. On this record, there is no indication that defendant willfully or deliberately intended to default in this action (see i.e. *EHS Quickstops Corp. v. GRJH, Inc.*. 112 AD3d 577 [2d Dept 2013]; see also *Cantarelli S.P.A. v. L. Della Cella Co., Inc.*, 40 AD3d 445 [1st Dept 2007]). Moreover, there is no prejudice to petitioner for the delay and respondent's request for an extension of time to serve a response to the petition is in line with the court's strong public policy favoring resolution of cases on the merits (*EHS Quickstops, supra*).

Based on the foregoing, petitioner's motion for a default judgment (motion seq.

no. 2) is denied and respondent's answer is deemed timely filed *nunc pro tunc.*

MOTION SEQUENCE 001 and 003 – ARTICLE 78

In motion sequence 003, petitioner moves pursuant to CPLR 7804(f) for an order re-noticing the CPLR Article 78 petition (motion sequence number 001) and to compel respondent to reimburse petitioner for the additional services petitioner was mandated to provide student DP by respondent's amended IEP. Respondent has not submitted formal opposition to the motion to re-notice except the re-filing of its Answer with counter-claims dated September 24, 2018.

In accordance with the First Department's directive, this court restored the petition (motion sequence 001) to the active calendar in an interim order dated November 20, 2018 where the court heard oral argument on the petition as well as both motion sequences. Since the court calendared the matter for December 18, 2018, that portion of the motion is moot.

The remaining issues are 1) whether respondent shall reimburse petitioner for the additional services under the amended IEP and 2) whether the doctrine of estoppel is applicable in this case.

Student DP has attended CFD, located in Sullivan County, New York, as a full-time residential student since December 2015. DP, whose parents are residents of Staten Island, was placed in CFD's residential school program by the New York City Department of Education pursuant to the procedures of the Individuals with Disabilities Education Act ("IDEA"). DP has engaged in a pattern of aggressive and self-injurious behavior since entering the facility. In 2016, respondent held a special meeting of the Committee on Special Education ("CSE") to address the need for additional services for

DP due to the safety and danger issues he posed not only to himself but also to others at petitioner's school. Respondent proposed that DP receive additional therapeutic and safety services to remain at CFD. Those services include an around-the-clock one-on-one crisis management paraprofessional, and psychological and behavioral services by a board-certified analyst to monitor and oversee implementation of a behavior intervention plan.

These additional services were not included in DP's initial IEP upon placement at CFD. While petitioner currently receives the tuition rate set by the State for DP, it only otherwise receives funding for a one-on-one paraprofessional for the 30 hours per week in which DP receives educational services.

DISCUSSION

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary, capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[TIhe proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after *quasi*-judicial hearings required by statute or law" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck. Westchester County*, 34 NY2d 222, 231 [1974] [emphasis removed]; *see also Matter of Colton v. Berman*, 21 NY2d 322, 329 [1967]).

Here, respondent amended the IEP and mandated additional services to be provided to DP in 2016 and then declined to reimburse petitioner. The court finds that

respondent's failure to reimburse petitioner for the services it mandated petitioner to provide to DP was arbitrary and capricious. In the March 2015 "Special Education Field Advisory" by the State Education Department regarding placement of students with disabilities in private residential schools, page 3, it provides in bold type that "regardless of the State's determination regarding approval of State reimbursement of tuition costs, the district is responsible to implement the CSE's recommendation for timely placement in an approved private school". Education Law § 4402(2)(b)(1), the State Education Department regulations 8 NYCCR § 200.2(d)(1) and the "Field Advisory" place the obligation on the school district, here the New York City Department of Education, to arrange for services for a child with disabilities such as DP. The court agrees with petitioner that the respondent's obligation to "arrange for appropriate special education" (8 NYCRR § 200.2[d][1]) necessarily means that it shall pay for the services it mandated in DP's IEP.

There is no dispute that CSE recommended additional services for DP in the amended IEP, which DP has been receiving since 2016. It would be unjust to require petitioner, who relied on the CSE recommendation and the amended IEP that mandated the additional services for DP, to pay for those services. DP is a danger to himself and other individuals at CFP. The relevant statutes, regulations and March 2015 advisory all provide that disabled students are entitled to an education and services that are tailored to his/her needs accordingly. Respondent should not be permitted to irrationally and arbitrarily place this financial burden on petitioner or otherwise require petitioner to come up with the funds itself. Indeed, respondent has offered no rationale for declining to reimburse petitioner. Therefore, petitioner has demonstrated that it is entitled to the

relief it seeks herein.

Accordingly, the petition is granted and respondent is directed to reimburse petitioner for all of the services that it is rendering to DP.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that the motion for a default judgment (motion sequence number 002) is denied; and it is further

ORDERED that motion sequence number 003 is denied as moot; and it is further

ORDERED, ADJUDGED and DECLARED that the petition is granted and respondent is directed to reimburse petitioner for all of the services that it is rendering to DP in accordance with the amended IEP.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision, Order and Judgment of the court.

Dated: New York, New York
1/29/19

So Ordered:

Hon. Lynn R. Kotler, J.S.C.