State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING
MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDS 6021-19
AGENCY DKT. NO. 2019-29661
(CONSOLIDATED)

UPPER FREEHOLD REGIONAL BOARD OF EDUCATION,
Petitioner,
v.
M.H. on behalf of J.G.,
Respondent,

And,

OAL DKT. NO. EDS 6736-19
AGENCY DKT. NO. 2019-29663

M.H. on behalf of J.G.,
Petitioner,
v.
UPPER FREEHOLD REGIONAL BOARD OF EDUCATION,
Respondent.

Jared S. Shure, Esquire, for petitioner/respondent Upper Freehold Regional Board of Education (Methfessel & Werbel, attorneys)

M.H. on behalf of J.G., respondent/petitioner, pro se

Record Closed: June 3, 2020 Decided: June 5, 2020

BEFORE **DEAN J. BUONO,** ALJ:

STATEMENT OF THE CASE

Petitioner/respondent, Upper Freehold Regional Board of Education (District or Board), brings a motion for summary decision because respondent/petitioner's (M.H.) request for independent educational evaluations were allegedly made before the District conducted any evaluations of its own. It is alleged that it is axiomatic that a parent or guardian may not request an independent evaluation until the school district completes an initial or reevaluation; as a matter of law the Board has no obligation to provide independent evaluations. M.H. argues that the Upper Freehold Board of Education failed to comply with her requests and placed abnormally burdensome struggles on her in order to obtain rights under the IDEA.

PROCEDURAL HISTORY

The Upper Freehold Regional Board of Education filed a complaint for due process with the Office of Special Education Programs (OSEP). M.H. on behalf of J.G., filed a cross-petition for relief. The complaints were filed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400 to 1482. On May 6, 2019, the Office of Special Education Programs transmitted OAL Dkt. No. EDS 6021-19 to the Office of Administrative Law (OAL) and on May 17, 2019, the Office of Special Education Programs transmitted OAL Dkt. No. EDS 6736-19 to the OAL.

On March 4, 2019, the Board of Education filed its motion for summary decision. On May 29, 2020, M.H. filed a reply and on June 3, 2020, the District filed a follow-up supportive response.

STATEMENT OF FACTS

Upper Freehold Board of Education argues that J.G. is a nine-year-old fourth grader who attends the Newell Elementary school. M.H. is J.G.'s legal guardian. On February 24, 2019, M.H. requested that the District's child study team evaluate J.G. for eligibility in special education related services. On March 12, 2019, M.H. met with the child study team who determined that an evaluation was not warranted in this case. Thereafter, M.H. requested that the District fund independent educational, psychological and neurological evaluations of J.G. However, the District had not conducted any evaluations of J.G.

On September 19, 2019, the parties convened for an initial evaluation planning meeting. As a result of the meeting, the child study team proposed to conduct a full array of evaluations of J.G. consisting of an educational evaluation, psychological, social and speech/language evaluation. M.H. consented to these evaluations. All evaluations were completed by November 19, 2019, and on December 3, 2019, the parties conducted an initial eligibility meeting. The findings at this eligibility meeting were that the child study team recommended and proposed special education and related services under a classification category of other health impaired for J.G. M.H. consented to J.G.'s eligibility and classification.

M.H. contends that this case involves the Child Find statues that required the District to find, locate and evaluate J.G. for special education services. She alleged that the District failed to follow procedural safeguards as mandated by the IDEA and consistently denied M.H. reasonable, appropriate and meritorious requests related to J.G.'s education.

Specifically, it is alleged that the District violated its Child Find obligation after receiving a referral request from M.H. In fact, the District's initial eligibility evaluation did not include a therapist that consulted with J.G. and a basic skills teacher. Moreover, it is alleged that the District placed burdensome struggles on J.G.'s family under the IDEA, including choosing to be unresponsive and delaying J.G.'s free and appropriate education. Examples are set forth in an eleven-point recitation in their response to the

motion for summary decision. However, in her April 4, 2019, purported request for due process, M.H. on behalf of J.G. is requesting independent educational evaluations. In fact, it states that: "I would like this matter resolved by the school district being required to pay for outside testing."

However, in retort, the District argues that the sole issue raised by M.H. in the sole pleading she filed in this matter is whether she is entitled to independent educational evaluations ("IEE's"). It is beyond dispute that she is not. She argues that it is axiomatic that parents are only entitled to IEE's upon a school district's completion of an initial evaluation or reevaluation. See, 34 C.F.R. § 300.502(b); N.J.A.C. 6A:14-2.5(c). As argued at length in the Board's moving papers, M.H. is not entitled to IEE's because she requested them *before* the District conducted its own evaluations of J.G. See, T.P. v. Bryan Cty. Sch. Dist., 792 F.3d 1284, 1293 (11th Cir. 2015); Schaffer v. Weast, 546 U.S. 49, 60 (2005); S.S. v. Hillsborough Twp. Pub. Sch. Dist., 2019 U.S. Dist. LEXIS 15136 (D.N.J. Jan. 31, 2019). As district-administered testing is a prerequisite to a parent requesting an IEE, M.H. has no legal right to request IEE's from the District.

The case law and non-binding agency guidance M.H. cites in her opposition are unavailing. In N.S. o/b/o W.S. v. Newark Bd. of Educ., 2014 N.J. AGEN LEXIS 734 (OAL Dkt. No. EDS 08229-14, Nov. 19, 2014), the Court did not hold that a parent may request an IEE prior to a district conducting an evaluation, but rather granted a parent's request for independent evaluations because the school district failed to adhere to N.J.A.C. 6A:14-2.5(c)(1)(ii), which requires school districts to request a due process hearing within twenty calendar days of receiving a request for IEE's. The Court in W.S. did not concede that the parent's request was valid, but noted that the twenty-day requirement prevents school districts from "refus[ing] to evaluate indefinitely, without recourse to the parent." W.S., 2014 N.J. AGEN LEXIS 734 at *18. Here, unlike in W.S., the Board filed for due process to deny the IEE's sought by M.H. within twenty days of receiving her request.

Similarly, in C.S. & L.B. o/b/o K.S. v. Ramsey Bd. of Educ., 2012 N.J. AGEN LEXIS 99 (OAL Dkt. No. EDS 10160-11, Feb. 24, 2012), the Court did not hold that a

parent may request an IEE prior to a district conducting an evaluation, but again granted such a request because the respondent school district did not file for due process within twenty calendar days of receiving a request. "Both the federal and New Jersey regulations either require the District to pay for the independent educational evaluation requested by the parent, or alternatively, initiate a due process hearing . . . . The District did neither." Id. at 7. Again, here, the Board filed for due process to deny the IEE's sought by M.H. within twenty days of receiving her request.

Pointedly, the dicta in the United States Department of Education's non-binding 2019 Zirkel guidance letter merely buttresses the Board's position. That letter does not stand for the proposition that a parent may request IEE's before a district conducts its own testing. Rather, it simply advises that, under the IDEA, parents may request IEE's after a district conducts an initial evaluation *even if the district's initial evaluation determines that the student is ineligible for special education and related services*. Zirkel addresses the fact that the right to an IEE is not limited to parents of children who are eligible under the IDEA but extends to a child who was found not eligible for special education—but only *after* completion of an initial evaluation. In other words: if a district convenes an initial planning meeting and decides not to evaluate a child, then the parent may file a request for due process or mediation, but would not be entitled to an IEE because the disagreement is over a decision to evaluate as opposed to the results of an evaluation. By contrast, if a district conducts a full initial evaluation of a student and determines he/she is not eligible, the parent would be entitled to request an IEE because the disagreement stems from the results and/or interpretation of a completed evaluation. Moreover, in reviewing the applicable sections of 34 C.F.R., we were unable to find any regulation stating that a decision not to evaluate a student is somehow legally tantamount to having evaluated a student. This is unsurprising both as a matter of logic and of common sense: not evaluating and evaluating cannot possibly be the same thing.

The District also claims that in M.H.'s opposition to the Board's motion, M.H. characterizes the issues in this case. However, apart from entitlement to IEE's, none of the issues—Child Find, eligibility, procedural safeguards, FAPE, and "reasonable, appropriate and meritorious requests"—was ever raised by M.H. in any pleading, and

therefore these issues are not cognizable before the Court. See M.H.'s Petition for Due Process, Exhibit D to Antonucci Cert., wherein M.H. requests only that the Board "pay for outside testing." I agree with the District.

LEGAL DISCUSSION

Pursuant to N.J.A.C. 1:1-12.5(b), a summary decision "may 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." This rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules, R. 4:46-2. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> [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 fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . 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 (citations omitted).]

Here that law is quite clear that district-administered testing is a prerequisite to a parent requesting an IEE, M.H. has no legal right to request IEEs from the District. T.P. v. Bryan Cty. Sch. Dist., 792 F.3d 1284, 1293 (11th Cir. 2015); Schaffer v. Weast, 546 U.S. 49, 60 (2005); S.S. v. Hillsborough Twp. Pub. Sch. Dist., 2019 U.S. Dist. LEXIS 15136 (D.N.J. Jan. 31, 2019).

CONCLUSION

The Board's argument for summary decision is correct based upon the facts and law. In M.H.'s April 4, 2019, purported request for due process, M.H., on behalf of J.G., is simply requesting IEE's. In fact, it states that: "I would like this matter resolved by the school district being required to pay for outside testing." There is no genuine issue of material fact that district-administered testing is a prerequisite to a parent requesting an IEE, M.H. has no legal right to request IEEs from the District. As such, having reviewed the parties' submissions and arguments in support of, and opposition to, the within motion for summary decision, **I CONCLUDE** that no issue of material fact exists.

ORDER

It is **ORDERED** that the Board's motion for summary decision be and hereby is **GRANTED.** It is **FURTHER ORDERED** that these matters be **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 Policy and Dispute Resolution.

June 5, 2020
DATE

DEAN J. BUONO, ALJ

Date Received at Agency

Date Mailed to Parties:

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