

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NOS. EDS 03461-18

AND EDS 00479-19 (**CONSOLIDATED**)

AGENCY DKT. NOS. 2018-27490

AND 2019-29125

C.J. ON BEHALF OF Y.D.,

Petitioner,

v.

WILLINGBORO TOWNSHIP BOARD

OF EDUCATION,

Respondent.

Julie Warshaw, Esq., for petitioner (Warshaw Law Firm, LLC, attorneys)

Patrick J. Madden, Esq., for respondent (Madden & Madden, P.A., attorneys)

Record Closed: March 4, 2019

Decided: April 10, 2019

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF CASE

In January 2018, Willingboro Township Board of Education (Willingboro) determined that an evaluation of Y.D. for special education services was not warranted. Petitioner C.J., on behalf of her daughter, Y.D., filed a pro se petition requesting evaluations for identification for classification and development of an Independent Educational Program (IEP). While the due process petition was pending, petitioner, through counsel, in January 2019, filed a second due process petition seeking

Independent Educational Evaluations (IEE) in order to determine eligibility for special education, compensatory education, and reimbursement of all fees associated with matter.

In February 2018, Willingboro agreed to perform the evaluations subject to the dismissal of the due process petition. Those evaluations were the subject of extended settlement negotiations which ultimately failed. However, in January 2019, Willingboro agreed to petitioner's request for independent evaluations at public expense in the areas of educational, psychological, and functional behavior assessment, subject to Willingboro's Policy 2468-Independent Educational Evaluations (Policy).

Petitioner maintains that Willingboro's Policy is too restrictive, and that Willingboro is using its Policy to avoid paying for comprehensive evaluations. Petitioner further maintains that because Willingboro failed to file for due process within the required twenty-day period, it is required to pay for the IEEs requested by petitioner.

PROCEDURAL HISTORY

C.J. filed for due process with the Office of Special Education Programs (OSEP) on February 5, 2018. The matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on March 8, 2018 and assigned OAL Docket Number EDS 03461-18. The matter was assigned to me and I held a status conference on March 15, 2018 and scheduled the matter for hearings for August 15, 2018, August 20, 2018, August 21, 2018 and August 24, 2018. At the status conference on May 2, 2018, I was advised that petitioner retained counsel, Julie Warshaw, Esq., and that the parties were discussing settlement. At the June 5, 2018 status conference, the parties advised that because they were in the process of drafting a settlement agreement, they mutually requested adjournments of the three earliest August hearing dates. The matter was scheduled to proceed on August 24, 2018. On August 24, 2018, the parties again mutually requested an adjournment until October 29, 2018, because they were in the process of a global settlement involving all of C.J.'s children attending Willingboro schools. The parties continued to discuss settlement alternatives and agreed to new hearing dates of December 3, 2018 and December 12,

2018. Those dates were also mutually adjourned because the parties represented that settlement discussions were continuing. The new hearing date was scheduled for January 23, 2019 but adjourned after the parties filed motions.

C.J. filed a second due process with OSEP on December 10, 2018. By letter, dated December 20, 2018, Willingboro filed a motion to dismiss this petition with OSEP pending the resolution of the earlier due process involving Y.D. By letter, dated January 6, 2019, petitioner opposed Willingboro's motion and cross-moved for summary decision for IEEs at Willingboro's expense. The matter was transmitted to the OAL where it was filed as a contested case on January 9, 2019 and assigned OAL Docket Number EDS 00479-19. I held a status conference on January 23, 2019 and the parties requested that the two matters be consolidated.

The above matters were consolidated by agreement and Order of Consolidation.

In their moving papers, the parties represented that the motions would be dispositive of the issues and that a hearing would not be required. I heard oral argument on March 4, 2019 and left the final hearing date of April 17, 2019 on the calendar, if needed.

ISSUE

There are only two issues to be decided: the first issue is whether Willingboro is required to pay for independent evaluations at a cost that exceeds its maximum allowable cost requirement; and the second is whether this tribunal has jurisdiction to determine prevailing party status.

Petitioner is requesting that Willingboro pay for an independent educational assessment at a total cost of \$1,200 and an independent psychological evaluation at a total cost of \$1,200 to be performed by Leonard Educational Evaluations, LLC (Leonard). Petitioner further maintains that she is entitled to prevailing party status as a matter of law.

Willingboro is requesting that this tribunal direct that petitioner proceeds with independent evaluations within the guidelines set forth in Policy 2468 for independent educational evaluations. Willingboro further maintains that this tribunal lacks jurisdiction to determine whether petitioner is a prevailing party.

The parties submitted in their moving papers that the above issues should be determined by summary decision and that a hearing would be a waste of judicial resources and would result in an unnecessary expenditure of counsel fees.

FACTUAL DISCUSSION

Based upon a review of the pleadings, and the parties' written submissions and attached exhibits, and drawing all reasonable inferences in favor of each respective non-moving party, for purposes of summary decision only, I **FIND as FACT** the following.

On or about January 12, 2018, Willingboro determined that an evaluation of Y.D. was not warranted, given that Y.D. "is not suspected of having a disability which adversely affects the student's educational performance, and is not in need of special education and related services, or speech language services, only." (Answer of Respondent to Due Process Petition filed on February 22, 2018 in OAL Docket No. EDS 01994-2018¹.) When Willingboro made the determination, Y.D. was seventeen years old and a Junior in the Willingboro School District, attending the Alternative Education Program. Y.D.'s date of birth is June 19, 2000.

On January 29, 2018, C.J. requested independent evaluations for her daughter, Y.D., in the following areas: Educational, Psychological, and Functional Behavior Assessment. (Exhibit A attached to petitioner's letter brief, dated January 6, 2019.) There is nothing in the record from Willingboro showing that they either agreed to the request or filed a due process petition. Consequently, on February 5, 2018, petitioner filed a pro se petition requesting evaluations for her daughter which was transmitted to

¹ Respondent used an incorrect OAL docket number on its answer. The correct docket number is 03461-18.

the OAL and assigned OAL Docket No. EDS 03461-18. Thereafter in April 2018, Willingboro offered to perform said evaluations subject to petitioner's dismissal of the due process petition. (Certification of Patrick J. Madden, Esquire, paragraph 7.)

Petitioner filed a second petition on December 10, 2018, seeking independent evaluations, among other things which Willingboro immediately sought to dismiss as premature given its longstanding offer to provide evaluations. (Respondent's December 20, 2018 letter to the Commissioner of Education.) By letter, dated January 6, 2019, petitioner opposed the motion and cross-moved for summary decision because Willingboro failed to file a due process petition to dispute C.J.'s January 29, 2018 request for independent evaluations and failed to conduct any evaluations of Y.D. during the year since the initial request.

On January 16, 2019, Dr. Alegria, Director of Special Services for Willingboro Public Schools, sent the following letter to C.J.:

We are in receipt of your request for an Independent Evaluation in the following areas-Educational, Psychological, and Functional Behavior Assessment for Y.D.

This letter will serve as notice that Willingboro Public Schools has agreed to this Independent Educational, Psychological, and Functional Behavior Assessment and to provide you information on where to obtain the Independent evaluations. The web link www.nj.gov/education/specialed/clinics/, allows you to search a number of ways (by County, Clinic Name, services, and/or Keyword Search) for the Independent Evaluation.

Delta-T Group, Inc., www.deltak12.com, 732079102981, and Educational services Unit of Burlington County Special Services School District, www.bcsssd.k12.nj.us/esu, 609-267-6677 also provide independent assessments. Any other providers, not listed above, will have to provide their information and credentials (i.e., professional license and NJDOE certifications) to my office for processing. They will also be required to fill out a W-9 Form for payment.

I have also included Policy 2468-Independent Educational Evaluations and its corresponding fee schedule, Criteria for Independent Evaluations, for your review. Please notify my

office at your earliest convenience, when you select the evaluator, so we can start the paperwork and process.

[Certification of Melody Alegria, Ed.D., Exhibit 1]

Petitioner requested that Leonard perform the independent evaluation of Y.D. In 2017, Leonard performed evaluations on behalf of Y.D.'s sister, A.D., and C.J. wanted this same provider and the same level of services for Y.D. The cost to Willingboro for the prior Leonard evaluations for A.D. was \$1,200 per evaluation. (Warshaw's letter of February 20, 2019.) Willingboro maintains that the Leonard evaluations for A.D. were part of a comprehensive settlement of a due process petition brought by A.D. in a separate proceeding and as such has no bearing on this matter. (Certification of Alegria, paragraphs 21-23.)

With respect to Y.D., Willingboro agreed to the performance of independent evaluations in accordance with its letter of January 16, 2019, as noted above. After petitioner's insistence upon using Leonard, Dr. Alegria performed an analysis to show that Leonard's premium evaluations not only exceed Willingboro's cost criterion, but also exceed other independent evaluators in the area. (Certification of Alegria, paragraph 20.) Pursuant to Policy 2468, Willingboro's cost criteria for Psychological and Educational evaluations are \$500 per evaluation. (Certification of Alegria, paragraph 10.) The Policy also provides that Willingboro's rates are to be reviewed against the Rate Schedule of the Education Services Unit of the Burlington County Special Services School District (ESU). ESU's rates for the Functional Behavior Assessment range from \$820 to \$1,230. (Certification of Alegria, paragraphs 11-12.) Dr. Alegria researched pricing information from other entities furnishing independent evaluations and found as follows:

Camden County Educational Services Commission performs Psychological and Educational evaluations at \$360 per evaluation.
Delta Group performs LDTC² evaluations at \$400 per evaluation.

² LDTC refers to learning disabilities teacher consultant.

Educational Specialized Associates performs Educational and Psychological evaluation at \$500 per evaluation and Functional Behavior Assessments for \$700.

ESU performs Learning and Psychological evaluations at \$435 per evaluation.

[Alegria Certification, paragraph18.]

LEGAL DISCUSSION

Both parties contend that there are no disputed facts requiring a hearing, and that the matter is appropriate for summary decision.

Summary decision may be granted when “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). The rule further provides that an adverse party must respond by affidavit setting forth specific facts showing that there is a genuine issue which can only be determined at an evidentiary hearing. Ibid. The rule is patterned on the New Jersey Supreme Court’s rules concerning summary judgment. The New Jersey Supreme Court has explained that when deciding a motion for summary judgment under R. 4:46-2,

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.

[Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

Here, I **CONCLUDE** that no material facts are at issue, and that the matter is therefore appropriate for summary decision.

Cost of Independent Evaluations

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1485, is designed to assure that disabled children may access a free appropriate public education (FAPE) that is tailored to their specific needs. 20 U.S.C. § 1400(c). Under the state regulations implementing the IDEA, N.J.A.C. 6A:14-1.1 to –10.2, a “school district of residence” is responsible for “the location, identification, evaluation, determination of eligibility, development of an individualized education program and the provision of a [FAPE] to students with disabilities.” N.J.A.C. 6A:14-1.3. In determining whether a student is eligible for special education services, a school district must conduct an initial evaluation, which “shall consist of a multi-disciplinary assessment in all areas of suspected disability” and “shall include at least two assessments and shall be conducted by at least two members of the child study team in those areas in which they have appropriate training or are qualified through their professional licensure or educational certification and other specialists in the area of disability as required or as determined necessary.” N.J.A.C. 6A:14-3.4(f).

If a parent disagrees with the results of an initial evaluation, he or she may request an independent evaluation and “shall specify the assessment(s) the parent is seeking as part of the independent evaluation request.” N.J.A.C. 6A:14-2.5(c). The school district shall pay for the independent evaluation “unless the school district initiates a due process hearing to show that its evaluation is appropriate and a final determination to that effect is made following the hearing.”³ N.J.A.C. 6A:14-2.5(c) and (c)(1). N.J.A.C. 6A:14-2.5(c)(1)(ii) specifies that “[n]ot later than 20 calendar days after receipt of the parental request for the independent evaluation, the school district shall request the due process hearing.” Thus, “[t]he school district shall not delay either providing the independent evaluation or initiating a due process hearing to defend the school district's evaluation.”⁴ N.J.A.C. 6A:14-2.5(c)(5). If, at a due process hearing, “an administrative law judge orders that an independent evaluation be conducted, the

³ Under special education law, “[a] due process hearing is an administrative hearing conducted by an administrative law judge.” N.J.A.C. 6A:14-2.7(a).

⁴ A parent also has the right to request a due process hearing when he or she disagrees with a school district with respect to a child's evaluation. N.J.A.C. 6A:14-2.7(a).

independent evaluation shall be obtained by the district board of education in accordance with the decision or order of the administrative law judge, and the district board of education shall pay the cost of the independent evaluation.” N.J.A.C. 6A:14-2.5(c)(7).

Pursuant to N.J.A.C. 6A:14-2.5(c)(2), independent evaluations at public expense can 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, or private practitioner, who is appropriately certified and/or licensed, where a license is required.

Pursuant to 34 C.F.R. § 300.502(e) (2018), the district can specify a list of evaluators that meet its criteria, including those concerning reasonable cost, as long as it permits the parents the opportunity to select an evaluator who is not on the list but who meets said criteria.

Willingboro’s guidelines for independent evaluations is set forth in its Policy 2468. In addition to the state regulations, Willingboro’s policy contains additional criteria as follows:

1. The Board will not pay for an IEE unless it complies with the following criteria until the parent can show that unique circumstances warrant deviation from same:

...

b. The independent evaluator may only charge fees for educational evaluation services that, in the judgment of the Board, are reasonable in accordance with below;

...

2. The maximum allowable cost for an independent evaluation will be limited to the reasonable and customary rate, as determined and approved by the Board annually. The rate shall be in the range of what it would cost the Board to provide the same type of assessment through either another public school district, educational service commission, jointure commission, a clinic or agency approved under N.J.A.C. 6A: 14-5 or private practitioner, who is appropriately certified and/or licensed, where a license is required. The Board-approved rate shall be

provided to the parent upon their request for an IEE. The Board shall not be responsible for any costs beyond the IEE, such as transportation, lodging, food, etc.

a. The parent may provide documentation to the Board demonstrating unique circumstance to justify an IEE that exceeds the maximum allowable rate established by the Board. If in the Board's judgment, there is no justification for the excess, cost, the Board may agree to fund the IEE up to the school district's maximum allowable cost with the parent responsible for any remaining cost or in the alternative, the Board may request a due process hearing to enforce the established maximum allowable cost.

[Policy 2468-Independent Educational Evaluations, Certification of Alegria, Exhibit 1]

Rather than consider any of the evaluators on the list, petitioner requested Leonard. The justification for Leonard was described in petitioner's letter brief, dated February 20, 2019, wherein she stated: "that said evaluations should be the same in content and price as Y.D.'s sister's prior evaluations by the same independent provider in 2017 and the same evaluations." To do otherwise, petitioner maintained, would be considered discrimination and differing treatment.

Willingboro's only objection to Leonard is excessive cost. In her certification, Dr. Alegria presented the names of four evaluators who could perform the evaluations requested by petitioner within Willingboro's cost criteria. Petitioner refused to consider any evaluator except for Leonard. The only reason offered was petitioner's familiarity with Leonard and that Willingboro paid for evaluations by Leonard for Y.D.'s sister. In cases where the cost of the IEE exceeds the maximum amount established by the District, the parents must demonstrate unique circumstances that justify the additional cost involved. C.P. on behalf of F.P. v. Clifton Board of Education, OAL Dkt. No. EDS 15781-17, Final Decision (December 13, 2018), citing, A.A. v. Goleta Union Sch. Dist., 2017 U.S. Dist. LEXIS 24853, at *16 (C.D. Cal. Feb. 22, 2017). Unique circumstances can include complex medical, educational, health, or psychological needs.

Here, petitioner did not present any unique circumstances justifying the amount charged by Leonard for the evaluations. I do not accept petitioner's position that the Leonard evaluation is warranted herein because Willingboro had allowed it in the past for Y.D.'s sister. Every situation is different and must be viewed upon its own set of circumstances. Therefore, I **CONCLUDE** that Willingboro must pay for the IEEs requested by petitioner but there are no unique circumstances that warrant exceeding the maximum allowable costs established in Policy 2468.

Prevailing Party

Petitioner has requested that this tribunal determine that she is the prevailing party as a matter of law. As has been noted by other Administrative Law Judges, this administrative forum does not have the authority to determine "prevailing party" status under 20 U.S.C. § 1415(i)(3). Jurisdiction to decide prevailing party issues rests with a Federal District Court. M.F. and M.F. o/b/o West Windsor-Plainsboro Reg'l Bd. of Educ., EDS 8905-08, Final Decision (July 16, 2009).

ORDER

Accordingly, it is **ORDERED** that:

1. Petitioner's cross-motion for summary decision requesting that Willingboro pay for three independent evaluations in the areas of educational, psychological, and functional behavior assessment for Y.D. is **GRANTED**, in part;
2. Willingboro is required to pay for Y.D.'s independent evaluations in accordance with its Policy 2468.
3. Willingboro's motion to dismiss petitioner's Due Process Petition under OAL Docket No. 00479-19 is **GRANTED** because the issues regarding IEEs are now moot as a result of the cross-motion having been granted

and the remaining issues are premature and cannot be determined until evaluations are completed.

4. Evaluations must be conducted without further delay and by no later than sixty days from the date of this decision.

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 Programs.

April 10, 2019

DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

tat/lam