State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 16969-19

AGENCY DKT. NO. 2020 30865

WARREN HILLS REGIONAL BOARD OF EDUCATION,

Petitioner,

v.

C.D. ON BEHALF OF T.D.,

Respondent.

Esther M. Canty-Barnes, Esq., for petitioner (Rutgers Special Education Law Clinic, attorneys)

Alison L. Kenny, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: March 2, 2020 Decided: March 2, 2020,

BEFORE **ELLEN S. BASS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415, the Warren Hills Board of Education ("the Board"), filed a petition for due

process on November 4, 2019, which it seeks to deny C.D.'s request for an Independent Educational Evaluation ("IEE") for her son, T.D. The matter was transmitted to the Office of Administrative Law (OAL) on December 4, 2019. The Board asserts that C.D. is not entitled to an Independent Evaluation at public expense because it has not conducted an initial evaluation of T.D., leaving nothing with which C.D. can disagree, as required by N.J.A.C. 6A:14-2.5(c).

During a telephonic prehearing conference with counsel, they indicated that the pleadings raised only a legal dispute; that the underlying facts were uncontroverted. Accordingly, the Board filed a Motion for Summary Decision on January 24, 2020. The parent filed a Cross-motion for Summary Decision on February 7, 2020. The Board replied on February 24, 2020, at which time the record closed.[1]

FINDINGS OF FACT

I **FIND** as follows:

T.D. is a sixteen-year-old resident of Washington, New Jersey, a community that falls within the jurisdiction of the Warren Hills Regional School District (Warren Hills). In January 2019, T.D. transferred into the district as a ninth-grade student, having begun the 2018-2019 school year at Gregory the Great Academy, a private boarding school in Pennsylvania. By March he had been referred to the Child Study Team (CST). A document dated March 13, 2019 outlines the outcome of the initial identification and evaluation planning meeting, and confirms that it was determined that no evaluations were necessary and that "[T.D.] was not suspected of having a disability" that affected his academic performance. The document lists a "description of the procedures, tests, records or reports and factors used in determining the action proposed or denied," and specifically notes that an evaluation completed the prior year by the Phillipsburg School District was reviewed and considered, together with other medical and educational

[1] A second petition for due process was filed by the Board on December 24, 2019, and transmitted to the OAL on February 3, 2020. The second petition challenged additional Independent Evaluations sought by the parent but was later withdrawn.

records.[2] The Phillipsburg evaluation had resulted in a determination that T.D. was ineligible for Special Education Services. The Warren Hills document also cites T.D.'s ongoing drug use as a reason not to formally evaluate.

During the spring and summer of 2019, T.D.'s behavioral and substance abuse issues had accelerated to the point that he was placed by Order of the New Jersey Superior Court at the Bonnie Brae School, a residential treatment facility. T.D. was again referred to the CST by his mother in or about August 2019. A meeting with the Warren Hills team took place, and it was again determined that an evaluation was not warranted. An August 26, 2019, document outlines the results of this second evaluation planning meeting, noting that the determination not to evaluate was based on a review of notes from the March 2019 meeting. In September 2019, via counsel, C.D. again asked that her son be evaluated. That request again was denied.

Via letter dated October 14, 2019, C.D., through counsel, wrote requesting Independent Evaluations, to include psychological, academic, and speech-language assessments. At the August evaluation planning meeting it had been suggested that the need for evaluations would be reassessed after about two months at Bonnie Brae. But the parties did not formally meet again to discuss T.D. until November 14, 2019, at which point they gathered to address T.D. continued educational difficulties, which included his refusal to cooperate with home instructors. Evaluation was again discussed, and again rejected as an option; the district again cited T.D.'s "active drug use."

C.D. obtained Independent Evaluations at her own expense via Balaban and Associates in or about October and November 2019. Psychological, educational and speech/language testing was completed. The psychological and educational evaluators both concluded that T.D. was eligible for Special Education Services.

[2] During the 2017-2018 school year, T.D. attended a private parochial school in Phillipsburg. It was for this reason that, as a privately placed student, he was evaluated by the Phillipsburg team in the spring of 2018. See: N.J.A.C. 6A:14-6.1.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5(b) 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 alleged disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'Fanciful, 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) (citing 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 (citing 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 252. I **CONCLUDE** that this matter is ripe for summary decision and that C.D. is entitled to dismissal of the petition, and to the IEE that she seeks, as a matter of law.

The parent's request for an Independent Evaluation springs from N.J.A.C. 6A: 14-2.5(c), which provides as follows:

> 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.
>
> [emphasis supplied] [See also: 34 CFR §300.502(b)(1)]

Citing the plain language of the regulation, the Board asserts that it has no obligation to provide an Independent Evaluation at public expense because it has not completed an initial evaluation. Hence, there cannot be the disagreement that is the condition precedent to invoking this regulatory right. Case law is in accord. Our Supreme Court has stated that an Independent Evaluation at public expense is intended to give parents "access to an expert who can evaluate all the materials that the school district must make available, and who can give an independent opinion." Schaffer v Weast, 546 U.S. 49, 60-61 (2005). The courts have recognized that the Independent Evaluation is intended to furnish parents with what they need to confirm or contest the results of a school district evaluation. T.P. v Bryan Cnty. Sch. Dist., 792 F.3d 1284, 1293 (11th Cir. 2015). In interpreting the Federal counterpart to our regulation, the courts have confirmed that a parent has a right to an Independent Evaluation only "if the parent disagrees with an evaluation obtained by the public agency." Krista P. v. Manhattan Sch. Dist., 255 F. Supp. 2d 873, 889 (N.D. Ill. 2003).

But C.D. urges that Warren Hills' review of data constitutes an evaluation, triggering her right to disagree and seek an IEE. I concur. T.D. was tested under the IDEA by the Phillipsburg CST, which determined that he was ineligible for Special Education Services. Warren Hills chose to decline to formally test and instead based its determination that there was no suspected disability on the Phillipsburg findings, among other data. Warren Hills thus "evaluated" T.D.[3] And the parent thus has the

[3] Had the Warren Hills team declined to evaluate without benefit of any testing whatsoever I might have reached a different conclusion. But the CST's own documentation reflects reliance on recent public-school testing, which in my view is tantamount to accepting the testing completed by the Phillipsburg CST.

right to disagree with the Warren Hills CST and seek an IEE in accordance with the regulatory scheme. See: Haddon Twp. Sch. Dist. v. N.J. Dept. of Educ., Docket No. A-1626-14T4, (App. Div., 2016), where the court held that the term "evaluation" can mean a review of existing data. Indeed, the Haddon court points out that 34 C.F.R. §300.305 specifically contemplates that an initial evaluation or reevaluation include a review of existing evaluative data. And while the Warren Hills CST might complain that it did not have an opportunity to itself to formally test T.D., the uncontroverted facts reveal that it had repeated opportunities to do so.[4]

C.D. cites Letter to Zirkel, U.S. Department of Education, Office of Special Education Services (May 2, 2019). A code clarification does not carry the weight of law but can be instructive in interpreting regulatory language. The inquiry made in Letter to Zirkel was whether a "parent [has] the right to obtain an IEE at public expense if the child is evaluated under the IDEA and found not to be a child with a disability in need of Special Education and related services." The U.S. Department of Education advised as follows:

> Yes. Under 34 C.F.R. §300.502(a), the parents of a child with a disability have the right under Part B of IDEA to obtain an IEE, subject to 34 C.F.R. §300.502(b) though (e). Under 34 C.F.R. §300.15, the term "evaluation" means the procedures used in accordance with 34 C.F.R. §§ 300.304 through 300.311 to *determine whether a child has a disability* (emphasis in original), and the nature and extent of the Special Education and related services that the child needs. Because the definition of evaluation included eligibility determinations under IDEA, we believe an IEE can be obtained after an initial evaluation regardless of whether the child was found as a child with a disability, if the parent disagrees with the initial evaluation obtained by the public agency, subject to certain conditions. 34 C.F.R. §300.502(b)(1). The right to and IEE at public expense, therefore, would extend to parents who suspect their child might be a child with a disability and who disagree with the initial evaluation obtained by the public agency.

[4] Warren Hills' submission suggests that drug use made testing inappropriate. This argument is a nonstarter. If this was the reason not to test, the report of the Evaluation Planning meeting would have stated that testing would be conducted once T.D. presented evidence that he was clean and sober. Instead, the report mentions the drug use, but lists classroom performance, doctor's reports and the Phillipsburg findings as the reason for declining to evaluate further.

T.D. was evaluated under the IDEA by Warren Hills and found not to be a child with a disability. His mother accordingly is entitled by law both to disagree with that evaluation and to an IEE that might dispute the CST's decision.

The decision relied upon by the Board, M.S. v Hillsborough Twp. Pub. Sch. Dist., ___Fed. Appx. ____ (3rd Cir., November 20, 2019) is factually distinguishable. There, the court denied a parental request for reimbursement for an IEE where the board and parents agreed to a reevaluation and "the parents then shifted course, requested an IEE at Hillsborough's expense, and withdrew their consent for Hillsborough's planned reevaluation." Id. Under the facts in Hillsborough, there was no District evaluation with which the parents could disagree, as they withdrew their consent for one. Here, the parent has repeatedly asked Warren Hills for an evaluation. And, Warren Hills has repeatedly declined to evaluate.

Accordingly, I **CONCLUDE** that the parent is entitled to an IEE under N.J.A.C. 6A: 14-2.5(c) and 34 C.F.R. §300.502(a). C.D. seeks reimbursement for the testing completed by Balaban and Associates. N.J.A.C. 6A:14-2.5(c)(2)(ii) requires that an Independent Evaluation "be obtained from another public school district, educational services commission, jointure commission, a clinic or agency approved under N.J.A.C. 6A:14-5 …." I have consulted the New Jersey Department of Education website, and Balaban and Associates is an approved agency. In the interest of efficiency, and to avoid repetitive testing for T.D., I **CONCLUDE** that Warren Hills should reimburse the parent for the costs of these Independent Evaluations.

ORDER

Based upon the foregoing it is **ORDERED** that the parent's Motion for Summary Decision is **GRANTED**, and petition of appeal is **DISMISSED**. The Board's Motion is **DENIED,** and it is directed to reimburse the parent for the evaluations obtained via Balaban and Associates.

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.

March 2, 2020 DATE	**ELLEN S. BASS**, Acting Director and Chief ALJ
Date Received at Agency	March 2, 2020
Date Mailed to Parties:	March 2, 2020

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