# *State of New Jersey*

OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EDS 10497-18 AND
EDS 11689-18
AGENCY DKT. NO. 2018-28351 AND
2019-28625
**(CONSOLIDATED)**

**C.B. ON BEHALF OF C.B.,**

Petitioners,

v.

**HOPEWELL TOWNSHIP BOARD OF EDUCATION,**

Respondent.

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**Jamie Epstein,** Esq., for petitioners

**Alexandria A. Stulpin,** Esq., for respondent, (Comegno Law Group, P.C., attorneys)

Record Closed: November 13, 2018 Decided: December 5, 2018

BEFORE **JOHN S. KENNEDY**, ALJ:

## STATEMENT OF THE CASE

Petitioner C.B. filed a due-process petition seeking independent evaluation of her son, C.B., under the Federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 to 1482. The Hopewell Township Public School District ("respondent" or "the

District") contends that petitioners are not entitled to an independent evaluation at public expense because they did not make the request for an independent evaluation or disagree with an evaluation obtained by a public agency at the time the most recent evaluations were made in June 2016. Respondent argues that since C.B. is not due for re-evaluation until June 2019, petitioners are not entitled to request an independent evaluation until that time.

Petitioners further argue that the District essentially has waived its right to object by failing to file a request for a due-process hearing about the evaluation within twenty days of the request for independent evaluation.

## PROCEDURAL HISTORY

On May 31, 2018, petitioner requested an independent evaluation performed at the District's expense. As of June 21, 2018, the District had not accepted the neuropsychologist the petitioner had requested perform the evaluation and did not file a request for a due-process hearing. On June 25, 2018, the Office of Special Education Programs (OSEP) received a due-process request from petitioners seeking to compel the District to conduct the independent evaluation. OSEP transmitted the case to the Office of Administrative Law (OAL), where it was filed on July 24, 2018. A second due-process request was filed by petitioners on July 10, 2018, seeking to compel the District to conduct an independent evaluation for reading. OSEP transmitted that case to the OAL, where it was filed on August 13, 2018. The two cases were consolidated on September 18, 2018. Following unsuccessful attempts to settle the case, the matters were scheduled for hearing to begin on December 14, 2018. On July 24, 2018, the OAL received respondent's motion for summary decision, and on August 13, 2018, the OAL received petitioner's motion to compel discovery. On October 10, 2018, petitioner filed a cross-motion for summary decision. On October 26, 2018, respondent filed opposition to both petitioner's motions. On November 11, 2018, petitioner filed a reply brief in support of the cross-motion and the discovery motion.

## FACTUAL DISCUSSION

The parties agree to the following: C.B., a second-grade male student, is classified as a child with a disability, and has been diagnosed as autistic. The District last evaluated C.B. in June 2016, as part of a re-evaluation and eligibility meeting that included social, physical, and psychological assessments. Petitioner attended the re-evaluation and eligibility meeting on June 8, 2016, and did not request an independent evaluation at public expense. C.B. is not due for re-evaluation until June 8, 2019. By email, dated May 31, 2018, petitioner requested an independent evaluation at public expense to include a behavior assessment and a psychological and learning evaluation to be conducted by a neuropsychologist. (See exhibit "H" attached to certification of Kelli Manski.) On June 12, 2018, petitioner requested that the behavior assessment be performed by Dr. McCabe-Odri and the psychological and learning evaluation be conducted by Dr. Sarah Allen. (See exhibit "K" attached to certification of Kelli Manski.) On June 15, 2018, respondent sent an email to petitioner explaining that Dr. Allen's rates were above the range of other neuropsychologist that the District had researched and asked petitioner to explain why Dr. Allen was a better choice. (See exhibit "M" attached to certification of Kelli Manski.) On June 20, 2018, respondent emailed petitioner the names of two different doctors they felt were qualified to conduct the evaluations and requested that petitioner agree to these doctors. (See exhibit "O" attached to certification of Kelli Manski.) On June 25, 2018, petitioner filed a due-process request seeking to compel the District to conduct the independent evaluations to be completed by Dr. McCabe-Odri and Dr. Allen. The petitioner also included a Demand for Prior Written Notice pursuant to N.J.A.C. 6A:14-2.7(e)(1-4) as well as a Demand for Discovery. (See exhibit "Q" attached to certification of Kelli Manski.)

As the aforementioned facts are undisputed, I **FIND** them as **FACT**.

## LEGAL ANALYSIS AND CONCLUSION

The District's primary argument is that it had no obligation to provide an independent evaluation because the parents did not disagree with any of the evaluations at the time they were conducted in June 2016. Further, the demand for the independent evaluation fell outside the two-year statute of limitations in 20 U.S.C. § 1415(c).

The petitioners contend that the District is out of time to object to the performance of an independent evaluation. They point to N.J.A.C. 6A:14-2.5(c)(1)(ii), which states 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."

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.
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> [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. The procedure for requesting independent evaluations of disabled children at issue here lies in N.J.A.C. 6A:14-2.5(c). In relevant part, that section states:

> 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.
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> 1. Such independent evaluation(s) shall be provided at no cost to the parent 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.
>
>    i. Upon receipt of the parental request, the school district shall provide the parent with information about where an independent evaluation may be obtained and the criteria for independent evaluations according to (c)2 and 3 below. In addition, the school district shall take steps to ensure that the independent evaluation is provided without undue delay; or
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>    ii. Not later than 20 calendar days after receipt of the parental request for the independent evaluation, the school district shall request the due process hearing.
>
> [N.J.A.C. 6A:14-2.5(c).]

This procedure is consistent with federal law in granting parents a right to an independent evaluation of their children. The federal regulation is as follows:

> (a) General.
>
> (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.
>
> (2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent

educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this subpart—

(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.103.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

> (4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.
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> [34 C.F.R. § 300.502 (2017).]

With regard to the firmness of the twenty-day deadline for the District to file a due-process petition, Haddonfield Board of Education v. S.R. ex rel. P.R., OAL Dkt. No. EDS 05392, Final Decision (June 24, 2016), concerned a school district's due-process filing that was late by seven days because the school was closed for spring break. In that case, the ALJ determined that the IDEA provided no additional time for extenuating circumstances. In that instance, the parents were unhappy with the district's assessments. Northern Highlands Regional Board of Education v. C.E. and A.E. ex rel. C.E., EDS 10891-16, Final Decision (January 19, 2017), <http://njlaw.rutgers.edu/collections/oal/>, concerns a due-process filing one day late, which the ALJ found to be beyond the time limit. In that instance, the request for independent evaluations grew out of a meeting about an Individualized Education Program (IEP). In Monroe Township Board of Education v. T.L. ex rel. I.L., OAL Dkt. No. EDS 15499-16, Final Decision (November 29, 2016), concerned a request for evaluation in the context of a determination as to whether the child was eligible for special education services. Administrative Law Judge, Lisa James-Beavers, ordered the payment of the independent evaluation on grounds that the board did not file the due-process petition until day twenty-seven (27). Thus, the case law is clear that where a due-process petition is filed late, the parent is entitled to reimbursement. It is clear in this case that the District never filed a due-process petition at all.

With regard to the question of whether a parent's right to request an independent evaluation is limited to the situation in which that parent disagrees with a school-district assessment, two decisions supporting this view predate a change to New Jersey's rules

and an unpublished New Jersey Appellate Division opinion concluding that New Jersey's rules and its guidance as to the federal government's interpretation of the provision in question was sound. See, e.g., C.S. v. Middletown Twp. Bd. of Educ., EDS 729-08, Final Decision (April 14, 2008), http://njlaw.rutgers.edu/collections/oal/; Lawrence Twp. Bd. of Educ. v. M.S. ex rel. E.S., EDS 00595-07, Final Decision (June 20, 2007), http://njlaw.rutgers.edu/collections/oal/.

According to the U.S. Supreme Court, the purpose of the Independent IEE is to ensure that parents, in contesting a district's assessment, "are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." Schaffer v. Weast, 546 U.S. 49, 60 (2005). It would be difficult for many parents to "match the firepower" of the government if they could not afford to pay the evaluator to present her findings at an IEP meeting that necessarily includes the district's assessment team.

In Haddon Township School District v. New Jersey Department of Education, No. A-1626-14T4 (App. Div. February 4, 2016), http://njlaw.rutgers.edu/collections/courts/, a school district challenged the rules and rule interpretations of the New Jersey OSEP. The school district had advised the parents that they were not entitled to an independent evaluation because the district had not, at that point, done any formal assessments of its own. The parents filed a compliance complaint with the New Jersey OSEP, after which OSEP concluded:

> The district's position, that the complainants were not entitled to an independent FBA because there was no assessment, does not comport with the requirements of 34 CFR § 300.502, which permits a student's parent to request an independent evaluation when there is disagreement with an evaluation conducted by the district. Here, even though there were no formal assessments conducted as part of the triennial reevaluation, the student was evaluated and determined eligible for special education and related services through review of information provided by his teachers and related service providers. This review constitutes a re-evaluation, and the parents are entitled to an independent evaluation pursuant to 34 CFR § 300.502.

The Appellate Division went on to note that on May 14, 2013, the New Jersey Department of Education sent a guidance letter to the school district advising it that:

> the [United States Department of Education] OSEP indicated that the current regulations contained in N.J.A.C. 6A:14-2.5(c)1 violate the [Independent Educational Evaluations (IEE)] provisions in 34 CFR § 300.502.
>
> . . . .
>
> Therefore, please be aware that districts may no longer limit the parents' rights to an IEE by first conducting an assessment in an area not already assessed by the initial evaluation or reevaluation before the parents' request is granted. Rather, when a parental request for an independent evaluation is received, a district must provide the evaluation at no cost to the parent, unless the school district initiates a due process hearing . . . .

Neither party has pointed to any change in OSEP's guidance.

The Appellate Division concluded that by acting on federal guidance, which indicated that New Jersey's rule was more limited in regard to parental rights than the IDEA allows, OSEP had acted properly.

Given the combination of the Appellate Division's deference to OSEP's interpretation, which in turn was based on federal guidance, the fact that OSEP guidance has been available to school districts for some time, and the fact that the leading federal case directly discussing independent evaluations also suggests a broad interpretation of a parent's right to seek independent evaluations, I **CONCLUDE** that in this instance, the parent had requested the independent assessment of the child's progress on May 31, 2018, and in the case of the IEE for reading, on June 14, 2018, and the parent was not required to make those request at the time the District evaluated the child in June 2016. To conclude otherwise would place a time limitation upon the parent's entitlement to an independent evaluation not otherwise found in the regulations. Therefore, I **CONCLUDE** that because the District did not file for a due-process hearing within the twenty-day window, the parents are entitled to the independent evaluations requested.

## ORDER

Accordingly, it is **ORDERED** that:

1. Petitioner's cross-motion for summary decision is **GRANTED**;

2. Petitioner's motion to compel discovery and Prior Written Notice is moot as a result of the cross-motion having been granted;

3. Respondent's motion is **DENIED**; and

3. The petition in this matter is **DISMISSED**.

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.

December 5, 2018
DATE

**JOHN S. KENNEDY**, ALJ

Date Received at Agency

Date Mailed to Parties:

/dm