State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 15781-17

AGENCY DKT. NO. 2017-26116

C.P. ON BEHALF OF F.P.,

Petitioner,

v.

CLIFTON BOARD OF EDUCATION,

Respondent.

_____

John Rue, Esq., for petitioner (Law Office of John D. Rue)

Jessika Kleen, Esq., for respondent (Machado Law Group)

Record Closed: November 19, 2018 Decided: December 13, 2018

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

F.P. is a twelve-year-old student who attends Clifton Public School Number 16 and is eligible for special education and related services under the classification of "other health impaired." On or about November 21, 2016, the Clifton Public Schools (District) conducted a psychological evaluation. C.P., F.P.'s mother, disagreed with the results of the evaluation, and on January 18, 2017, requested two independent evaluations, a psychological evaluation and a central-auditory-processing evaluation, at District

expense. The District did not file a request for due process, and on April 27, 2017, petitioner filed for due process on seeking independent evaluations. The matter was transmitted to the Office of Administrative Law on October 24, 2017.[1]

The parties negotiated for many months, reaching multiple settlements that fell apart. Following transmittal, scheduled settlement conferences were adjourned multiple times at the request of the parties, who indicated that a tentative settlement had been reached.

On December 12, 2017, the parties advised the settlement judge that the matter had not been settled, and the matter was assigned to the undersigned and the initial telephone conference scheduled for December 22, 2017.

The parties thereafter filed motions, and another telephone conference was held on April 9, 2018. In that conference, the parties were offered nine dates[2] between April and September 2018 on which one or both were not available. Accordingly, the hearing was scheduled for September 7, 2018.

Another status conference call was scheduled by the undersigned for July 23, 2018, and in that call the parties indicated that they were revisiting the issue of settlement. Thereafter, having heard nothing from the parties, correspondence was sent to the parties on August 7, 2018, inquiring as to the status of the matter. The parties advised that the case was settled.

On September 4, 2018, counsel for petitioner wrote to advise that "there will be no settlement," and in a September 6 conference call, the hearing that had remained scheduled for September 7 was adjourned, as the parties were not ready to proceed the following day. The hearing was scheduled for the next available date, which was October 24, 2018, and was held on that date. The appropriateness of the request for independent educational evaluations (IEEs) is not at issue here.

[1] This was six months after the due-process petition was filed.
[2] The dates offered were April 18, May 1, May 24, June 15, June 21, June 22, July 6, August 3, and August 16, 2018.

Importantly, the case is not related to the student's programming, which was not at issue; indeed, the IEEs claimed to have been obtained have never been provided to the District, and petitioner has never sought to have them considered, nor does the District challenge the parents' right to obtain IEEs. The sole issue is the reasonableness of the request for reimbursement and whether the evaluations were obtained in a manner consistent with District criteria.

TESTIMONY

Renee Blackowski

Ms. Blackowski is the coordinating supervisor of special services for the District. She began working for the District in 1970 as a speech correctionist and left the District in 1972 to stay home and raise her children. She returned to the District in 1980 as a speech-language specialist and remained in that position until 1990, when she became a learning disabilities teacher consultant. She remained in that position until 2001, when she became district supervisor of special education, responsible for scheduling of special-education teachers and overseeing student schedules. She was also responsible for observing and evaluating thirty-eight special-education teachers and twenty paraprofessionals at the high school. She held that position until 2007, when she assumed her current position. She oversees all District special education, including observation of all special-education supervisors, child-study-team members, occupational-therapy and physical-therapy providers, and behaviorists, and does the evaluations of all professionals in the District. She will also sit on an individualized education program (IEP) meeting if asked to do so.

Ms. Blackowski testified that if a parent sends in a letter with a request, she assesses the reasonableness of the request. In this case, the parent, C.P., asked for a psychological evaluation on January 18, 2017, indicating that the one that the District performed does not "accurately reflect [F.P.'s] intellectual functioning skills." (P-3.) She determined to grant the request for an independent evaluation, and reached out to the parent in order to schedule an appointment for the requested psychological evaluation,

as well as an independent central-auditory-processing (CAP) evaluation. Ms. Blackowski testified that no one responded to the email (R-4) and that she has never seen the reports generated. She also testified that she has never seen a psychological report cost anywhere near $5,200, which is the reimbursement amount the petitioner seeks. Ms. Blackowski testified that an independent psychological evaluation typically costs $900; some amounts are lower and some are higher, but none are close to $5,200. A psychological evaluation includes a cognitive assessment and a social/emotional component, and usually it takes two hours, or up to four hours, if including preparation of the report, and if the report writer is a slow writer. Her knowledge as to how long these evaluations take comes from the fact that there is an office in the District that has to be booked for testing, and that no psychologist has ever used the office for more than a few hours for such an evaluation.

Ms. Blackowski stated that she helped create documents related to psychological-evaluation providers and costs (R-2), and has participated in county round-table discussions. Most providers' costs are in the same ballpark, and extensive research has been done to see what others have paid. She also provided a packet of redacted invoices (R-3) for independent psychological evaluations done for other students in the District from 2015 to 2017 where the Board has paid for the evaluations, and all of those evaluations have cost $900, except for one that was $1,350 and another that was $650. Ms. Blackowski also identified the Board criteria for independent evaluations. (R-5.)

On cross-examination, Ms. Blackowski was asked about the email to the parent on September 29, 2017[3], noting that it was well beyond the time frame of the parent's letter of January 18, 2017. Ms. Blackowski indicated that they had reached out immediately after receiving the parent request, and received no response whatsoever. She was also asked whether a psychological evaluation is always the same, and responded that it was in this type of case, when the concern is intellectual functioning, as here. She reiterated that there is a cognitive and social/emotional assessment, and that is what is done in these circumstances. Here, the mother's request had indicated that the District testing does not "accurately reflect [the student's] intellectual functioning skills and

[3] The email was dated November 29, 2017.

is contradictory to the other evaluation results." As such, the subsequent testing done was the same as that which had previously been done by the District.

Ms. Blackowski was asked whether the testing was any different if administered by an evaluator with a Ph.D., and she indicated that a Ph.D. was not needed to do a psychological evaluation—some evaluators on the list have a Ph.D. and others don't. She agreed that the District uses ACES frequently, and indicated that this is because they are accurate and expeditious, and parents have been very happy with them. She added that sometimes parents will bring in the assessment, but she does not often know what they paid. In this case, she has never seen any psychological evaluation by Dr. Edelman, which is the psychological evaluation for which petitioner seeks reimbursement.

No other witnesses testified.

LEGAL DISCUSSION AND CONCLUSION

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1485, is designed to assure that disabled children may access a free appropriate public education (FAPE) that is tailored to their specific needs. 20 U.S.C. § 1400(c). Under the State regulations implementing the IDEA, N.J.A.C. 6A:14-1.1 to -10.2, a school district of residence is responsible for "the location, identification, evaluation, determination of eligibility, development of an individualized education program and the provision of a [FAPE] to students with disabilities." N.J.A.C. 6A:14-1.3. In determining whether a student is eligible for special-education services, a school district must conduct an initial evaluation, which "shall consist of a multi-disciplinary assessment in all areas of suspected disability," and if the child is deemed eligible, a school district must conduct "a multi-disciplinary reevaluation . . . to determine whether the student continues to be a student with a disability" at least every three years. N.J.A.C. 6A:14-3.4(f); N.J.A.C. 6A:14-3.8(a).

N.J.A.C. 6A:14-2.5(c) states:

> Upon completion of an initial evaluation or reevaluation, a parent may request an independent evaluation if there is disagreement with the initial evaluation or a reevaluation provided by a district board of education. A parent shall be entitled to only one independent evaluation at public expense each time the district board of education conducts an initial evaluation or reevaluation with which the parent disagrees. The request for an independent evaluation shall specify the assessment(s) the parent is seeking as part of the independent evaluation request.

The school district shall pay for the IEE "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." N.J.A.C. 6A:14-2.5(c) and (c)(1). N.J.A.C. 6A:14-2.5(c)(1)(ii) specifies that "[n]ot later than 20 calendar days after receipt of the parental request for the independent evaluation, the school district shall request the due process hearing." Thus, "the school district shall not delay either providing the independent evaluation or initiating a due process hearing to defend the school district's evaluation." N.J.A.C. 6A:14-2.5(c)(5).

Pursuant to 34 C.F.R. § 300.502(e) (2018), the district can specify a list of evaluators that meet its criteria, including those concerning reasonable cost, as long as it permits the parents the opportunity to select an evaluator who is not on the list but who meets said criteria. The standard for meeting the agency criteria has also been discussed in sparse case law. "The degree of compliance necessary for an IEE to 'meet agency criteria' under 34 C.F.R. 300.502 is not explicitly defined in IDEA, its implementing regulations, or the case law, nor is there any directly relevant agency guidance." Seth B. v. Orleans Par. Sch. Bd., 810 F.3d 961, 977 (5th Cir. 2016). "Yet standards akin to substantial compliance are already utilized in other IDEA contexts. For example, we consider substantial compliance in determining whether school districts have provided education 'in conformity with' students' individualized education programs (IEPs), as IDEA requires." Id. at 977–78. The Fifth Circuit Court was persuaded that the substantial-compliance standard also suffices in the IEE context, noting that, "34 C.F.R. 300.502 nowhere demands perfect adherence to agency criteria. Indeed, such a requirement is

in tension with core purposes of the right to an IEE and of the IDEA generally. Id. at 978. The appellants had requested an IEE at public expense, and the school requested neither a hearing as to the appropriateness of its own evaluation nor a hearing to show that appellant's evaluation did not meet agency criteria. Rather, the school in that case requested a hearing on the subject of reimbursement. The appellants there, as the petitioner here, urged that by failing to request a hearing, the school had waived its right to refuse reimbursement. The Fifth Circuit disagreed, noting:

> The plain text of the regulation contradicts appellants' reading. 300.502(b)(2)(ii) excuses an agency from paying for an IEE if the agency simply "*demonstrates* in a hearing . . . that the evaluation obtained by the parent did not meet agency criteria." It does not require the agency to "initiate" or "request" the hearing. In contrast, under (b)(2)(i), the agency must "file" a complaint and "request" a hearing if it wishes to decline reimbursement on the ground that its own evaluation was appropriate. This distinction strongly favors reading 300.502(b)(2)(ii) *not* to require the agency to initiate a hearing.

The Court added:

> Appellants and amici refer us to Department of Education commentaries suggesting that 300.502(b)(2)(ii) gives a school district the duty to initiate a hearing in this context. This contradicts the unambiguous text of the regulation.

Districts have adopted a version of the federal and state regulations with regard to the IEEs. The Clifton Board of Education lays out guidelines for the IEEs in its policy ("policy"). The policy states that:

> An "independent educational evaluation" is an evaluation conducted by a qualified examiner who is not an employee of the public school district responsible for the education of the child in question. Such IEEs shall be provided at no cost to the parent unless the school district initiates a due process hearing in accordance with the provisions of N.J.A.C. 6A:14-2.7 et seq. to show that its evaluation is appropriate and a final determination to that effect is made following the hearing. If it is determined the school district's evaluation is appropriate, the parent still has the right to an IEE, but not at the school district's expense.

> [Clifton Bd. of Educ. Policy, Independent Educational Evaluations § 2468 (adopted March 6, 2013), http://www.clifton.k12.nj.us/pdf/policy/2000policy.pdf.]

The Clifton Board of Education has adopted additional criteria:

> The Board will not pay for an IEE unless it complies with the following criteria unless the parent can show that unique circumstances warrant deviation from same:
>
> . . . .
>
> d. The independent evaluator and members of the Child Study Team must be permitted to directly communicate and share information with each other. The independent evaluator must also agree to release the assessment information, results and report(s) to the school district prior to receipt of payment for services;
>
> . . . .
>
> f. The independent evaluator shall make at least one contact with the pupil's case manager in his/her current programming.
>
> [Ibid.]

As to the reasonableness of the cost of the IEE, the Board has adopted further criteria:

> The maximum allowable cost for an independent evaluation will be limited to the reasonable and customary rate, as determined and approved by the Board annually. This rate shall be in the range of what it would cost the Board to provide the same type of assessment through either another public-school district, educational services commission, jointure commission, a clinic or agency approved under N.J.A.C. 6A:14-5, or private practitioner, who is appropriately certified and/or licensed, where a license is required. This Board-approved rate shall be provided to the parent upon their request for an IEE. The parent may provide documentation to the Board demonstrating unique circumstances to justify an

> IEE that exceeds the maximum allowable cost established by the Board. If, in the Board's judgment, there is no justification for the excess cost, the Board may agree to fund the IEE up to the school district's maximum allowable cost with the parent responsible for any remaining costs. In the alternative, the Board may request a due process hearing to enforce its established maximum allowable cost.
>
> [Ibid.]

The District offered competent and credible testimonial and documentary evidence at the hearing as to its policy, and that all of the psychological evaluations it has funded over the past two years have been at a cost of $900, with the exception of two (one for $1,350 and another for $650). In cases where the IEE cost exceeds the maximum amount, the parents must demonstrate unique circumstances that justify the cost of the evaluation. Ibid. The petitioner will bear the burden of demonstrating that his "unique circumstances" justified a departure from the district's reasonable cost cap on independent educational evaluations. A.A. v. Goleta Union Sch. Dist., 2017 U.S. Dist. LEXIS 24853, at *16 (C.D. Cal. Feb. 22, 2017). Unique circumstances can include complex medical, educational, health, or psychological needs that would warrant such an exception. See ibid. If the petitioner is unable to meet the burden of showing the unique circumstances justifying the amount, the District shall be responsible for the maximum amount allowable by the Board, with the parents responsible for any remaining costs.[4] Clifton Bd. of Educ. Policy, Independent Educational Evaluations § 2468 (adopted Mar. 6, 2013), http://www.clifton.k12.nj.us/pdf/policy/2000policy.pdf.

The District reached out to petitioner to assist with scheduling the evaluations, and received no response from petitioner. Unbeknownst to the District, when it reached out to petitioner via email on November 29, 2017, having had no response to prior efforts, the evaluations purportedly had already been completed, on June 15, 2017 (the CAP evaluation), and September 10, 2017 (the psychological evaluation), before the due-process petition seeking independent evaluations was filed at the Office of Administrative Law on October 24, 2017. Moreover, there was no compliance with agency criteria. There was no communication from the evaluators or sharing of information, as required

[4] No details about the evaluations were provided, let alone any "unique circumstances."

by the policy. There was no contact by either evaluator with the pupil's case manager, as required by the policy. Neither the assessment information nor the results of the assessment were provided to the school district, as required by the policy. The reports were never released to the school, as is required by the policy before any payment is made for services.

Significantly, no witnesses or evidence were presented by petitioner at the hearing. There was no testimony that the evaluations were completed. The CAP evaluation claimed to have been completed on June 15, 2017, was never introduced into evidence. The unverified invoice dated June 17, 2017, is heavily redacted, including the diagnosis. The psychological evaluation claimed to have been completed on September 10, 2017, was never introduced into evidence. Curiously, the one-line unverified invoice for the psychological evaluation is dated February 27, 2018. Neither has ever been authenticated. The evaluators did not testify, nor were any certifications of the evaluators submitted. Petitioner did not testify, indeed, she did not even appear for the hearing as to the evaluations for which she was seeking reimbursement. No certification of petitioner has ever been submitted. The evaluations have never been provided.

Under 34 C.F.R. 300.502(b) and (e) (2018), a school board has no duty to pay for an IEE demonstrated not to meet agency criteria:

> . . . insignificant or trivial deviations from the letter of agency criteria may be acceptable as long as there is substantive compliance with all material provisions of the agency criteria and the IEE provides detailed, rigorously produced and accessibly presented data.
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> [Seth B. v. Orleans Par. Sch. Bd., 810 F.3d at 979.]

Based upon all of the foregoing, I **CONCLUDE** that there is no testimonial or documentary evidence to support a claim for reimbursement at public expense and therefore **ORDER** that the petition in this case be and hereby is **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2018) 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 (2018). 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.

December 13, 2018
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency December 13, 2018

Date Mailed to Parties:

dr

APPENDIX

Witnesses

For Petitioner:

None

For Respondent:

Renee Blackowski

Exhibits

Petitioner:

P-1 Not admitted
P-2 Not admitted
P-3 Letter from petitioner dated January 18, 2017, to Kristin Perry

Respondent:

R-1 Curriculum vitae of Renee Blackowski
R-2 Compilation of psychiatric evaluation costs and providers
R-3 Invoices for psychiatric evaluations District paid for 2015–2017
R-4 Email of November 29, 2017, to petitioner regarding scheduling evaluations
R-5 Clifton Board of Education Policy on Independent Educational Evaluations