State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 00982-19

AGENCY DKT. NO. 2019 29173

M.M. ON BEHALF OF K.M.,

Petitioner,

v.

PATERSON BOARD OF EDUCATION,

Respondent.

_____

David Giles, Esq. for petitioner (Law Offices of David Giles, attorneys)

R. Scott Eveland, Esq., for respondent (Inglesino, Webster, Wyciskala and Taylor, attorneys)

Record Closed: May 16, 2019 Decided: May 20, 2019

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415, M.M. has requested a due-process hearing on behalf of her son, K.M., who is classified as eligible for special education and related services. She contends that the Paterson Board of Education (the Board), failed to provide K.M. with the

comprehensive independent psychiatric evaluation contemplated by law, and as agreed upon via a settlement approved by the Office of Administrative Law (OAL) on October 31, 2018. She seeks another independent evaluation, or in the alternative, an order directing the Board to pay the psychiatrist to update her report. M.M. also seeks compensatory education. The Board replies that its actions throughout were consistent with the settlement agreement, and with applicable law and regulation.[1]

PROCEDURAL HISTORY

The request for due process was received by the Office of Special Education Programs (OSEP) on December 18, 2018. The contested case was transmitted to the OAL, where it was filed on January 18, 2019. During a telephonic pre-hearing conference, counsel advised that there were no facts in dispute and asked that the matter be resolved on Cross-Motions for Summary Decision. The motions and accompanying certifications and briefs were filed on or about April 26, 2019. Replies were filed on May 16, 2019, at which time the record closed.

FINDINGS OF FACT

The salient facts are undisputed, and I **FIND**:

K.M. is a sixteen-year-old student who is classified as eligible for special education services under the category "Emotionally Disturbed." He resides in Paterson and receives educational programming via an Individualized Education Program (IEP) designed by the school district. Concerned about the appropriateness of K.M.'s program, his mother, through counsel, requested independent evaluations. Counsel's October 26, 2017, letter sought psychiatric, psychological and learning evaluations. As it wished to deny the request, on November 15, 2017, the Board filed for Due Process. The parties' dispute was ultimately settled via a written settlement agreement, signed by M.M. on August 22, 2018, and by the Board on October 3, 2018. The settlement

[1] The petition also named the Department of Education (the Department) and alleged that the Department failed to fulfill its duty to investigate and correct the alleged violations of petitioner's rights. As I have no jurisdiction to consider these claims, they were not transmitted by the Department.

was approved by Judge Elissa Testa, A.L.J., via a Final Decision on October 31, 2018. The settlement provided in pertinent part:

> 1 Respondent [the Board] shall arrange and pay for an independent psychiatric evaluation of K.M. by Dr. Ellen Platt, D.O.
>
> 2. Upon receipt of K.M.'s psychiatric evaluation report, the District will convene an IEP meeting to review the report and review and revise K.M.'s IEP as per this Settlement Agreement and release.

The parties proceeded with the steps needed to procure the evaluation prior to committing their understanding to writing. Consistent with the agreement, on July 10, 2018, the Board contracted with Dr. Platt for an independent evaluation. That agreement made it clear, in paragraph six, that all communication was to be between Dr. Platt and district personnel, and that the district would be solely responsible for sharing pertinent documentation. Indeed, the agreement between the Board (denoted as DISTRICT) and Dr. Platt (denoted as PROVIDER) specifies as follows:

> PROVIDER shall not respond [to] third party requests for educational records, except as directed by DISTRICT in writing. The DISTRICT shall be solely responsible for responding to requests received by PROVIDER regarding data or information related to education records. If access to education records is sought by any third party…PROVIDER will immediately notify DISTRICT in writing…[2]

But, on July 11, 2018, counsel for M.M. wrote to Dr. Platt and enclosed a lengthy list of documents for her review and consideration. Somewhat remarkably, he does not copy his adversary. Also, apparently unbeknownst to his adversary, counsel for M.M. communicated with Dr. Platt after she evaluated K.M. and asked for a draft of her report. She obliged on August 22, 2018.

Apparently, counsel for M.M. thought the report needed some changes, because by letter dated August 23, 2018, he posed a series of questions which, if answered,

would both clarify and expand upon Dr. Platt's findings. This time he copied his adversary, who responded with outrage. She wrote to Dr. Platt on August 24, 2018, reminding Dr. Platt that her contract was with the Board, and that the contract had specified that all communication was to be exclusively with school personnel. Stressing that the evaluation was intended to be independent, she urged that Dr. Platt's ex parte communications with counsel were improper. Counsel urged that Mr. Giles' inquiry asked that Dr. Platt "consider various concerns of his relating directly to the substance of lawsuits he filed in the Office of Administrative Law (OAL) and the United States District Court for the District of New Jersey." And counsel for the Board complained that the report had been sent only to Mr. Giles, and not to any school district representatives. She wrote that,

> [t]he District would ask that you cease and desist all communication with Mr. Giles and his office regarding your independent evaluation of K.M. and that your report, which was disseminated today, be your final report. As a matter of professional practice, Mr. Giles' communications with you, including, but not limited to, his August 23, 2018 letter should have no influence on the substance of your report.

Dr. Platt did not respond to Mr. Giles' inquiry, and issued a final version of her report that was identical to her earlier draft.

Dr. Platt's report is fifteen pages long and quite comprehensive. It discusses the presenting problem and recounts an extensive document review. The report reflects that Dr. Platt spoke extensively with M.M., who related her son's developmental and educational history. Dr. Platt reviewed K.M.'s medical history. She observed and interviewed K.M. While Dr. Platt indicated that additional information would be needed to establish finalized diagnoses, she noted that K.M. appeared to meet the criteria for a diagnosis of mood disorder, and presented with a history of depressive disorder, dysthymic disorder and anxiety disorder. Dr. Platt opined that "[K.M.'s] clinical situation demands an academic setting that can accommodate to his serious emotional

[2] Although the evaluation was being purchased on behalf of K.M., he and his mother were a "third-party" for purposes of the contract between Platt and the Board.

problems; as well, at this time, mother should provide intensive psychiatric/psychotherapeutic treatment."

On August 27, 2018, counsel for M.M. filed a request for a Complaint Investigation with the Department, urged that the District's action in prohibiting Dr. Platt from responding to his inquiries and from communicating with him, "denied Dr. Platt the discretion to determine the content of her final evaluation report," and accordingly, denied his client the independent evaluation guaranteed by the IDEA. The Department declined to investigate, replying that the Complaint did not allege a violation of State or Federal special education law or regulation. A request for reconsideration by counsel was denied by the Department.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The parties seek relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "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." Our regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, 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 a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the 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 fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party [in a summary judgment motion] offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, '[f]anciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v.

Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 251–52. I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts that require a plenary hearing, and the Board is entitled to judgment as a matter of law.

The due process petition asks that I determine whether the Board complied with its obligations to provide M.M. with an independent evaluation at public expense. N.J.A.C. 6A:14-2.5(c) provides that 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." The regulation moreover specifies that a parent is 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." See also: 34 C.F.R. §300.502(d). The contention that the Board here did not properly provide an independent evaluation is based wholly on the view that the parent, through her attorney, is entitled to unfettered and ex parte contact with the independent expert, including the right to review a draft of the expert's report, and then ask the expert to edit that report.

I **CONCLUDE** that the claims of the petition are meritless and must be dismissed. My research reveals no interpretation of the operative regulations that would support M.M.'s view that an independent evaluation includes the right of the parent to privately seek amendments to its contents. Nor did either attorney cite any authority to that effect. And as the Board correctly asserts, an independent evaluation purchased at public expense must be conducted according to N.J.A.C. 6A:14-3.4. The regulation provides in pertinent part that evaluations must include the following:

> 1. An appraisal of the student's current functioning and an analysis of instructional implication(s) appropriate to the professional discipline of the evaluator;
>
> 2. A statement regarding relevant behavior of the student, either reported or observed and the relationship of that behavior to the student's academic functioning;
>
> 3. If an assessment is not conducted under standard conditions, the extent to which it varied from standard conditions;

Dr. Platt's report contained each of these components; comprehensively assessed K.M.; opined about his educational needs; and generally met the requirements of an evaluation for educational purposes as set forth at N.J.A.C. 6A: 14-3.4(h).

Moreover, petitioner's claims should have been pursued as a Request for Enforcement and not as a Petition for Due Process. For this additional reason, I **CONCLUDE** the petition must be dismissed. The controverted evaluation took place pursuant to a settlement agreement. While the parent has a right to request an independent evaluation, the Board also has a right to file for due process and contest that request. N.J.A.C. 6A:14-2.5(c)(1). The Board did so here, and its ultimate compromise with the parent was reduced to a Final Decision by Judge Testa on October 31, 2018. If M.M. feels that the Board has not complied with Judge Testa's decision, N.J.A.C. 6A:14-2.7(t) provides

> If either party fails to comply with any provision of a final decision in a due process hearing, either party may seek enforcement of the decision in a court of appropriate jurisdiction. If the public agency responsible for implementing the IEP fails to implement a hearing decision of the Office of Administrative Law with respect to the student's program or services, a request for enforcement may be made by the parent or the parent's attorney on behalf of the student. The request shall be made in writing to the State Director of the Office of Special Education Programs, Department of Education no later than the 90th calendar day from the date that the action directed in the hearing decision that is the subject of the enforcement request was required to have occurred. The request shall include a copy of the decision issued by the Office of Administrative Law…The Office of Special Education Programs

> shall determine the implementation of the decision. If it is determined that the district has failed to implement the decision or part of the decision, the Office of Special Education Programs shall order the district to implement the decision or part of the decision, as appropriate...

I anticipate counsel for M.M. will protest that he tried to seek the Department's assistance, but to no avail, as the Department declined to entertain his request for a Complaint Investigation. Any such protestations would be in vain. Firstly, a Complaint Investigation is a different procedural course than a Request for Enforcement. And secondly, to the extent that petitioner did not receive satisfaction from the Department, her recourse lies elsewhere. The decision on a Complaint Investigation is a final agency decision. See: Lenape Reg. Bd of Ed. v New Jersey Dept of Educ, 399 N.J. Super. 595 (App. Div., 2008). The OAL conducts fact-finding hearings and issues an Initial Decision (and the agency then issues a Final Decision) or conducts a fact-finding hearing and issues a Final Decision (as here, when a case is filed under the IDEA). The OAL does not review final agency decisions, to include decisions by the Department of Education. See: N.J.S.A. 52:14F-1 et seq.

ORDER

Based on the foregoing, the due-process petition is **DISMISSED**. The hearing date of **June 12, 2019**, thus will not be needed, and is adjourned.

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.

May 20, 2019

DATE

ELLEN S. BASS, ALJ

Date Received at Agency May 20, 2019

Date Mailed to Parties:

sej