State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDS 14675-17
AGENCY DKT. NO. 2018-26883

S.S. AND M.S. ON BEHALF OF H.S.,
Petitioners,
v.
HILLSBOROUGH TOWNSHIP
PUBLIC SCHOOL DISTRICT,
Respondent.

John D. Rue, Esq., for petitioner (John Rue & Associates)

Vittorio S. La Pira, Esq., for respondent (Fogarty & Hara)

Record Closed: January 9, 2018 Decided: January 19, 2018

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE

Petitioners S.S. and M.S. filed a due-process petition seeking reimbursement for an independent evaluation of their son, H.S., under the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 to 1482. The Hillsborough Township Public School District ("respondent" or "the District") contends that petitioners are only entitled

to an independent evaluation at public expense if they disagree with an evaluation obtained by a public agency. Respondent argues that since there was no evaluation with which the parents disagreed, they do not meet the standard for relief.

Petitioners further argue that the District essentially has waived its right to object by failing to file a request for a due-process hearing about the evaluation within twenty days of the request for independent evaluation. The Board responds that a procedural defect cannot create a new right under federal law.

PROCEDURAL HISTORY

On June 6, 2017, petitioners requested an independent evaluation performed at the District's expense. The District denied the request on July 27, 2017, but did not file a request for a due-process hearing. On September 5, 2017, the Office of Special Education Programs (OSEP) received a due-process request from petitioners regarding reimbursement for an independent evaluation, which they had obtained at their own expense. OSEP transmitted the case to the Office of Administrative Law, where it was filed on October 5, 2017. Following unsuccessful attempts to settle the case, it was set down for hearing on February 1, 2018. On January 5, 2018, the OAL received petitioners' motion for summary decision, and on January 9 the OAL received respondent's cross-motion for summary decision.

FACTUAL DISCUSSION

The parties agree on this much. H.S., a sixteen-year-old male student, is classified as a child with a disability, and has been diagnosed as autistic. The District last evaluated H.S. in 2011, as part of a triennial reevaluation that included social, educational, and psychological assessments. In June 2017 petitioners requested an independent evaluation at public expense. By email dated July 27, 2017, Suzan Radwan, director of Special Services, emailed the petitioners the following: "I understand that on or around June 6, 2017, you made a written request for an independent educational evaluation ('IEE') of your child, specifically seeking an independent neuropsychological examination. Please consider this written notice, pursuant to N.J.A.C. 6A:15-2.3(h)(5) [sic], that for the

reasons set forth herein, the District is denying your request." (Radwan Certif., Exh. 7.) Petitioners secured an independent evaluation, which was completed by Dr. Jane Healy on August 28, 2017, at their own expense.

Other facts are not specifically addressed in petitioners' brief, but have been offered by the District with supporting certifications. On December 12, 2014, respondent held a reevaluation planning meeting, at which the parties determined no additional information was required. Tristen Garretson, the case manager at the time, notified petitioners they could request additional assessments within fifteen days. (Radwan Certif., ¶ 5 and Exh. 1.) In an email dated June 2, 2017, M.S. notified the school psychologist that newer evaluations were needed to support H.S.'s acceptance into a five-week summer program in Boston. (Id., Exh. 2.) A reevaluation planning meeting that included M.S. and S.S. was held on June 5, 2017, and the results were memorialized in a letter advising that the District would perform a psychological evaluation and an educational evaluation as soon as possible, both to be conducted by District personnel. (Id., Exh. 3.) M.S. signed a consent to the assessments, dated June 5, 2017. (Ibid.) The next day, M.S. forwarded a letter acknowledging having signed the consent, but now stating that petitioners wanted an independent neuropsychological evaluation at District expense. She cited concerns about their son's academic performance, and a recent diagnosis of panic attacks and anxiety. She said they planned to have the independent evaluation done by Dr. Healey. (Id., Exh. 4.) After many attempts to schedule a new meeting, the parties convened again on June 26, 2017. (Radwan Certif., ¶¶ 11 and 12.) The District did not agree to itself conduct a separate neuropsychological evaluation, or to pay for an independent evaluation of that type. (Ibid.) Instead, Radwan sent a letter notifying the parents that the District had not agreed to pay for the independent evaluation. (Radwan Certif., Exh. 7.) She noted that the District's psychological evaluation would include a variety of other assessments to address the concerns the parents had raised in their request for a neuropsychological assessment. (Ibid.) Petitioners never allowed respondent to evaluate their son. (Radwan Certif., ¶ 16.)

As the brief filed by petitioners contained no certifications or affidavits challenging the facts supplied in the Radwan Certification and associated exhibits, the additional material above is **FOUND** as **FACT**.

LEGAL ANALYSIS

The District's primary argument is that it had no obligation to provide an independent evaluation because an evaluation with which the parents disagree is a legal prerequisite to a publicly paid independent evaluation. Further, the demand for the independent evaluation fell outside the two-year statute of limitations in 20 U.S.C. § 1415(c).

The petitioners contend there is no prerequisite, and that the District is out of time to object to the performance of an independent evaluation. They point to N.J.A.C. 6A:14-2.5(c)(1)(ii), which states 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."

Both parties contend that there are no disputed facts requiring a hearing, and that the matter is appropriate for summary decision.

Summary decision may be granted when "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). The rule further provides that an adverse party must respond by affidavit setting forth specific facts showing that there is a genuine issue which can only be determined at an evidentiary hearing. Ibid. The rule is patterned on the New Jersey Supreme Court's rules concerning summary judgment. The New Jersey Supreme Court has explained that when deciding a motion for summary judgment under R. 4:46-2,

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

Here, I **CONCLUDE** that the parties are correct in urging that no material facts are at issue, and that the matter is therefore appropriate for summary decision. The procedure for requesting independent evaluations of disabled children at issue here lies in N.J.A.C. 6A:14-2.5(c). In relevant part, that section 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.
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> 1. 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.
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> 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)2 and 3 below. In addition, the school district shall take steps to ensure that the independent evaluation is provided without undue delay; or
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> ii. Not later than 20 calendar days after receipt of the parental request for the independent evaluation, the school district shall request the due process hearing.
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> [N.J.A.C. 6A:14-2.5(c).]

This procedure is consistent with federal law in granting parents a right to an independent evaluation of their children. The federal regulation is as follows.

(a) General.

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this subpart—

(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.103.

(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.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant

> to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.
>
> (3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
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> (4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.
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> [34 C.F.R. § 300.502 (2017).]

With regard to the firmness of the twenty-day deadline for the District to file a due-process petition, the first case cited by petitioner, Haddonfield Board of Education v. S.R. ex rel. P.R., OAL Dkt. No. EDS 05392, Final Decision (June 24, 2016), concerned a school district's due-process filing that was late by seven days because the school was closed for spring break. ALJ Robert Bingham determined that the IDEA provided no additional time for extenuating circumstances. In that instance, the parents were unhappy with the district's assessments. The second, Northern Highlands Regional Board of Education v. C.E. and A.E. ex rel. C.E., EDS 10891-16, Final Decision (January 19, 2017), <http://njlaw.rutgers.edu/collections/oal/>, concerned a due-process filing one day late, which ALJ Richard McGill found to be beyond the time limit. In that instance, the request for independent evaluations grew out of a meeting about an individualized education program. In Monroe Township Board of Education v. T.L. ex rel. I.L., OAL Dkt. No. EDS 15499-16, Final Decision (November 29, 2016), concerned a request for evaluation in the context of a determination as to whether the child was eligible for special education services. ALJ Lisa James-Beavers ordered the payment of the independent evaluation on grounds that the board did not file the due-process petition until day 27. Thus, the

case law is clear that where a due-process petition is filed late, the parent is entitled to reimbursement.

With regard to the question of whether a parent's right to request an independent evaluation is limited to the situation in which that parent disagrees with a school-district assessment, two decisions supporting this view predate a change to New Jersey's rules and an unpublished New Jersey Appellate Division opinion concluding that New Jersey's rules and its guidance as to the federal government's interpretation of the provision in question was sound. See, e.g., C.S. v. Middletown Twp. Bd. of Educ., EDS 729-08, Final Decision (April 14, 2008), http://njlaw.rutgers.edu/collections/oal/; Lawrence Twp. Bd. of Educ. v. M.S. ex rel. E.S., EDS 00595-07, Final Decision (June 20, 2007), http://njlaw.rutgers.edu/collections/oal/.

According to the U.S. Supreme Court, the purpose of the IEE is to ensure that parents, in contesting a district's assessment, "are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." Schaffer v. Weast, 546 U.S. 49, 60 (2005). It would be difficult for many parents to "match the firepower" of the government if they could not afford to pay the evaluator to present her findings at an IEP meeting that necessarily includes the district's assessment team.

In Haddon Township School District v. New Jersey Department of Education, No. A-1626-14T4 (App. Div. February 4, 2016), http://njlaw.rutgers.edu/collections/courts/, a school district challenged the rules and rule interpretations of the New Jersey Office of Special Education Programs. The school district had advised the parents that they were not entitled to an independent evaluation because the district had not, at that point, done any formal assessments of its own. The parents filed a compliance complaint with the New Jersey Office of Special Education Programs, after which OSEP concluded:

> The district's position, that the complainants were not entitled to an independent FBA because there was no assessment, does not comport with the requirements of 34 CFR § 300.502, which permits a student's parent to request an independent evaluation when there is disagreement with an evaluation

> conduct by the district. Here, even though there were no formal assessments conducted as part of the triennial reevaluation, the student was evaluated and determined eligible for special education and related services through review of information provided by his teachers and related service providers. This review constitutes a reevaluation, and the parents are entitled to an independent evaluation pursuant to 34 CFR § 300.502.

The Appellate Division went on to note that on May 14, 2013, the New Jersey Department of Education sent a guidance letter to the school district advising it 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.
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> . . . .
>
> Therefore, please be aware 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 reevaluation before the parents' request is granted. Rather, 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 . . . .

Neither party has pointed to any change in OSEP's guidance.

The Appellate Division concluded that by acting on federal guidance, which indicated that New Jersey's rule was more limited in regard to parental rights than the IDEA allows, OSEP had acted properly.

Given the combination of the Appellate Division's deference to OSEP's interpretation, which in turn was based on federal guidance, the fact that OSEP guidance has been available to school districts for some time, and the fact that the leading federal case directly discussing independent evaluations also suggests a broad interpretation of a parent's right to seek independent evaluations, I **CONCLUDE** that in this instance, the parent had placed the request for assessment of the child's progress in the context of

whether the educational plan might not be exactly as it should be, and the parent was not required to await the school district's internal assessments, even though the District had promised to conduct them quickly. Therefore, I **CONCLUDE** that because the District did not file for a due-process hearing within the twenty-day window, the parents are entitled to reimbursement of the cost of the independent evaluation.

ORDER

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.

January 19, 2018
DATE

LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency

Date Mailed to Parties:

/caa