Brown v Palmer
2016 NY Slip Op 33049(U)
October 13, 2016
Supreme Court, Sullivan County
Docket Number: 0347-2016
Judge: Mark M. Meddaugh
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At a term of the Supreme Court of the State of New York, held in and for the County of Sullivan, at Monticello, New York, on October 7, 2016.

STATE OF NEW YORK SUPREME COURT
COUNTY OF SULLIVAN

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TODD BROWN, as Father and Natural Guardian of NATHANIEL BROWN, an Infant,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

THOMAS W. PALMER, in his capacity as Superintendent of Schools and TRI-VALLEY CENTRAL SCHOOL DISTRICT; CHRISTINE H. SNOW, in her capacity as Director of Pupil Personnel Services at TRI-VALLEY CENTRAL SCHOOL DISTRICT; TRI-VALLEY CENTRAL SCHOOL DISTRICT; and TRI-VALLEY CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION,

Respondents.

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DECISION/ORDER & JUDGMENT
Index # 0347-2016
RJI # 52-37848-2016

Present: Hon. Mark M. Meddaugh,
Acting Justice, Supreme Court

Appearances: Hirshfield & Costanzo, P.C.
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FILED IN SULLIVAN COUNTY CLERKS OFFICE 10/25/2016

MEDDAUGH, J.:

Petitioner Todd Brown (hereinafter petitioner) is the father and natural guardian of Nathaniel Brown, born in August 2004. Nathaniel has been classified as a child with multiple disabilities, including significant bilateral hearing loss, by respondent Tri-Valley Central School District's Committee on Special Education (CSE). Pursuant to his Individualized Education Program (IEP), Nathaniel is enrolled in and attending a private day school at the School District's expense.

The petition alleges that, between November 2015 and January 2016, the CSE met with Nathaniel's parents to discuss, among other things, the placement of a sign language interpreter/skills coach for the deaf (hereinafter interpreter) to accompany Nathaniel on the bus ride to and from school. The CSE concluded, however, that the support Nathaniel currently receives from his bus monitor is appropriate to meet his communication and safety needs. To this end, the CSE observed that the existing bus monitor supports Nathaniel's communication through verbalization, gestures, body language and physical prompts. Thereafter, on February 4, 2016, respondents issued a final determination declining to add an interpreter for the bus ride to Nathaniel's IEP.

Petitioner subsequently initiated the instant CPLR article 78 proceeding seeking a judgment: (1) vacating and annulling the School District's determination; and (2) requiring the School District to provide Nathaniel with an interpreter for the duration of his bus ride to and from school. Petitioner asserts that the School District's determination was made in violation of Nathaniel's rights under the Individuals with Disabilities Education Act ([IDEA] 20 U.S.C. § 1400 *et seq.*), Education Law § 4402, 8 NYCRR 200.4(c)(5) and 8 NYCRR 200.4(d)(3)(iv). Respondents have moved to dismiss the petition on the ground that petitioner failed to exhaust his administrative remedies. Petitioner opposes respondents' motion.

DISCUSSION

It is well settled that exhaustion of administrative remedies is generally required before commencement of a CPLR article 78 proceeding challenging a determination (*see* CPLR 7801[1]; *Town of Oyster Bay v Kirkland*, 19 NY3d 1035, 1038 [2012], *cert denied* 133 S Ct 1502 [2013]; *Matter of Kravitz v DiNapoli*, 122 AD3d 1199, 1201 [3d Dept 2014]). As relevant here, the IDEA provides specific administrative procedures to address parental complaints with respect to a student's IEP (*see Calhoun v Ilion Cent. School Dist.*, 90 AD3d 1686, 1687 [4th Dept 2011], citing 20 U.S.C. §§ 1415[b][6], [f][1], and [h]). As such, those with a grievance related to the education of a disabled child generally must avail themselves of the IDEA's administrative remedies "before filing suit in federal [or state] court" (*Calhoun v Ilion Cent. School Dist.*, 90 AD3d at 1687).

In New York, the parent must first file a due process complaint notice with the school (*see Calhoun v Ilion Cent. School Dist.*, 90 AD3d at 1687, citing 20 U.S.C. § 1415[c][2]; 8 NYCRR 200.5[i]). If the grievance cannot be resolved, the matter will then proceed to an impartial due process hearing before an impartial hearing officer (*see Calhoun v Ilion Cent. School Dist.*, 90 AD3d at 1687, citing 20 U.S.C. § 1415[f][1][B][ii]; Education Law § 4404[1]; 8 NYCRR 200.5[j][3]). The impartial hearing officer's decision can be appealed by either party to the State Review Officer (SRO) at the Education Department (*see Calhoun v Ilion Cent. School Dist.*, 90 AD3d at 1688, citing 20 U.S.C. § 1415[g]; Education Law § 4404[1][c]; [2]; 8 NYCRR 200.5[k][1]). It is only <u>after</u> the SRO has made his or her determination that an aggrieved party may bring a civil action in state or federal court to review the determination (*see Calhoun v Ilion Cent. School Dist.*, 90 AD3d at 1688, citing 20 U.S.C. § 1415[i][2][A]).

Petitioner does not dispute that he had an administrative appeal process available to him and failed to avail himself of it. Indeed, the record shows that petitioner did not undertake any steps to

initiate the administrative review process under the IDEA and Education Law. Rather, petitioner urges the Court to find that requiring him to exhaust his administrative remedy would be futile and cause Nathaniel irreparable injury. While "there are exceptions to the exhaustion doctrine, including where resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury or where an agency's action is challenged as either unconstitutional or wholly beyond its grant of power" (*Matter of Kravitz v DiNapoli*, 122 AD3d at 1201, quoting *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978] [internal quotation marks omitted]), they are seldom exercised (*see* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY , Book 7B, CPLR C7801:7). More importantly, the Court of Appeals has held that courts lack the discretion to rely on an exception where [as here] the Legislature " has specifically delineated the exclusive steps a party must undertake in order to seek judicial relief" (*Bankers Trust Corp. v New York City Dept. of Fin.*, 1 NY3d 315, 322 [2003]).

Nevertheless, even if the Court considered petitioner's argument, the outcome would not change because the documentary evidence submitted fails to substantiate his assertion that Nathaniel would suffer irreparable injury absent judicial intervention (*see e.g. Matter of Dawson v Gibson*, 176 AD2d 876, 877 [2nd Dept 1991]; *compare Matter of Kravitz v DiNapoli*, 122 AD3d at 1202). Nor has petitioner demonstrated that it would be futile to exhaust his administrative remedies (*see e.g. Matter of Ruby Weston Manor v Commissioner of Health of the State of N.Y.*, 107 AD3d 1116, 1119 [3d Dept 2013]; *Matter of Dawson v Gibson*, 176 AD2d at 877).

WHEREFORE, based on the foregoing, it is hereby

ORDERED and ADJUDGED that respondents' motion is granted and the petition dismissed.

This memorandum shall constitute the Decision/Order & Judgment of this Court. The

original Decision/Order & Judgment, together with the motion papers have been forwarded to the Clerk's office for filing. The filing of this Decision/Order & Judgment does not relieve counsel from the obligation to serve a copy of this Decision/Order & Judgment, together with notice of entry, pursuant to CPLR § 5513(a).

Dated: October 13, 2016
Monticello, New York

ENTER:
HON. MARK M. MEDDAUGH
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition, dated March 2, 2016; Verified Petition, dated March 2, 2016, with annexed exhibits;

2. Notice of Motion to Dismiss the Verified Petition Pursuant to CPLR 3211(a), dated June 6, 2016; Affirmation of Robert T. Schofield, Esq. in Support of Respondents' Motion to Dismiss, dated June 6, 2016, with annexed exhibits; Respondents' Memorandum of Law in Support of Their Motion to Dismiss, dated June 6, 2016; and

3. Affirmation of Jeremy D. Barberi, Esq. in Opposition and in Further Support of the Petition, dated June 9, 2016, with annexed exhibits.