State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDS 08328-19

AGENCY DKT. NO. 2019-30106

WASHINGTON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

H.M. ON BEHALF OF R.M.,

Respondents.

Sanmathi Dev, Esq., for petitioner (Capehart & Scatchard, P.A., attorneys)

H.M., on behalf of R.M., respondents, pro se

Record Closed: August 19, 2019 Decided: September 6, 2019

BEFORE **TAMA B. HUGHES**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

The Washington Township Board of Education ("Board" or "District") filed a Due Process Petition with the New Jersey Department of Education, Office of Special Education Programs (OSEP), on June 12, 2019. By this petition, the Board sought to compel H.M. ("H.M." or "respondent") to consent to re-evaluations of R.M.[1] (Sanmathi

[1] On July 12, 2019, H.M. obo R.M., filed a Due Process Petition with the OSEP, which was subsequently filed with the OAL under Docket No. 09364-19, Agency Ref. No. 2019-30094. Through that petition, H.M. seeks an amendment of the current IEP and proposed evaluation plan. It appears that both parties

Dev (Dev) Brief, Exhibit A) The matter was transmitted to the Office of Administrative Law (OAL) 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, where it was filed on June 19, 2019, under OAL Docket No. EDS 08328-2019.

On July 2, 2019, a settlement conference was held before the Honorable Susan Scarola, Administrative Law Judge (ALJ), Retired, on Recall. The matter did not settle and was assigned to the Honorable Tama B. Hughes, ALJ. A Prehearing Order (Order) was entered on July 2, 2019, through which the hearing date of September 17, 2019, was set, and a briefing schedule provided.

In accordance with the Order, on July 25, 2019, the Board filed a Motion for Summary Decision. On August 12, 2019, the parent's opposition to the motion was received.

FINDINGS OF FACT

Based on the papers submitted and arguments of the parties therein, I make the following findings of **FACT**.

R.M. is sixteen-years-old and is currently a tenth-grade student at the Washington Township High School. She is eligible to receive special education and related services under the classification of "Other Health Impaired" (Board's Brief - Eren Semen (Semen) Certification, Exhibit B - ¶ 7) The classification is due in part to R.M. having been diagnosed with Attention Deficit/Hyperactivity Disorder (ADHD).

R.M. has been eligible to receive special education and related services since she was ten-years-old and in fourth grade (2013). (Board's Brief - Semen Certification, Exhibit B - ¶ 8)

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mistakenly utilized that Docket Number (EDS 09364-19) in their moving papers. The correct one is provided above.

In May 2016, a triennial re-evaluation meeting regarding R.M. was held in which H.M. was present. (Board's Brief - Semen Certification, Exhibit B, Tab 1) During this meeting, the District proposed to conduct updated formal assessments to determine R.M.'s continued eligibility for special education and related services.

R.M. initially consented to the evaluations, however, subsequently revoked her permission. (Board's Brief - Semen Certification, Exhibit B - ¶10 and Tab 1) As a result of this revocation, the District did not perform the evaluations.

On March 14, 2019, when R.M. was fifteen-years-old and in tenth grade, a second triennial meeting was held in which H.M. attended. (Board's Brief - Semen Certification, Exhibit B - ¶ 12 and Tab 2) Due to the time lapse of six years between testing, H.M. was informed that updated testing was required see if R.M. remained eligible to receive special education and related services.

The assessments were to include a cognitive, academic, neurological and social history assessment. The psychological and academic achievement testing were to assess R.M.'s levels of intellectual functioning and academic performance. The formal rating scale (Conners Rating Scale), would have been given to the parent and R.M.'s teachers to determine whether or not R.M.'s diagnosis of ADHD was adversely affecting her academic performance. H.M. refused to provide consent. (Board's Brief - Semen Certification, Exhibit B - ¶ 14 and Tab 2)

H.M. was present for the April 19, 2019, eligibility conference. It was determined that based upon the District's review of other evaluative date (teacher interviews and student records) as no formal assessments had been performed, that R.M. was no longer eligible to receive special education and related services because her disability did not adversely affect her classroom performance. (Board's Brief - Semen Certification, Exhibit B - ¶ 16 and Tab 3)

Thereafter, on April 26, 2019, H.M. on behalf of R.M., filed a Petition for Mediation (OAL Docket No. EDS 09364-2019). Through this petitioner, H.M., stated

that she disagreed with the District's determination that R.M. no longer required special education and related services. In Paragraph Five of the petition, H.M. stated that "I originally declined the case manager's request to have my child tested and I have reconsidered my decision". Among other forms of relief requested, H.M. again stated: "I originally declined the case manager's request to have my child tested and I have reconsidered my decision" she went on to state "I am requesting that she be tested and those results be considered in order to make a more accurate determination" (Board's Brief - Exhibit C)

As a result of H.M.'s statement in her petition, on May 9, 2019, the District sent H.M. an updated re-evaluation plan and consent form. (Board's Brief- Exhibits D and E)

In or around May 20, 2019, H.M. signed and returned the consent form, however, added a request for additional testing and placed restrictions on the testing environment.

By email, dated May 22, 2019, the District notified H.M. that the consent form that she had signed and returned could not be accepted by the District due to her modifications. She was requested to provide information on the additional evaluation requested and informed that her other request - that she be present for her daughter's testing, would compromise the integrity of the testing and therefore denied.

On June 11, 2019, the parties participated in mediation conducted by OSEP. The mediation was unsuccessful, and H.M. did not provide consent for evaluations.

Thereafter, on July 24, 2019, H.M. was notified that the District had rescinded the April 12, 2019, determination that R.M. was no longer eligible for special education services and that she would continue in the IEP at the start of the 2019-2020 school year. She was asked to sign the consent form that had previously been sent to her so that the assessments could be conducted. (Board's Brief - Exhibit F)

To date, H.M. has not returned the consent form sent by the District.

H.M. does not dispute the District's right to evaluate R.M. for eligibility under the Individuals with Disabilities Education Act (IDEA), however, would like testing accommodations for her daughter.

LEGAL DISCUSSION

N.J.A.C. 1:1-12.5 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 "the judgment or order sought shall be rendered 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 allegedly 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 (1995) (citing Judson v. Peoples Bank and 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 at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202, 212 (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 at 252, 106 S. Ct. at 2512, 91 L. Ed.2d at 214. Based upon the facts in the present matter as more fully set forth above, I **CONCLUDE** that this matter is ripe for summary decision.

The issue in this matter is whether the District can compel the triennial re-evaluation of R.M. absent H.M.'s consent.

The District argues that by law, they are required to conduct a triennial re-evaluation of R.M. to determine whether she continues to be a student with a disability. To do so, additional data/assessments are required to determine her educational needs. This is particularly important in this matter as R.M. has not been evaluated since she was ten-years-old. It is the District's position that they have a well settled legal right to conduct the assessments absent H.M.'s consent and in an environment that does not compromise the integrity of the test.

H.M. does not dispute the District's right to conduct the proposed evaluations, however, contends that a material issue of fact exists as to R.M.'s medical diagnosis and the school's refusal to provide her accommodations during the IEP evaluation testing and has set forth several accommodations that she believes would allow her child to feel safe during testing.

The IDEA requires a local school district to provide a Free Appropriate Public Education (FAPE) to all children with disabilities and determined eligible for special education. 20 U.S.C.A. 1412 (a)(1)(A). Once the school district determines eligibility and classification of the student, the district is required to determine whether the student continues to be a student with a disability every three years, or sooner, if conditions warrant. N.J.A.C. 6A:14-3.8; 20 U.S.C.A. 1414(a)(2). To that end, the district must determine the nature and scope of the triennial re-evaluation and identify what additional data/assessments, if any, are needed to determine the educational needs of the student. N.J.A.C. 6A:14-3.8(b).

Prior to conducting any assessment as part of a re-evaluation of a student with a disability, the school district must obtain consent from the parent. N.J.A.C. 6A:14-3.8(c) However, if the district is unable to obtain the required consent to conduct a re-evaluation, it can request a due process hearing. N.J.A.C. 6A:14.2.7(b)

In Sparta Twp. Bd. of Educ. V. B.Y. and K.Y. o/b/o B.Y., 2009 N.J. Agen Lexis 83, Sparta Township Board of Education (BOE) sought an Order allowing it to conduct several re-evaluations of B.Y. The BOE alleged that although B.Y. was due for a triennial re-evaluation, her parents refused to provide their consent. B.Y.'s parents refused to provide consent arguing that the independent evaluations that they had previously been obtained sufficed; she was denied a re-evaluation hearing; the BOE had not made any changes to B.Y.'s educational program after the last set of testing; and that B.Y. had been evaluated within the last three years.

In finding the BOE request reasonable and appropriate and citing to Dubois v. Connecticut State Bd. of Educ. 727 F.2d 44, 48 (2d Cir. 1984), the ALJ determined that if a parent wants their child to receive special education under the IDEA, they are obliged to permit re-evaluation. The BOE is also entitled to re-evaluate a special education student by an expert of their choice because the student was up for triennial evaluation as required by the IDEA. (citing to Dubois at 48; and M.T.V. v. DeKalb County Sch. Dist. 446 F. 3d 1153 (11th Cir. 2006).

This matter is distinguishable from Sparta in that here, H.M. acknowledges the District's right and obligation to conduct a triennial evaluation, however she seeks to alter the testing environment claiming that R.M. suffers from anxiety which has been exasperated as a result of an alleged inappropriate touching by one of the Districts staff members in January 2019. In support of this assertion, H.M. provides an incident report and a doctor's note, dated July 1, 2019 - post filing, wherein R.M.'s treating physician requests that the District take R.M.'s diagnosis (attention deficit disorder (ADD), anxiety, and irritable bowel syndrome (IBS) into consideration when creating her

IEP and allow the necessary accommodations.[2] No other supporting documentation, certifications or legal authority was provided.

In essence, H.M. wants her child to receive special education under the IDEA, acknowledges that the District has the right to perform evaluations, yet wants the evaluations done under her terms and conditions. Even assuming arguendo H.M.'s assertions are true; the District cannot determine what affect these conditions have on R.M. receiving FAPE without conducting the evaluations.

While H.M.'s concerns for her child are commendable and should be taken into consideration during the evaluation process, the District not only has the legal right and authority to conduct the evaluations in question, but also has the obligation to conduct them in an environment that ensures the integrity of the testing process and provide FAPE to R.M.

Accordingly, I **CONCLUDE** that the Board's Motion for Summary Decision should be **GRANTED**.

[2] The Investigation Report provided was dated January 30, 2019. According to the report, no charges were filed against the alleged assailant.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Board's Motion for Summary Decision is **GRANTED.** It is further **ORDERED** that the Board initiate and conduct evaluations of R.M. (cognitive, academic testing, social history and neurological assessments) as soon as practicable.

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 6, 2019
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency

Date Mailed to Parties:

/dm

APPENDIX

For Petitioner:

Motion for Summary Decision, with Brief in Support of Summary Decision with Attached Exhibits A-F

For Respondent:

Brief in opposition to Motion for Summary Decision with Attached Exhibits A-E.