State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 01486-18

AGENCYDKT. NO. 2018-27349

WEST ORANGE BOARD OF EDUCATION,

Petitioner,

v.

C.O. ON BEHALF OF M.O.,

Respondent.

_____

Joseph D. Castellucci, Esq., for petitioner (Methfessel & Werbel, attorneys)

C.O., respondent, pro se

Record Closed: July 2, 2018 Decided: August 14, 2018

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On January 26, 2018, this matter was transmitted to the Office of Administrative Law by the Department of Education, Office of Special Education Policy and Procedure. The West Orange Board of Education (District) seeks an Order denying the parents' request for independent evaluations.

On May 14, 2018, the District filed a Motion for Summary Decision. Respondent filed opposition on May 18, 2018.

STATEMENT OF FACTS

1. The District is a body politic and subdivision of the Borough of West Orange in the County of Essex.

2. The District operates the West Orange Public Schools.

3. Respondent is the parent of M.O., a student who resides within the West Orange School District and is classified as eligible for special education and related services under the classification "Autistic."

4. M.O. currently attends "Celebrate the Children," which is a State-approved private school located in Denville, New Jersey.

5. Prior to attending Celebrate the Children, M.O. attended Reed Academy for several years (including September 2013 through November 2017) before being asked to leave in November 2017 due to chronic behavioral issues for which Reed Academy did not feel it had the appropriate program.

6. An IEP meeting was held on December 7, 2017, where the parties discussed a change in placement for M.O. to home instruction, pending an appropriate out-of-district placement being determined for M.O. At that meeting, the parents made a request for independent psychological, educational, and speech evaluations, as well as a Functional Behavioral Assessment (FBA) of M.O. at the District's expense.

7. The Reed Academy is a specialized school for students with Autism and uses an applied behavioral analysis model.

8. The parents claim that M.O. has no behavioral issues prior to being placed at Reed Academy in 2013.

9. On or about December 13, 2017, Kristin Gogerty (Gogerty), the District's Director of Special Services, sent an email to the parents offering to move up M.O.'s reevaluation that was scheduled for May 1, 2018. Gogerty offered to have the District's staff complete the FBA, educational, psychological, and speech evaluations of M.O. as a part of the re-evaluation. Gogerty also sent the parents a proposed re-evaluation form for their signature.

10. On or about December 18, 2017, the parents responded that they would agree to the District's completion of the educational, psychological, and speech evaluations as a part of the re-evaluation, but still felt that the FBA should be an independent evaluation. The parents' position for an independent FBA was based on the fact that the District refused to place M.O. in a District public school because the District claimed that they did not have qualifying staff to create a program that would address M.O.'s educational and behavioral needs.

11. As a result of the parents' subsequent refusal to provide consent for an FBA, on or about December 27, 2017, the District filed a Petition for Due Process.

12. On February 8, 2018, the parties attended a Settlement Conference before Judge Leslie Z. Celentano, where the matter did not settle.

13. The District held a reevaluation planning meeting with the parents on or about February 13, 2018. As a result of this meeting, the District proposed an evaluation plan which offered to conduct educational, psychological, speech/language, and occupational therapy evaluations, as well as an FBA.

14. On February 13, 2018, the parents allege that the petitioner provided the parents with the name of the staff who would be conducting the assessment of M.O.

15. After this meeting, the parents revoked their consent to permit the District to conduct the proposed evaluations. The parents alleged that the District's personnel

would be biased in their evaluations and that it was a conflict of interest for them to perform the evaluations.

16. On February 20, 2018, the District filed a second Petition for Due Process to compel the re-evaluation of M.O.

17. After the District filed its second Petition for Due Process, the parties engaged in settlement discussions to resolve the issues presented in the Petition.

18. On or about March 14, 2018, as a result of further settlement discussions, the respondent provided consent for the District to conduct an educational, psychological, speech/language, and occupational therapy evaluation and the parents requested the name of the District's staff who would conduct the evaluation. No such name was provided by the District to the parent.

19. As of this date, the parents continue to withhold their consent for the District to conduct a FBA and maintain that an independent FBA is required.

20. On March 14, 2018, the parents received the name of the evaluator proposed by the District and the parents provided consent for the District to conduct an educational, psychological, speech/language, and occupational therapy evaluations.

STANDARD FOR SUMMARY DECISION

Summary decision may be granted "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." N.J.A.C. 1:1-12.5(b). An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issues to the trier of fact. R. 4:46-2.

The burden of showing that no genuine issue of material fact exists rests initially on the moving part. However, this "burden . . . may be discharged by showing . . . that there is an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Moreover, in order to defeat a properly supported motion for summary judgment, a party may not rely upon self-serving conclusions, unsupported by specific facts in the record. Ibid. Instead, the non-moving party must point to concrete evidence in the record, which supports each essential element of his case. Ibid.

Moving parties in summary judgment motions are required to submit a Statement of Facts that contains a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. R. 4:46-2(a). A party that opposes a summary judgment motion must submit a responding statement "either admitting or disputing each of the facts in the movant's statement." R. 4:46-2(b). "All material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact." R. 4:46-2(b). Moreover, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. N.J.A.C. 1:1-12.5.

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America. 142 N.J. 520 (1995). In Brill, the Supreme Court adopted a standard that requires the motion judge to engage in an analytical process essentially determining whether the competent evidence presented, when viewed in the light most favorable to the non-moving party presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Id. at 533 (quoting Anderson v. Liberty Lobby, 477 U.S. 242 (1986)). To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose." Brill, 142 N.J. at 541.

As detailed above, I **FIND** that the facts that set forth the basis of this case are established and thus this matter is ripe for a summary decision.

LEGAL DISCUSSION

The District asserts, among other things, that the applicable law affords the parents the right to have an independent evaluation upon a disagreement with an evaluation provided by the school district, unless the district files a petition for due process and demonstrates that its evaluation is appropriate

The District further asserts that pursuant to N.J.A.C. 6A:14-2.5(c), the parents' request for an independent evaluation shall specify the assessment(s) the parents are seeking as part of the independent evaluation request. The District states that it requested the parents' consent to conduct a FBA of the student at the District's expense and the parents denied this request. The parents then sought to have an independent evaluation related to an FBA.

The District argues that the parents' request for an independent evaluation is premature and thus inappropriate. The District maintains that if the parents of a classified student disagree with any of the evaluation reports generated as part of a school district's re-evaluation, the parents may request an independent evaluation at the District's expense.

Based on the fact that the parents' refused to permit the FBA, the District was unable to conduct such an assessment. Based on the fact that there was no evaluation report for the parents to contest, the District avers that there are no grounds for the parents to request an independent evaluation.

In opposing summary decision, respondent states that they advised the District on numerous occasions that they demanded numerous discovery items and that the District failed to provide all the necessary documents demanded and related to this matter. (See submission by respondent on May 14, 2018.) This opposition is of no consequence to the decision on the petitioner's motion as it is not relevant.

Respondent still maintains that the District complete a FBA by an independent evaluator based on the fact that the District refused to place M.O. in the District public school claiming that they do not have qualifying staff to create a program that would address M.O.'s educational and behavioral needs. Respondent further states that Ms. Gogerty, the Director of Special Services, was in agreement with the parents regarding the request for an independent evaluation for M.O. regarding a FBA during the December 7, 2017, meeting. The parents then allege that thereafter Ms. Gogerty retracted her agreement when the parents of M.O. sent an email requesting that Ms. Gogerty provide a list of the providers, so the parents can make the appropriate selection.

As stated above, "In New Jersey if, during a re-evaluation of student to create an IEP, the parents of a classified student disagree with any of the evaluation reports generated as part of a school district's re-evaluation, the parents may request an independent evaluation at the district's expense." Haddonfield Bd. of educ., Petitioner, 2016 WL 3577994, at *2 (EFPS, June 24, 2016).

The parents, in their submission, state that the IDEA provides that even if the school district does not conduct an evaluation, the student's parents may be entitled to an IEE at public expense if the school district refused to conduct evaluations. The parents cite the following case: Haddon Twp. Sch. Dist. v. New Jersey Dep't of Educ., 67 IDELR 44 (N.J.S.C. 2006); A-1626-14, http://njlaw.rutgers.edu/collections/courts/.

In the Haddon Township School District case, the Appellate Division stated that OSEPP concluded that the parents in Haddon Township were entitled to an independent educational evaluation pursuant to C.F.R. § 300.502 (2016). At the time of this decision, N.J.A.C. 6A:14-2.5(c) read as follows:

> (c) A parent may request an independent evaluation if there is a disagreement with any assessment conducted as part of an initial evaluation or a reevaluation provided by a district board of education.
>
> 1. If a parent seeks an independent evaluation in an area not assessed as part of an initial evaluation or a

reevaluation, the school district shall first have the opportunity to conduct the requested evaluation.

i. The school district shall determine within ten days of receipt of the request for an independent evaluation whether or not to conduct an evaluation pursuant to (c)(1)(iii) and (iv) below, and notify the parent of its determination.

ii. If the school district determines to conduct the evaluation, it shall notify the parent in writing and complete the evaluation within 45 calendar days of the date of the parent's request.

iii If the school district determines not to conduct the evaluation first, it shall proceed in accordance with (c)(2) below.

iv. After receipt of the school district's evaluation, or the expiration of the 45-calendar day period in which to complete the evaluation, the parent may then request an independent evaluation if the parent disagrees with the evaluation conducted by the school district.

2. Such independent evaluation(s) shall be provided at no cost to the parent unless the school district initiates a due process hearing to show that its evaluation is appropriate and a final determination to that effect is made following the hearing.

i. Upon receipt of the parental request, the school district shall provide the parent with information about where an independent evaluation may be obtained and the criteria for independent evaluations according to (c)(3) and (4) below. In addition, except as provided in (c)(1) above, the school district shall take steps to ensure that the independent evaluation is provided without undue delay or

ii. No later than 20 calendar days after receipt of the parental request for the independent evaluation, the school district shall request the due process hearing.

> [46 N.J.R. 1996(a) (Oct. 6, 2014); see also N.J.A.C. 6A:14-2.5(c).]

In contrast, 34 C.F.R. § 300.502(b)(1) stated:

> (b) Parent right to evaluation at public expense.
>
> (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

The Haddon Township School District case goes on to state this conflict between the federal and state regulations was brought to the attention of the school district on at least three occasions by way of guidance letters. On May 14, 2013, the New Jersey Department of Education sent a guidance letter to the school district advising them that, "The [United States Department of Education] OSEP indicated that the current regulations contained in N.J.A.C. 6A:14-2.5(c)(1) violate the [Independent Educational Evaluations (IEE)] provisions in 34 CFR 300.502."

Therefore, the Haddon Township School District Court stated that districts may no longer limit the parents' rights to an IEE by first conducting an assessment in an area not already assessed by the initial evaluation or re-evaluation before the parents' request is granted. Instead, the Court goes on to state that when a parental request for an independent evaluation is received, a district must provide the evaluation at no cost to the parent, **unless the school district initiates a due process hearing**.

In this case, there is no dispute that the petitioner has filed due process petitions which is the subject of its motion for summary decision. Based on Haddon, this filing for due process by the District prevents the parents/respondent from getting an independent evaluation under the circumstances presented in this case.

I **CONCLUDE** that there is sufficient evidence to dispose of this matter by summary decision.

ORDER

Based on the foregoing, it is **ORDERED** that the District's Motion for Summary Decision is **AFFIRMED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2017) 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 (2017). 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.

August 14, 2018
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency August 15, 2018

Date Mailed to Parties:

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