



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 01335-19

AGENCY DKT. NO. 2019-29210

MAHWAH BOARD OF EDUCATION,

Petitioner,

v.

S.M. ON BEHALF OF L.T.,

Respondent.

Nathanya G. Simon, Esq., for petitioner (Scarinci & Hollenbeck, attorneys)

S.M., petitioner, pro se

Record Closed: July 22, 2019

Decided: September 20, 2019

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Mahwah Board of Education (Board or petitioner) filed a Due Process Petition (Petition) to deny respondent S.M.'s (the parent or respondent) request for an independent Functional Behavioral Assessment (FBA), including a home evaluation, on the basis that the prior FBAs conducted by the Board on L.T. were appropriate. The Department of Education, Office of Special Education Policy and Procedure transmitted

the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 to the Office of Administrative Law (OAL), where it was filed on January 25, 2019.

A Due Process hearing was scheduled for April 23, 2019, but adjourned at the request of the parties as they attempted to resolve the matter. The hearing was rescheduled to June 21, 2019, which was also adjourned at the request of the parties as they were not available. The Due Process hearing is presently scheduled for October 18, 2019.

When the respondent rejected the Board's Offer of Settlement, the petitioner filed a Motion for Summary Decision on June 4, 2019. Respondent filed an opposition to the motion and petitioner then filed a reply. The record closed on July 22, 2019, following receipt of subsequent correspondence from the parties concerning the Motion.

FINDINGS OF FACT

Based upon the parties' submissions, and for the purpose of deciding the motion to dismiss, I **FIND** the following:

1. L.T. is a nine-years-old student, born on May 26, 2010, and is classified as Multiply Disabled.
2. L.T. is currently attending an out-of-district placement at the Inclusive Learning Academy, located in Kinnelon, New Jersey. Mahwah Township Public School District (District) is the local education agency responsible for providing L.T. with a free appropriate public education in the least restrictive environment.
3. On December 7, 2018, petitioner received a written request from the parent requesting an independent FBA, including a home evaluation for L.T. The written request specifically reads: "Please consider this request pursuant to N.J.A.C. 6A:14-2.5 for Independent functional behavior assessment including home evaluation of [L.T.]."

4. L.T. had an FBA conducted over two days, on April 18 and April 30, 2018, and a second FBA on August 14, 2018, the results of which were reported to the IEP team.
5. On December 26, 2018, the Board filed the instant Petition seeking to deny respondent's request for a third FBA. The Board contends in its Petition that the requested independent FBA is not necessary, would be repetitive, and would not provide any new or educationally relevant information because the prior two FBAs were complete and comprehensive, were thoroughly considered, were utilized to develop an appropriate IEP containing services in an out-of-district placement, and were recently conducted within the 2018 calendar year.
6. In respondent's Answer to the Petition, she asserts that the most recent FBA is not appropriate and needs to be updated, and indicates that she had been in contact with Dr. Rebecca Schulman (Schulman), a Licensed Psychologist and Board Certified Behavior Analyst, concerning conducting the FBA.
7. By email dated February 22, 2019 to Lisa Rizzo (Rizzo), the District Director of Special Services, the parent expressed her intention to have Schulman perform the independent evaluation.
8. In March 2019, the parties discussed having a behaviorist, possibly Schulman, do an in-school observation and in-home parent training and the Board reached out to Schulman requesting her availability. Rizzo proposed to Schulman that she provide one hour of file review; one hour of in-school observation; up to two hours for each home parent training (respondent and L.T.'s father); development of a BIP that would coordinate the home towards the school methods; and recommendations. Schulman suggested the agreement not refer to "development of a BIP," but "development of behavioral strategies that will coordinate" Schulman reported her

availability, and Rizzo was to seek the parent's consent to conduct the FBA and report back.

9. The parent was promptly informed of Rizzo's communications with Schulman, including the terms of services to be provided by Schulman and paid for by the Board. The Board would proceed with contracting Schulman's services upon receiving the parent's consent.
10. A letter dated March 26, 2019 from Nathanya G. Simon, Esq. (Simon), counsel for the Board, to the parent confirmed the Board's agreement to utilize Schulman in accordance with the terms of the proposal submitted by Schulman to the District, and pay for her services. The parent was asked to sign the required Parent Informed Consent Form to proceed with retaining Schulman, and an Authorization to release/obtain records and information by and between Schulman, the District and Inclusive Learning Academy. The Parent Informed Consent Form prepared by Schulman's office lists the following anticipated consultation services: School behavioral observation (one hour); In-Home consultation to parents for program development, addressing challenging behaviors, positive behavior supports, social skills, etc. (four hours); and Recommendations will be evidence-based. The parent was informed that once the signed documents were received, she would be able to speak directly with Schulman.
11. When there was no response from the parent, Simon emailed her again on April 1, 2019 and the parent indicated that she needed time to review the proposal. The April 23, 2019 hearing was subsequently adjourned to allow the parties additional time to settle the matter.
12. By letter dated April 24, 2019, Simon repeated to the parent the Board's willingness to resolve the matter by providing an FBA by Schulman which would include both school-based and home-based observations, review of records and development of behavioral strategies to coordinate with the school-based BIP. In the letter, Simon recounted a telephone conference

with the parent and the undersigned in which the parent appeared to indicate that she would now prefer to have the behaviorist at L.T.'s school provide the services requested. Simon asked the parent to clarify whether she no longer wanted Schulman to provide the FBA services, and reminded the parent of Schulman's limited availability for the remainder of the school year.

13. On May 14, 2019, the parent rejected the Board's Offer of Settlement.

LEGAL ANALYSIS AND CONCLUSION

Petitioner asserts that the matter is ripe for summary decision and should be dismissed because the matter is moot. The parent requested an independent FBA with an in-home evaluation. The Board filed the Petition to deny the parent's request for an independent FBA on the basis that it was not needed as the two FBAs conducted earlier that year were entirely appropriate. According to petitioner, it is undisputed that after extensive negotiations, the Board's Offer of Settlement incorporates the proposal made by Schulman, a behaviorist who the parent herself selected. Schulman would perform one hour of file review, a one-hour in-school observation, up to two hours of in-home observations and training for both homes, and would develop behavioral strategies and recommendations for L.T. to coordinate with the school BIP. Because the Board's Offer of Settlement provides what the parent requested, petitioner argues that the matter should be summarily decided and dismissed as there is no necessity for an evidential hearing on this Petition.

The parent filed an opposition to the motion for summary decision, and requests that an independent educational evaluation (IEE) be ordered. In the opposition, which does not contain an affidavit, respondent appears to assert that the Offer of Settlement does not contain the evaluation sought and that Schulman's evaluation would not be independent because the District has a relationship with her. The suggestion that Schulman would not be providing an "independent evaluation," is without merit and unsupported by any facts. An IEE is broadly defined as "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the

education of the child in question.” 34 C.F.R. 300.502(a)(3)(i). There is nothing in the record to suggest that Schulman is not qualified to conduct the IEE/FBA or that she is employed by the Board and therefore not “independent.” In fact, it was the parent herself who suggested using Schulman. The parent’s opposition also recounts several complaints she has with the District and Simon which are not related to the present matter.

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits that may have been filed with the application, show that there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party, in order to prevail, must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding. Ibid. These provisions mirror the summary-judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

An action is considered moot when it no longer presents a justiciable controversy, and the conflict between the parties has become merely hypothetical. In re Conroy, 190 N.J. Super. 453, 458 (App. Div. 1983). A case is considered “moot” when the decision sought . . . can have no practical effect on the existing controversy.” Greenfield v. N.J. Dep’t of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006).

In P.S. ex rel. I.S. v. Edgewater Park Township Board of Education, EDS 10418-04, Final Decision (October 31, 2005), <http://njlaw.rutgers.edu/collections/oal/>, a parent filed for due process due to a disagreement over her district’s proposed placement of her child, and requested a different, approved private school. The district had agreed to the parent’s placement request and moved to dismiss the petition as moot due to the same. The parent wanted to continue the hearing to resolve other disagreements she had over the program that would be provided to the child at her requested placement. The administrative law judge (ALJ) concluded that the relief sought by the parent had already been granted by the district through their agreement to place the child at her requested school. The ALJ dismissed the petition as moot and reasoned that the parents had the right to file a new due process petition regarding other issues with the district.

Here, the parent requested an independent FBA including a home evaluation for L.T. The Board responded by filing the instant Petition seeking to deny this request, in compliance with N.J.A.C. 6A14-2.5(c), on the basis that the April and August 2018 FBAs were appropriate. The parties engaged in negotiations over the course of several weeks and the Board ultimately agreed to the independent FBA which included the home evaluation the parent expressly requested. The Board also agreed to have the independent FBA conducted by Schulman, a behaviorist selected by the parent herself. However, the parent then rejected the Board's Offer of Settlement, which would have provided the independent FBA including a home assessment requested by her in December 2018, and now appears to be requesting an IEE to be conducted by another individual with conditions dictated by the parent. I agree with petitioner that the request originally sought by the parent was fully granted through the Board's Offer of Settlement and that the matter is ripe for dismissal. Here, a due process hearing would be merely a hypothetical exercise and the decision sought by the parent (i.e., an order compelling an independent evaluation or independent FBA) would have no practical effect on the existing controversy since the Board has already agreed to provide such service at their own expense.

Based on the foregoing, I **CONCLUDE** that the matter is ripe for summary decision as there are no genuine issues of material fact which would require a due process hearing. I also **CONCLUDE** that the Board's motion for summary decision to dismiss the matter with prejudice should be granted because the matter is now moot. The relief requested by respondent, an independent FBA which included a home assessment, has been granted by the Board in the Offer of Settlement.

Finally, I **CONCLUDE** that the respondent's request for an order compelling an IEE is denied as respondent has not provided the legal or factual basis to warrant such relief.

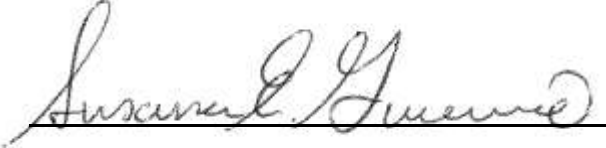
ORDER

For the reasons set forth above, it is hereby **ORDERED** that the petitioner's motion for summary decision is hereby **GRANTED** and the matter is hereby **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) 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 (2019). 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.

September 20, 2019

DATE



SUSANA E. GUERRERO, ALJ

Date Received at Agency:

September 23, 2019

Date Mailed to Parties:

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