State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDS 12874-18
AGENCY DKT. NO. 2019-28611

C.R. AND N.R. ON BEHALF OF E.R.,
Petitioners,
v.
SOUTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION,
Respondent.

Julie M. W. Warshaw, Esq., for petitioners (Warshaw Law Firm, LLC, attorneys)

Michael A. Pattanite, Jr., Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey, LLC, attorneys)

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

Petitioners, C.R. and N.R. on behalf of minor child, E.R., have filed a petition against respondent, South Brunswick Township Board of Education, with regard to an incident which took place on February 20, 2018, seeking: a change in E.R.'s teacher and teacher's aide; payment for outside psychological counseling; compensatory education; and reimbursement for all fees associated with this matter. Respondent (the "Board")

filed a motion for summary decision, stating that petitioners failed to state a claim regarding E.R.'s special education for which relief can be granted.

PROCEDURAL HISTORY

Petitioners filed a petition with the Commissioner of Education on August 3, 2018. This matter was transmitted to the Office of Administrative Law (OAL), where it was filed on September 5, 2018, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Telephone hearings were held on October 4 and 12, 2018. On December 26, 2018, respondent filed a motion for summary decision with accompanying brief. Petitioners filed a reply brief on January 29, 2019. Oral argument on respondent's motion was held on February 19, 2019. Supplemental briefs were received from petitioners on March 14, 2019, and from respondent on March 21, 2019. The record was closed on March 27, 2019.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Based upon the parties' briefs and oral argument from February 19, 2019, and for the purpose of deciding the motion for summary decision, I **FIND** the following:

1. Student E.R. was a seventeen-year-old student at South Brunswick High School (SBHS), classified as Moderate Intellectual Disability. Her special education services were governed by an Individualized Education Program (IEP) dated June 13, 2018. (Petitioners' Request for Due Process, dated August 3, 2018, page 3.)

2. On February 20, 2018, student E.R. indicated to her teacher and the classroom aide that she was suffering vaginal discomfort. The aide accompanied E.R. to the school nurse, after which the nurse returned E.R. to class. Moments after returning to class, E.R. again indicated she

was in pain, and the classroom aide accompanied E.R. back to the nurse's office. E.R. went into a stall in the bathroom at the nurse's office.

3. Concerned as to the long period of time E.R. remained in the bathroom stall in the nurse's office, the classroom aide entered the stall to check on E.R. E.R. pointed to her vaginal area, and the classroom aide then noticed vaginal discharge in E.R.'s underpants. The nurse then entered the bathroom stall, inspected E.R.'s underpants, and saw vaginal discharge.

4. The nurse began to question E.R. about potential causes of the discharge, including whether there was any sexual abuse at home. Concerned about E.R.'s responses, the nurse contacted the police, who contacted Child Protective Services (CPS). (Petitioners' Request for Due Process, dated August 3, 2018, page 7.)

5. C.R. was called to SBHS, where she experienced a long delay before she was able to see E.R. C.R. then took E.R. to a hospital emergency room. There, a CPS doctor examined E.R. and concluded there had been no sexual abuse.

6. Petitioners subsequently claimed that E.R. was traumatized by the incident and did not return E.R. to SBHS. (Petitioners' Request for Due Process, dated August 3, 2018, page 8.)

LEGAL ANALYSIS AND CONCLUSION OF LAW

The issue is whether petitioners are entitled to an administrative law due process hearing on their claim for damages due to an alleged strip search of their daughter, or whether respondent's motion for summary decision should be granted.

Petitioners alleged that: a classroom aide and nurse entering their daughter's bathroom stall to check on her constituted an illegal search and seizure; neither the classroom aide nor the nurse had received proper training on how to handle a special

education student suffering physical pain; the questioning of E.R. by the nurse constituted bullying on the part of the school, requiring the Board to bring charges of Harassment, Intimidation and Bullying (HIB) against the nurse, which it did not do; the nurse failed to follow proper protocol by referring this matter to the police and CPS when she suspected possible sexual abuse at the student's home; and that the aide's and nurse's actions traumatized the student and created a hostile learning environment such as to deny E.R. a free and appropriate public education (FAPE).

Respondent has asserted that: petitioners have failed to plead a special education issue; petitioners' request for due process did not contest the level of services provided to E.R. and did not claim that E.R.'s educational program was inappropriate or denied her FAPE as a result of her IEP; the original petition for due process dealt solely with whether there was an unconstitutional strip search that denied E.R. FAPE, which constitutional issues were outside of the jurisdiction of OAL; issues regarding Board staff training and protocol are negligence issues to be raised in Superior Court, not in OAL; and, as a result, petitioners have failed to state a claim upon which relief could be granted by this tribunal.

Summary decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). No evidentiary hearing need be held if there are no disputed issues of material fact. Frank v. Ivy Club, 120 N.J. 73, 98, cert. denied, 498 U.S. 1073 (1991). "When the evidence is so one-sided that one party must prevail as a matter of law, the [tribunal] should not hesitate to grant summary [decision]." "[W]hen the evidence 'is so one-sided that one party must prevail as a matter of law,' the [tribunal] should not hesitate to grant summary [decision]." Della Vella v. Bureau of Homeowner Prot., CAF 17020-13, Initial Decision (March 31, 2014), http://njlaw.rutgers.edu/collections/oal/ (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

Further, the non-moving party has the burden "to make an affirmative demonstration . . . that the facts are not as the movant alleges." Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App.Div. 1962). This requirement, however, does not relieve the moving party from having to initially establish in its moving papers that

there was no genuine issue of fact and that they were entitled to prevail as a matter of law. It is the "movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of fact." Conti v. Board of Education, 286 N.J.Super. 106 (App. Div. 1995) (quoting Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954)).

Respondent was correct to assert that the basis of petitioners' claim in their petition for a due process hearing was a purportedly illegal strip search which allegedly took place on February 20, 2018, and the investigative methods used subsequent to that search. Although the parties were given the opportunity to submit supplemental briefs pursuant to the oral argument on February 19, 2019, the Board was correct in asserting that the supplemental facts presented by petitioners in their brief of March 14, 2019, raised new issues with regard to E.R.'s IEP which were not included in petitioners' initial petition for due process. The original petition did not contest the level of services received by E.R. and did not make any claims that E.R.'s educational program or IEP was inappropriate or deficient. The original petition did not claim that the Board was denying E.R. a FAPE due to the terms of the IEP or the teacher's effectuating of said IEP.

Accordingly, I **FIND** that the only issues to be heard as part of respondent's motion for summary decision are those issues specified in petitioners' original petition for due process dated August 3, 2018. Any issues raised by petitioners in their supplemental brief regarding the level of services received by E.R. or claims that E.R.'s educational program or IEP was inappropriate or deficient, or that the Board had denied a FAPE to E.R. due to the terms of the IEP, should have been raised in either a new petition or amended petition for due process.

Petitioners did reference the IEP in their moving papers, but only for a limited purpose. First, petitioners referenced E.R.'s IEP regarding whether it required a 1:1 (one-to-one) aide. Petitioners claimed that having a 1:1 aide accompany E.R. to the bathroom was a violation of the IEP because the IEP did not call for 1:1 assistance. This reference, however, was insufficient to comprise a special education claim. The aide who accompanied E.R. to the bathroom was not a 1:1 aide assigned to E.R., but rather a classroom aide who assisted the teacher with the entire class, whom the teacher asked to assist with an ill student. The mere fact that only one aide was asked to walk with E.R.

to the bathroom did not constitute a claim that special education services were not properly provided under an IEP.

Second, petitioners asserted in their original petition that the Board failed to provide E.R. with a FAPE because the Board allowed E.R. to be strip-searched and bullied and did not open an HIB file against the classroom aide or school nurse. However, respondent correctly asserted that such claims are part of the constitutional and negligence claims which would be properly pleaded in Federal Court and New Jersey Superior Court, respectively. These are not special education claims to be heard before the within tribunal. At no time did petitioners assert that the IEP provided for an insufficient educational program, nor did they make attempts to convene an IEP meeting in order to modify E.R.'s IEP and educational program.

Even if petitioners had properly asserted special education claims which could be heard before the OAL, the relief sought would not be warranted. There was no illegal search and seizure by the classroom aide or nurse on February 20, 2018. Student E.R. made repeated bathroom trips on that date and had already made an earlier trip to the nurse's office that day. When E.R. asked again to be excused to the bathroom, a concerned teacher asked the classroom aide to accompany E.R. The classroom aide was familiar with E.R., and knew of her lack of effective communication skills. With this knowledge in mind, the aide became concerned due to the long period of time E.R. remained in the bathroom stall. It was a heightened sense of concern that led the classroom aide to enter E.R.'s stall.

The classroom aide did not order a strip search, or order E.R. to show her underwear. A concerned school staff member went to help a student who had already indicated vaginal pain. The student pointed to her vaginal area and the aide saw underwear stained with vaginal discharge. This is not a search and seizure because the classroom aide was seeking the source of E.R.'s distress, not searching for evidence of a broken rule or law. Petitioners incorrectly relied on New Jersey v. T.L.O., 469 U.S. 325 (1985), which dealt with the scenario of a school seeking evidence of violations of the school's code of conduct, which is not the fact pattern in the within matter.

As the actions of the classroom aide did not constitute an illegal search and seizure, the subsequent viewing of E.R.'s underwear by the school nurse also did not constitute an illegal search and seizure.

Petitioners accused the classroom aide and nurse of inappropriate questioning of E.R. regarding the source of the vaginal problems. Respondent correctly asserted that the purported lack of training on behalf of the aide and nurse were part of petitioners' negligence claims and did not represent a special education claim for relief.

There were many issues of concern arising from the incident on February 20, 2018. It may have been true that a student with ineffective communication skills could not have given consent for a school staff member to enter her bathroom stall and look at her underwear. But, the teacher and classroom aide were exercising judgment meant to help a student with an urgent medical issue. Even if found to be an unconstitutional, illegal search and seizure, it did appear that high school staff were taking whatever steps they could to immediately address an urgent issue involving the health, safety and welfare of a student in their care.

Whether the aide and nurse followed school guidelines and protocol in questioning E.R. regarding possible sexual abuse at home is an issue for the Superior Court. It is of concern that a nurse would question a student who clearly had less than effective communication skills. The line of questioning used by the nurse, and E.R.'s responses, are matters that will undoubtedly be raised in a negligence suit against the Board. But it is also hard to take issue with a nurse who believed a female student had indicated that she had been sexually abused, and difficult to fault the nurse for following her statutory responsibility to refer this matter to law enforcement.

It is also disconcerting that petitioners had such difficulty getting answers, speaking with persons of authority, and visiting with E.R. The length of time it took to resolve the issue and release E.R. to her parents very possibly could have caused trauma to E.R. However, petitioners offered nothing to indicate that there was a genuine issue of fact in dispute. Petitioners provided no evidence that E.R. had suffered trauma, nor that they sought any professional medical or psychological help for which they should be

compensated. They also offered no proof that E.R. would have been treated differently had she returned to classes at SBHS after the date of the incident; in fact, it appeared that any break in educational services for which petitioners were claiming damages actually stemmed from petitioners voluntarily keeping E.R. home from school. Such issues would be germane to a negligence suit.

Even if petitioners could show that the nurse was required to first report this matter to a case manager, superintendent or principal before reporting this to the police, such information would be applicable in a negligence case, but did not set forth a special education cause of action for which this tribunal could provide relief.[1]

N.J.A.C. 6A:14-1.1(b)(1) requires a student with disabilities to have available to them a FAPE as set forth in the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400 et seq.). Section (b)(2) refers to FAPE in light of a student's IEP. N.J.A.C. 6A:14-2.7(a) limits petitions for due process in special education cases when there is "a disagreement regarding identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action." However, despite claiming a denial of a FAPE, petitioners' original claim for relief did not set out how respondent failed to meet its burden to provide a FAPE pursuant to the IEP in place, and did not refer to identification, evaluation, reevaluation, classification or educational placement.

Petitioners claimed in their original petition that E.R. was denied a FAPE because of a "hostile learning environment," but offered no examples of how the environment was hostile, nor evidence or proofs of same, as required in order to defeat a motion for summary decision. Petitioners further claimed that E.R. was denied a FAPE because respondent discriminated against E.R. due to her disability, but offered no examples of discrimination, nor evidence or proofs of same, as required in order to defeat a motion for summary decision. All claims raised by petitioners revolved around the purportedly negligent and/or unconstitutional actions by respondent. While petitioners therefore have recourse under negligence laws in State Court or constitutional laws in Federal Court,

[1] Respondent has referenced N.J.A.C. 9:6-1 et. seq., which requires anyone working for a public school district to report potential sexual abuse to the New Jersey Department of Children and Families (DCF), and to the police if necessary.

they have failed to show that they were entitled to relief under New Jersey special education statutes and regulations.[2]

Petitioners, as the non-moving party to respondent's motion for summary decision, have failed to meet their burden to make an affirmative demonstration that the facts are not as the movant (the respondent) alleged. See Spiotta v. William H. Wilson, Inc., at page 581. Conversely, respondent, as moving party, met its burden by excluding any reasonable doubt as to the existence of any genuine issue of fact. See Conti v. Board of Education.

Accordingly, I **FIND** that petitioners failed to state a claim upon which relief could be granted.

Based on the within findings, this matter is ripe for summary decision and respondent's motion for summary decision is hereby **GRANTED**.

[2] Petitioners have acknowledged that this matter belongs in State or Federal Court by stating on the record at oral argument that the within matter was transmitted to OAL to exhaust all administrative remedies before filing complaints in State and Federal Courts, and by having filed a Notice of Tort Claim on May 16, 2018.

ORDER

I **ORDER** that respondents' motion for summary decision is **GRANTED**, and this matter is hereby **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.

April 10, 2019 _____

DATE **JEFFREY N. RABIN**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JNR/dw

APPENDIX

EXHIBITS

For petitioners:

1. Reply brief, dated January 29, 2019
2. Supplemental brief, dated March 14, 2019

For respondent:

1. Motion for summary decision, and brief, dated December 26, 2018
2. Supplemental brief, dated March 21, 2019