State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DOCKET NO. EDS 16744-19

AGENCY REF. NO. 2020-30840

D.F. AND G.D. ON BEHALF OF J.F.,

Petitioners,

v.

LAWRENCE TOWNSHIP BOARD

OF EDUCATION, MERCER COUNTY,

Respondent.

D.F. and **G.D.** on behalf of **J.F.,** petitioners, pro se

Michael A. Pattanite, Jr., Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Lang, Carrigg & Casey, LLC, attorneys)

Record Closed: April 14, 2020 Decided: April 27, 2020

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF CASE

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1485, and N.J.S.A. 18A:36A-11(b). Petitioners D.F. and G.D. bring this action on behalf

of their minor son, J.F., seeking an order directing respondent, Lawrence Township Board of Education (Board), Mercer County, New Jersey, to use the comprehensive evaluations of J.F. conducted in 2017 by or at the request of the West Windsor-Plainsboro School District (WW-P), Mercer County, New Jersey, to develop a service plan for use by J.F.'s current placement, Notre Dame High School (Notre Dame), Lawrence Township, New Jersey, and in the interim, to use the last service plan for J.F. used by St. Paul's R.C. School (St. Paul), Princeton, New Jersey.

PROCEDURAL HISTORY

On September 30, 2019, petitioners D.F. and J.D. filed a petition of appeal with the Department of Education's Office of Special Education Policy and Dispute Resolution (OSEP). A local resolution session was scheduled for November 12, 2019, but petitioners did not participate. On November 13, 2019, Respondent Board filed a motion for summary decision in its favor in lieu of an answer. On November 29, 2019, this matter was transmitted by OSEP to the Office of Administrative Law (OAL), where it was filed for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On December 5, 2019, the parties appeared for a settlement hearing before the Honorable Joseph A. Ascione, Administrative Law Judge (ALJ). The matter did not settle but at the parties' request, was adjourned and rescheduled for a settlement hearing on January 2, 2020, before the Honorable Mary Ann Bogan, ALJ. The matter did not settle and was reassigned to the undersigned. I met with the parties on January 2, 2020, and scheduled hearings for March 2, April 22 and 24, 2020. During this meeting, petitioners stated that they were considering retaining an attorney and therefore, I agreed to set the briefing schedule on respondent's motion for summary decision during the March 2, 2020 hearing.

A prehearing order was issued on January 6, 2020. Petitioners objected to the description of the issues in dispute found in the prehearing order and, therefore, the parties participated in a telephonic hearing on January 6, 2020. An amended prehearing order was issued on January 13, 2020, to which petitioners objected on the grounds that the

description of the issues in dispute was not accurate.[1] Further discussion on this matter was postponed until the telephonic hearing of March 2, 2020.

During the March 2, 2020 telephonic hearing, petitioners stated that they decided against retaining counsel for this matter. The briefing schedule for respondent's motion for summary decision was set and the hearing of April 22, 2020 was adjourned to permit time for consideration of the motion. Further, petitioners were advised of the opportunity they would be provided to clarify their description of the disputed issues in both their responsive papers and on the record at the beginning of the April 24, 2020 hearing, should such hearing be necessary. The briefing schedule was memorialized in a letter to the parties dated March 3, 2020.

On or about March 18, 2020, D.F. and G.D. responded to the Board's motion to dismiss. Due to technical problems related to the closing of the OAL during the COVID-19 crisis, petitioners' response was not received by the undersigned until April 7, 2020. The April 24, 2020 hearing was adjourned due to the inability of the OAL to hold in-person hearings during the COVID-19 crisis, with the intention to reschedule should respondent's motion for summary decision be denied. On April 14, 2020, the Board submitted a reply brief, and the motion for summary decision is now ripe for review.

FACTUAL DISCUSSION AND FINDINGS

Based on the documents filed by the parties in this matter, including the petition for due process, respondent's motion for summary decision, petitioners' response to motion to dismiss, and respondent's reply, I **FIND** the following **FACTS:**

[1] Petitioners objected to the description found in the Statement of the Case, above. In their response to the motion for summary decision, petitioners state that they "are requesting that the Lawrence Township School District use the comprehensive 2017 West Windsor Plainsboro [sic] evaluations to formulate a current Service plan for JF 2019-2020 school year reevaluations. The request is for the last active Service plan provide to JF while he attend the previous non-public school be put in place by the Lawrence township school district be used in the interim." Ltr. Br. of Petitioners in Response to Motion for Summary Decision (March 18, 2020) at 1.

1. J.F. is a fourteen year old male student enrolled in ninth grade at Notre Dame, a private (non-public) high school located within Lawrence Township School District (District). J.F. resides within WW-P, but WW-P is not a party to this matter.

2. In their petition for due process, his parents described J.F. as having a "specific learning disability."[2] Petition for Due Process (September 30, 2019), at 1. J.F. is not currently classified as eligible for special education and/or related services.

3. During the 2017-2018 school year, J.F. attended seventh grade at St. Paul, a private (non-public) elementary and middle school located in Princeton Township School District (Princeton). Neither St. Paul nor Princeton is a party to this matter.

4. At some time prior to or during the 2017-2018 school year, WW-P performed an educational evaluation of J.F. and determined that he was eligible for special education and/or related services. During the 2017-2018 school year, St. Paul provided J.F. with special education and/or related services pursuant to a service plan. Neither the WW-P evaluation nor the St. Paul service plan were provided in this matter.

5. During the 2018-2019 school year, J.F. attended eighth grade at St. Paul.

6. On information and belief, Princeton uses the Educational Services Commission of New Jersey (ES Commission) to provide identification and evaluation services for students attending nonpublic schools within Princeton, including St. Paul. The ES Commission provides child study team services at St. Paul. Br. in Support of Respondent's Motion to Dismiss (November 13, 2019), Ex. F.

[2] The New Jersey code defines a "specific learning disability" as "a disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." N.J.A.C. 6A:14-3.5.

7. On or about October 9, 2018, the ES Commission notified petitioners by letter that "despite numerous attempts, [they] did not receive a signed 407-1 form for [J.F.'s] reevaluation" and, therefore, J.F. was declassified and was no longer eligible for special education or related services. Ibid.

8. J.F. did not receive special education and/or related services at St. Paul during the 2018-2019 school year.

9. Petitioners stated that prior to the beginning of the 2019-2020 school year, they requested that J.F.'s "last service plan" be reviewed and continued at Notre Dame and that a new service plan be formulated using the 2017 WW-P evaluation. Petition for Due Process, at 3. Petitioners' request was for Notre Dame to use the service plan in effect for J.F. at St. Paul during the 2017-2018 school year until a new service plan was developed and adopted.

10. On September 27, 2019, petitioners met with representatives of the ES Commission, including Dr. Ken Shore. Dr. Shore stated that the ES Commission would not accept the 2017 WW-P evaluation. Br. of Respondent, at 3. Petitioners were provided the consent for reevaluation forms required to reevaluate J.F. to determine his eligibility for special education and related services. Ibid. To date, petitioners have not executed such consent forms, J.F. has not been reevaluated, and he is not receiving special education and/or related services at Notre Dame.

11. On October 1, 2019, petitioners filed a mediation request with OSEP. The Board attempted to schedule the mediation session with petitioners but were unsuccessful, in part due to petitioners' refusal to communicate with the Board's attorney. See, Br. of Respondent, Exs. B and C.

12. On October 30, 2019, the request for mediation was converted to a Due Process Petition. The Board attempted to schedule a local resolution meeting but

petitioners refused to meet with the Board's attorney. See, Br. of Respondent, Exs. D and E.

13. The parties participated in two settlement hearings at the OAL on December 5, 2019, and January 2, 2020. Neither was successful.

POSITIONS OF THE PARTIES

The Board contends that summary decision in its favor is appropriate for three reasons: (1.) the petition of D.F. and G.D. on behalf of J.F., filed on October 1, 2019 (petition), fails to state a special education claim against the Board pursuant to N.J.A.C. 6A:14-2.7(a); (2.) the undisputed facts show that the Board has met its legal obligations to J.F. via its policy which ensures that students attending non-public schools within the District are identified, evaluated, and reevaluated as necessary, and by its action in facilitating a meeting between petitioners and the ES Commission, the agency retained by the Board to determine if non-public students are eligible for special education and related services; and (3.) the allegations raised in the petition regarding action or inaction of Notre Dame do not rise to a valid claim against the Board.

Petitioners D.F. and G.D. respond that J.F. became eligible for special education and related services in 2015, when he was initially classified with a learning disability.[3] To declassify J.F., the district (which would then have been Princeton) should have filed a petition for due process and presented documentation refuting the last documented evaluation on file, which would have been the 2017 WW-P evaluation. Princeton did not follow this process; when J.F. transferred to Notre Dame, respondent Board had "a duty to J.F. to review his complete file and determine that the last documented evaluation [deemed] J.F. eligible for services." Ltr. Br. of Petitioner, at 1. Further, New Jersey law permits parents to consent to or refuse reevaluations; in the case where the parent refuses to present the child for reevaluation, the child's continued eligibility for special education and related services is based on the last evaluation conducted. The Board cannot deny services to J.F. on the basis of Princeton's unlawful action in declassifying J.F. without due process.

[3] Note that petitioners have provided no documents to support any decisions made with respect to J.F.'s eligibility for special education and related services, but in any event, the present matter involves only the decision of the ES Commission and St. Paul to declassify J.F. in 2018.

The Board responds that petitioners allege no facts in dispute and the undisputed facts clearly show that at the time J.F. enrolled in Notre Dame, he was not eligible for special education and related services. At the time of J.F.'s enrollment and at all times afterward, petitioners have requested that J.F. be classified based on the 2017 WW-P evaluation. The Board took all action required by law and educational practice to evaluate a newly-matriculated, non-classified, nonpublic school student to determine his eligibility for special education and related services but petitioners have refused to have him evaluated.

LEGAL ANALYSIS AND CONCLUSION

Summary decision is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute. By applying the applicable law and standard of proof to the undisputed facts, a decision may be reached in a case without the necessity of a hearing at which evidence is presented and testimony taken. The procedure is equally applicable in judicial as well as executive branch administrative proceedings. N.J.A.C. 1:1-12.5.

The regulations provide that the decision sought by the movant "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." N.J.A.C. 1:1-12.5(b). For the adverse party (in this case, D.F. and G.D.) to prevail, they "must set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

The standards for determining motions for summary judgment are found in Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74–75 (1954), and later in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). A motion for summary decision may only be granted where the moving party sustains the burden of proving "the absence of a genuine issue of material fact," and all inferences of doubt are drawn against the movant. Judson, 17 N.J. at 74-75. The existence of disputed facts will only prevent summary decision if the disputed facts are

material to the application of the underlying charges. Frank v. Ivy Club, 120 N.J. 73, 98 (1990).

The papers filed by both parties in this case reveal no dispute with respect to material facts and, therefore, I **CONCLUDE** that summary judgement is appropriate. Petitioners appear to allege that Princeton and/or St. Paul acted unlawfully to declassify J.F. and to subsequently fail to maintain his records, but such allegations—even if true—involve action or inaction that would have occurred before J.F. enrolled at Notre Dame and therefore, before the Board had any obligation to J.F. Petitioners allege no basis by which the Board can be held responsible for the action or inaction of another district.

Summary decision is appropriate when "the evidence . . . is so one-sided that one party must prevail as a matter of law." Brill, 142 N.J. at 541 [quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)]. In reviewing the proffered evidence to determine the motion, the judge must be guided by the applicable evidentiary standard of proof that would apply at trial on the merits. The Board bears the burden of proof in this matter by a preponderance of the competent, credible evidence. N.J.S.A. 18A:46-1.1.

As a recipient of Federal funds under the IDEA, the State of New Jersey must have a policy that assures all children with disabilities the right to a free appropriate public education (FAPE) designed to meet their unique needs. 20 U.S.C. §1412. State regulations track this requirement that a local school district must provide FAPE as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. The obligation of a local school district to locate, identify and evaluate all students with disabilities extends to "students with disabilities attending nonpublic schools." N.J.A.C. 6A:14-1.2(b).

The regulations specifically require local districts to develop written procedures to locate disabled "students attending nonpublic schools located within the district regardless of where they reside," including "evaluation to determine eligibility for special education and related services." N.J.A.C. 6A:14-3.3(a)(3)(iii). The regulations further provide that a "parent may make a written request for an evaluation to determine eligibility for services" and such a

request must be acted on without delay. N.J.A.C. 6A:14-3.3(d)(1). In compliance with these regulations, Lawrence (and for that matter, Princeton) uses the ES Commission to evaluate students attending nonpublic schools within the District to determine their eligibility for special education and related services.

New Jersey regulations provide for an "initial evaluation and classification of a child by a 'child study team [CST],' which consists of a school psychologist, a learning disabilities teacher-consultant, and a school social worker." Lascari v. Bd. of Educ., 116 N.J. 30, 35 (1989). Once a child is classified with a disability and is therefore eligible for special education and related services, the local educational agency through the CST, which includes the parents, is responsible for promulgating and implementing an individual education program (IEP) for that child. 20 U.S.C. 1414(d)(2)(A). The IEP, also referred to (as by petitioners here) as a "service plan," is the "'centerpiece' of the IDEA's system for delivering education to disabled children," ensuring that each child receives a "basic floor of opportunity." D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010); see also, N.J.A.C. 6A:14-3.7.

While much of J.F.'s educational history is cloudy, the undisputed facts described above make clear that for a short period of time at least, J.F. received special education and related services pursuant to a service plan while enrolled at St. Paul. What is also clear is that in 2017, the district of J.F.'s residence, WW-P, conducted an evaluation of J.F. The results of this evaluation were found acceptable by Princeton and/or St. Paul because, during the 2017-2018 school year, J.F.'s service plan was developed using the WW-P evaluation. However, by the beginning of the 2018-2019 school year, Princeton, the local education district in which St. Paul is located, arranged with the ES Commission for a reevaluation of J.F. to confirm his continued eligibility for special education and related services. Petitioners did not execute the required consent for reevaluation (the 407-1 form) and as a result, the ES Commission notified petitioners that J.F. was declassified.

For the 2019-2020 school year, petitioners enrolled J.F. at Notre Dame, which is located in Lawrence. Prior to the beginning of the 2019-2020 school year, petitioners made a request to the Board for special education and related services for J.F., not for an evaluation

of J.F. Since J.F. was not at the time classified as eligible for special education, the Board properly convened a meeting with petitioners and representatives of the ES Commission "to determine whether an evaluation [was] warranted and . . . the nature and scope of the evaluation[.]" N.J.A.C. 6A:14-3.3(e). As a result of this meeting, the ES Commission decided to evaluate J.F. and gave petitioners the required consent forms. Petitioners acknowledge that educational evaluations are typically conducted with the parents' consent. N.J.A.C. 6A:14-2.3.

If the parent refuses to provide consent for an evaluation, the district may file for a due process hearing to compel consent, pursuant to N.J.A.C. 6A:14-3.4(c). Here, when petitioners failed to provide consent in an apparent attempt to force the Board to rely on the WW-P evaluation, the Board had the option of filing its own due process petition.[4] Rather than consent to the reevaluation of J.F., petitioners filed a petition for an order directing the Board (and, apparently, Notre Dame) to immediately implement the last service plan in effect for J.F., which would be the 2017-2018 service plan from St. Paul, and to use the WW-P evaluation to develop a new service plan for use at Notre Dame. The Board moved for summary decision in its favor on the grounds that petitioners failed to state a special education claim against the Board, the Board has met all legal obligations to J.F., and any allegations regarding action or inaction of Notre Dame do not rise to a valid claim against the Board.

With respect to the alleged deficiency of the petition, I note at the outset that petitioners are working on their own, without the assistance of counsel. For that reason, their pleadings are held to a less stringent standard than that by which pleadings drafted by an attorney are judged. Anchorage Poynte Condo. Ass'n. v. Di Christo, 2017 NJ Super Lexis 1112 (August 17, 2017), at 5 citing Haines v. Kerner 404 U.S. 519 (1972). As the procedural history of this matter shows, the petition is not a model of clarity, but it does state that D.F. and G.D. are bringing the current action to ensure that J.F. is re-classified and again receives the special education services his parents believe are necessary for him during the 2019-2020 school year. Therefore, I

[4] Given that the request for services came from the parents and Notre Dame made no independent request for evaluations of J.F., the Board is not criticized for electing against filing a due process petition to force the parents' consent.

CONCLUDE that the petition states a claim against the Board pursuant to N.J.A.C. 6A:14-2.7(a).

Even so, summary decision in favor of the Board is appropriate. The Board's obligations to J.F., who does not reside within Lawrence Township and who was voluntarily placed at a non-public school within the Board's jurisdiction, are set by regulation. The Board has a process to ensure the identification and evaluation of nonpublic students within its jurisdiction. The Board acted on the request of petitioners and set up a meeting with the ES Commission, and the ES Commission would have taken the next requisite step—to evaluate J.F.—had petitioners cooperated. Even though the action of the Board did not specifically respond to petitioner's request, the Board took action which was appropriate given the circumstances, that being that J.F. was not classified when he enrolled in a nonpublic school in the District and had not been classified during the previous school year. I **CONCLUDE** that the Board met its legal obligations to J.F. pursuant to N.J.A.C. 6A:14-1.2 and 3.3.

Petitioners have prevented successive school districts from evaluating their son, preferring to rely on a now-three year old evaluation. J.F. lost his classification while at St. Paul because his parents refused to consent to his reevaluation. He did not receive special education services for the entire eighth grade year but, worthy of note, he must have performed adequately in a general education classroom without special education supports as his teachers at St. Paul apparently raised no queries. The undisputed facts support the supposition that rather than consent to a reevaluation of J.F. in 2018, petitioners elected for him to go without special education and related services for one year and to try again to use the 2017 WW-P evaluation once J.F. got to high school. The law does not support them in this effort. In an analogous case involving a public school student whose parent refused to consent to district evaluations, wanting instead for the district to use the independent evaluations obtained by the parent, the judge ruled that "the District cannot be forced to rely on just an independent evaluation and must be allowed to evaluate the student itself." Pemberton Tsp. Bd. of Educ. v. C.M. and J.M. on behalf of B.M., OAL Docket No. EDS 04765-19, Final Decision (April 10, 2019), http://njlaw.rutgers.edu/collections/oal/. I **CONCLUDE** that the Board has no

legal obligation to use the 2017 WW-P evaluation to determine J.F.'s current eligibility for special education and/or related services.

Petitioners make claims regarding the failure of Princeton, not Lawrence, to change J.F.'s eligibility without providing him due process and the subsequent absence in J.F.'s file of documents showing his lawful declassification. These claims wholly ignore that the action taken by Princeton and/or St. Paul in 2018 to declassify J.F. was due to the failure of petitioners to permit reevaluations of J.F. Further, petitioners allege an obligation on the Board to use the last evaluation since "there was not a significant change in [J.F.'s] diagnosis." Ltr. Br. of Petitioner, at 2. There was in fact a significant change in J.F.'s diagnosis—he was declassified because his parents refused to permit an evaluation to confirm the diagnosis from WW-P.

J.F.'s file does include a document showing the decision to declassify J.F.; the Board obtained it and attached it to its brief in this matter. If petitioners believed that Princeton and/or St. Paul acted in violation of J.F.'s right to be heard in a due process hearing, they could have brought an action while J.F. was still enrolled at St. Paul. If they believed that J.F. was not receiving the services for which he was eligible and which were necessary to ensure that he received an appropriate education, they <u>should</u> have brought an action while J.F. was enrolled at St. Paul rather than allow him to go without such services for an entire school year (now, two years).

Finally, any claims petitioners may have against Notre Dame must be brought in a petition against Notre Dame, not the Board. Notre Dame will likely respond that it is unable to provide special education and/or related services to J.F. unless and until his eligibility for special education and related services is determined through an evaluation conducted and/or arranged by the ES Commission.

For the foregoing reasons, I **CONCLUDE** that the Board has shown by a preponderance of the credible evidence that summary decision in its favor is appropriate.

ORDER

For the foregoing reasons, I **ORDER** that the motion of respondent **LAWRENCE TOWNSHIP BOARD OF EDUCATION** for summary decision in its favor dismissing the due process petition of petitioners **D.F. and G.D on behalf of J.F.** is **GRANTED** and the due process petition is **DISMISSED** with prejudice.

This decision is final pursuant to 20 U.S.C. §1415(i)(1)(A) and 34 CFR §300.514 (2010), 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 CFR §300.516 (2010).

April 27, 2020 _____
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nd