

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 12392-16

AGENCY DKT. NO. 2016-24728

MONTCLAIR BOARD OF EDUCATION,

Petitioner,

v.

I.K. ON BEHALF OF Z.S.,

Respondent.

Katherine A. Gilfillan, Esq., for petitioner (Schenck, Price, Smith & King,
attorneys)

Krista Haley, Esq., and **Eric Storjohann**, Esq., for respondent

Record Closed: December 6, 2016

Decided: December 28, 2016

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

On February 4, 2016, Montclair convened an initial evaluation and planning meeting, and the parties determined that evaluations for eligibility for special education programs and services were warranted for Z.S. After the evaluations were completed, I.K. requested independent evaluations. Is I.K. entitled to individual evaluations when no competent evidence exists that the evaluations were inappropriate? No. A parent shall be entitled to independent evaluations unless the school district shows that its evaluations were appropriate. N.J.A.C. 6A:14-2.5(c)(1).

PROCEDURAL HISTORY

On June 20, 2016, Montclair filed a petition for due-process hearing with the Office of Special Education Programs. In its petition, Montclair asserts that its evaluations were appropriate. As a result, Montclair seeks an order denying I.K. the independent evaluations she requested on June 10, 2016.

On June 30, 2016, I.K. filed her answer.

On August 18, 2016, the Office of Special Education Programs transmitted the case to the Office of Administrative Law for hearing under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the Special Education Program, N.J.A.C. 1:6A-1.1 to -18.4.

On August 25, 2016, the case was assigned to me for hearing. The hearing was scheduled for September 16, 2016, but adjourned due to a medical emergency, and the case was rescheduled for November 11, 2016.

On August 31, 2016, I.K. withdrew her request for the independent occupational-therapy and the independent physical-therapy evaluations.

On November 11, 2016, I held the hearing; by December 5, 2016, the parties had submitted their post-hearing briefs; and on December 6, 2016, I closed the record.

FINDINGS OF FACT

Based on the testimony the parties provided, and my assessment of its credibility, together with the documents the parties submitted, and my assessment of their sufficiency, I **FIND** the following as **FACT**:

I. Montclair convened an initial identification and evaluation planning meeting.

On January 11, 2016, Montclair received a notice and referral from the New Jersey Early Intervention System that Z.S. was receiving services from it, that Z.S. was approaching the age of three, and that Z.S. might be eligible for special education and related services from Montclair under the Individuals with Disabilities Education Act (IDEA).

The notice and referral also informed Montclair that I.K. had not opted out of the notification and referral process and that Montclair was to convene a meeting to determine whether an evaluation for eligibility for special education programs and services was warranted, including the nature and scope of those evaluations.

On February 4, 2016, the parties held such a meeting. At the meeting were members of the child study team (who were knowledgeable about Montclair's programs), I.K. (who is a college professor and well researched about Z.S.'s condition), and a representative from the New Jersey Commission for the Blind and Visually Impaired (who was knowledgeable about children who are blind and visually impaired). Together they reviewed all of the records and documents from the New Jersey Early Intervention System, and together they determined that the evaluations for eligibility for special education programs and services were warranted, including the nature and scope of those evaluations. More specifically, the parties identified Z.S. as "potentially eligible for special education and related services" under the classification "preschool child with a disability" because Z.S. had been diagnosed with a disabling condition, "septo-optic dysplasia with absence of septum pellucidum," and was considered blind by both her pediatric ophthalmologist and the New Jersey Commission for the Blind and Visually Impaired.

To be sure, all of those in attendance at the meeting, including I.K., referred to Z.S. as blind, and considered her to be blind, without qualification.

In addition, the parties believed that this disabling condition adversely affected learning and required special education and related services.

As a result, the parties agreed to perform the following evaluations or assessments:

- Educational Evaluation
- Psychological Evaluation
- Social History
- Speech/Language Evaluation
- Physical Therapy Evaluation
- Consult with Commission for the Blind and Visually Impaired

Although I.K. would later argue that Z.S. might have had some vision based on her diagnosis, and that Montclair should have performed a low-vision evaluation, I.K. never shared this belief with anyone at the meeting, and no one raised the possibility of even considering the need for any health appraisal or specialized medical evaluation.

II. Montclair completed the agreed-upon evaluations.

By the end of the following month, Montclair had completed all but one of the above evaluations and assessments and had written the reports for them. More specifically, on March 15, 2016, Montclair performed a collaborative occupational- and physical-therapy evaluation; on March 21, 2016, Montclair performed a speech-and-language evaluation; on March 22, 2016, Montclair performed a collaborative psychological and educational evaluation; and on March 24, 2016, Montclair took a social history from I.K. Meanwhile, Montclair scheduled a mobility assessment with the Commission for the Blind and Visually Impaired.

III. Montclair convened an IEP meeting.

On May 2, 2016, the parties convened an IEP meeting and proposed an IEP.

On June 1, 2016, the New Jersey Commission for the Blind and Visually Impaired performed the mobility assessment.

Yet on June 10, 2016, I.K. requested the following independent evaluations:

- Functional Visual Assessment by a Teacher of the Visually Impaired (TVI)
- Learning Media Assessment by a TVI
- Activities of Daily Living Skills Assessment by a TVI or Certified Vision Rehabilitation Specialist
- Orientation and Mobility Evaluation by a Certified Orientation and Mobility Instructor
- Technology Evaluation by a Certified Technology Specialist familiar with technology for blind students
- Low-Vision Evaluation by a Low-Vision Optometrist
- Occupational Therapy
- Physical Therapy
- Psychological Evaluation
- Learning/Educational Evaluation
- Speech Evaluation

On June 20, 2016, a related-services meeting was held, and I.K. renewed her request for these independent evaluations, but at no point did I.K. explain why. Some of these independent evaluations would have been duplicative, while some would have been additional. But as will be seen below, none were justified. As a result, Montclair was compelled to file this petition for due process.

IV. Montclair presented expert testimony.

At the hearing, Montclair presented its case manager, who was in attendance at the initial identification and evaluation planning meeting, and all of the experts who performed the evaluations and wrote the reports, all of whom were also at the meeting. All of these witnesses were well-trained and well-experienced professionals whose testimony was both credible and reliable. Meanwhile, I.K. presented no expert

testimony, documentary evidence, or otherwise competent evidence to challenge their testimony.

A. The case manager testified.

Ruby Campbell is the case manager for Z.S. She has been licensed as a certified school social worker in New Jersey for more than ten years and has managed hundreds of special education students. She began working in Montclair in 2010.

Campbell testified that the child study team reviewed all of the records and documents from the Early Intervention System and explained to I.K. at the meeting which evaluations and assessments Montclair would perform and how they would perform them.

Campbell noted that I.K. had explained to her and the rest of the child study team that Z.S.'s receptive and expressive language was within normal limits; that Z.S. was capable of handling the academic work that preschool demanded; and that I.K. wanted Z.S. placed in the general education setting with the appropriate supports.

Second, Campbell testified that no one, including I.K., questioned the appropriateness of the evaluations, the need for any additional evaluations, or the need for any additional information.

Third, Campbell testified that no one questioned the need for any additional evaluations or any additional information regarding Z.S.'s vision, because all of the parties understood that Z.S. was blind. More pointedly, Campbell testified that Z.S. presented as someone who was blind because she walked with a cane and attended school with an aide. In addition, Campbell testified that I.K. never raised the possibility that Z.S. had any sight, or could gain any in the future, because she only presented the child study team with a prescription from Z.S.'s doctor that Z.S. was blind. Moreover, Campbell testified that the New Jersey Commission for the Blind and Visually Impaired had provided the child study team with information that no further evaluation was necessary.

On this score, I.K. admitted at the hearing that she provided Montclair with no medical documentation other than the prescription that her daughter was blind, and only raised the possibility that Z.S. might gain some sight in the future for the first time at the hearing. More significantly, I.K. provided no expert testimony or any documentary evidence that this possibility might be true, and then conceded that this was not true at the time of the initial identification and evaluation planning meeting. Paradoxically, I.K. testified that she deliberately moved to Montclair from West Orange because she believed that Montclair was the best school district in the area to evaluate and educate her child.

B. The speech-language pathologist testified.

Denise Roche is the speech-language pathologist who performed the speech-and-language evaluation on March 21, 2016. Roche has been licensed as a school-based speech-language pathologist in New Jersey for more than thirty years and has performed more than a thousand evaluations. She has been working with preschool students for the past seventeen years and has been working in Montclair since 1985. Roche was offered as an expert in speech-language pathology and assessment and was accepted as such without objection.

Roche testified that she reviewed the records and documents from the Early Intervention System at the meeting, observed Z.S. in her preschool, and consulted with the professionals who had worked with Z.S. Roche testified that Z.S. had strong language skills but had difficulty with pragmatic language, and that any assessment of pragmatic language had to be a functional one in a natural setting. It is the most effective means for measuring emerging language, she said.

Roche further testified that she had not worked with a blind student before, but had consulted with the New Jersey Commission for the Blind and the Visually Impaired and had performed her own research to guarantee that the evaluation would be appropriate.

I.K. presented no competent evidence to prove otherwise.

C. The learning disabilities teacher-consultant testified.

Miya Thompson-Smith is the learning disabilities teacher consultant (LDT-C) who performed the educational component of the collaborative psychological and educational evaluation on March 22, 2016. Smith has been licensed as an LDT-C in New Jersey for more than ten years and has performed more than 1,000 evaluations. Previously Smith was a second-grade teacher, and she has been working in Montclair since 1993. Smith was offered as an expert in both teaching and learning disabilities and was accepted as such without objection.

Smith testified that she reviewed the records and documents from the Early Intervention System at the meeting, observed Z.S. in her preschool, and consulted with the professionals who had worked with Z.S. Smith testified that Z.S. had solid academic and cognitive skills, and that Montclair was going to continue to work with the New Jersey Commission for the Blind and Visually Impaired in providing specialized instruction for Z.S., but that there was no indication that Z.S. needed any specialized testing for her evaluation. Indeed, Smith testified that she had evaluated a blind student before, and merely needed to perform a functional assessment to determine what specialized instruction was needed in the classroom. In short, Smith had no concern about her ability to evaluate Z.S. and the appropriateness of her evaluation.

I.K. presented no competent evidence to prove otherwise.

D. The school psychologist testified.

Marisa Klar is the school psychologist who performed the psychological component of the collaborative psychological and educational evaluation on March 22, 2016. Klar has been licensed as a school psychologist in New Jersey for more than ten years and has performed more than 1,000 evaluations. She has also worked as a case manager and has been working in Montclair since 2004. Klar was offered as an expert in school psychology and was accepted as such without objection.

Klar testified that she reviewed the records and documents from the Early Intervention System at the meeting, observed Z.S. in her preschool, and consulted with the professionals who had worked with Z.S. Klar testified that no standardized tests exist for blind students, and that a functional assessment in a natural environment was all that was needed for Z.S., who had already been found categorically eligible for special education and related services. Moreover, Klar testified that the evaluation she would perform—what she would do and how she would do it—was explicitly explained to I.K. and to the Early Intervention specialists at the initial identification and evaluation planning meeting, and that no one—neither I.K. nor anyone else—raised any questions or concerns about her evaluation, or any other evaluation for that matter. Finally, Klar testified that she had tested two blind students before and that the testing for Z.S. revealed no red flags to warrant any additional testing.

I.K. presented no competent evidence to prove otherwise.

V. I.K. presented no expert testimony at the hearing.

I.K. testified at the hearing but presented no expert testimony, documentary evidence, or otherwise competent evidence to challenge the veracity of the reports or the appropriateness of the evaluations.

CONCLUSIONS OF LAW

I. The parties identified Z.S. as “potentially eligible for special education and related services” under the classification “preschool child with a disability.”

The purpose of Chapter 14, Special Education, N.J.A.C. 6A:14-1.1 to -10.2, is to ensure that all students with disabilities, as defined by Chapter 14, have available to them a free, appropriate public education. N.J.A.C. 6A:14-1.1. Toward this end, each district board of education must, among other things, develop written procedures for students, ages three through twenty-one, who may have a disability due to physical, sensory, emotional, communication, cognitive, or social difficulties. N.J.A.C. 6A:14-3.3(a). When such a student is referred for an initial evaluation to determine eligibility

for special education programs and services under Chapter 14, a meeting of the child study team must be convened, and the child study team, including the parent and a teacher or other professional who is knowledgeable about the district programs, must determine whether an evaluation for eligibility for special education programs and services is warranted, including the nature and scope of the evaluation. N.J.A.C. 6A:14-3.3(e).

When an evaluation is warranted, the student shall be considered identified as “potentially a student with a disability.” N.J.A.C. 6A:14-3.3(f). To determine the nature and scope of the evaluation, the child study team must review existing evaluation data on the student—“including evaluations and information provided by the parents, current classroom-based assessments and observations, and the observations of teachers and related services providers”—and consider the need for any health appraisal or specialized medical evaluation. N.J.A.C. 6A:14-3.4(a)(1). On the basis of that review, the child study team must identify what additional data is needed to determine whether that student has a disability; the present levels of academic and functional achievement and related developmental needs, and educational needs of the student; and whether the student needs special education and related services. N.J.A.C. 6A:14-3.4(a)(2). The child study team must also determine which child study team members or specialists shall conduct each assessment that is part of the evaluation. N.J.A.C. 6A:14-3.4(a)(3).

A student shall then be determined eligible and classified as “eligible for special education and related services” when it is determined that the student has one or more of the disabilities defined in N.J.A.C. 6A:14-3.5(c). One of those classifications is “preschool child with a disability.” N.J.A.C. 6A:14-3.5(c)(10). Such a classification corresponds to preschool handicapped and means a child between the ages of three and five who is experiencing developmental delay as measured by appropriate diagnostic instruments and procedures in one of five areas (including vision) or has an identified disabling condition (including vision) that adversely affects learning or development and requires special education and related services. N.J.A.C. 6A:14-3.5(c)(10).

A parent shall be entitled to independent evaluations unless the school district shows that its evaluations were appropriate. N.J.A.C. 6A:14-2.5(c)(1).

In this case, Montclair convened a meeting where members of the child study team (who were knowledgeable about Montclair's programs), I.K. (who is a college professor and well researched about Z.S.'s condition), and a representative from the New Jersey Commission for the Blind and Visually Impaired (who was knowledgeable about children who are blind and visually impaired). Together they reviewed all of the records and documents from the New Jersey Early Intervention System, and together they determined that the evaluations for eligibility for special education programs and services were warranted, including the nature and scope of those evaluations. The parties identified Z.S. as "potentially eligible for special education and related services" under the classification "preschool child with a disability" because Z.S. had been diagnosed with a disabling condition, "septo-optic dysplasia with absence of septum pellucidum," and was considered blind by both her pediatric ophthalmologist and the New Jersey Commission for the Blind and Visually Impaired.

Again, all of those in attendance at the meeting, including I.K., referred to Z.S. as blind, and considered her to be blind, without qualification.

In addition, the parties believed that this disabling condition adversely affected learning and required special education and related services.

As a result, the parties agreed to perform the following evaluations or assessments:

Educational Evaluation

- Psychological Evaluation
- Social History
- Speech/Language Evaluation
- Physical Therapy Evaluation
- Consult with Commission for the Blind and Visually Impaired

II. The agreed-upon evaluations were appropriate.

I.K. argues that Z.S. might have had some vision based on her diagnosis, and that Montclair should have performed a low-vision evaluation, but I.K. never shared this belief with anyone at the meeting, and no one raised the possibility of even considering the need for any health appraisal or specialized medical evaluation. In fact, I.K. admitted at the hearing that she provided Montclair with no medical documentation other than the prescription that her daughter was blind, and only raised the possibility that Z.S. might gain some sight in the future for the first time at the hearing. More significantly, I.K. provided no expert testimony or any documentary evidence that this possibility might be true, and then conceded that this was not true at the time of the initial identification and evaluation planning meeting.

I.K. further argues that Montclair was nevertheless obligated to conduct a vision screening under N.J.A.C. 6A:14-3.3(h), but a vision screening had already been conducted by a pediatric ophthalmologist, who had diagnosed Z.S. with “septo-optic dysplasia with absence of septum pellucidum” and considered her blind. That a school nurse was still required to determine the medical status of Z.S. does not make sense. Moreover, I.K. fails to explain why such a vision screening was even needed. Upon review, the only explanation is the unsupported assertion that Montclair did not fully understand this diagnosis and needed to do the vision screening (or speak to the pediatric ophthalmologist) to better understand the disabling condition.

At the same time, I.K. argues that she has no obligation to know about or investigate the disabling condition herself. In doing so, I.K. turns her back on the procedural safeguards of the IDEA, which require, among other things, that a parent of a child with a disability be a member of the child study team, ostensibly to provide input and participate in decision-making. Now in her post-hearing brief, I.K. acknowledges that she abandoned that role at the initial identification and planning meeting and abdicated that responsibility to Montclair.

Finally, I.K. argues that the evaluations she requested, including the additional evaluations, are necessary because the professionals who conducted the evaluations

did not know what they were doing as a matter of fact, and failed to use a variety of assessment tools as a matter of law, referencing N.J.A.C. 6A:14-2.5. Once again, I.K. makes assertions without any support. As repeated time and again above, I.K. provided no competent evidence to challenge the appropriateness of the evaluations, in any dimension, whether their nature and scope or reasoning and conclusion. In the absence of any such proof, the arguments I.K. asserts cannot stand. Therefore, I **CONCLUDE** that the evaluations Montclair performed in this case were appropriate and that the request for independent evaluations should be denied.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the evaluations Montclair performed in this case were **APPROPRIATE** and that the request for independent evaluations is **DENIED**.

This decision is final under 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2016), and is appealable by filing a complaint and bringing a civil action in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2016). If the parent or adult student believes that this decision is not being fully implemented, with respect to a program or service, this concern should be communicated in writing to the director of the Office of Special Education Programs.

December 28, 2016
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency

Date Mailed to Parties:
dr

APPENDIX

Witnesses

For Petitioner:

Ruby Campbell
Denise Roche
Miya Thompson-Smith
Marisa Klar

For Respondent:

I.K.

Documents

Joint:

- J-1 Records from Early Intervention System
- J-2 Notification/Referral to Local School District dated January 11, 2016
- J-3 Consent for Initial Evaluation dated February 4, 2016
- J-4 Collaboration/Observation Occupational & Physical Therapy Report dated March 15, 2016
- J-5 Speech/Language Evaluation Report dated March 21, 2016
- J-6 Collaborative Evaluation Psychological/Educational dated March 22, 2016
- J-7 Confidential Social History dated March 24, 2016
- J-8 Initial Eligibility Determination dated May 2, 2016
- J-9 Not in evidence
- J-10 IEP Resolution Meeting Attendance Sign-in Sheet dated May 16, 2016
- J-11 Mobility Assessment dated June 3, 2016
- J-12 Letter from I.K. to Montclair dated June 10, 2016
- J-13 Related-Services Meeting Sign-in Sheet dated June 20, 2016
- J-14 Email exchange between I.K. and Ruby Campbell from June 21, 2016, to June 22, 2016

- J-15 Petition for Due Process filed June 22, 2016
- J-16 Response to Petition for Due Process dated June 30, 2016
- J-17 Offer of Settlement dated June 16, 2016
- J-18 Not in evidence
- J-19 Prescription dated March 30, 2016
- J-20 Not in evidence
- J-21 Résumé of Ruby Campbell
- J-22 Not in Evidence
- J-23 Résumé of Denise Roche
- J-24 Résumé of Miya Thompson Smith
- J-25 Résumé of Marissa Klar