

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

**DECISION ON MOTION FOR
SUMMARY DECISION**

OAL DKT. NO. EDS 06533-16

AGENCY DKT. NO. 2016 24356

HAMILTON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

v.

K.H. ON BEHALF OF V.H.,

Respondents.

Michael Pattanite, Jr., Esq., for petitioner (Leneck, Socey, Formidoni, Giordano,
Cooley, Lang & Casey, attorneys)

K.H., respondent, pro se

Record Closed: July 19, 2016

Decided: August 1, 2016

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On April 29, 2016, petitioner Hamilton Township Board of Education (Hamilton) filed a petition for due process with Office of Special Education Programs (OSEP) of the New Jersey Department of Education (Department). The petition contested the need for the Independent Educational Evaluations (IEE) requested by respondent K.H. on behalf of her minor daughter V.H. On May 2, 2016, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing. A settlement conference was held at the OAL on May 12, 2016, and a telephone prehearing conference took place on May 25, 2016.

On June 23, 2016, petitioner filed a motion for summary decision and on June 27, 2016, a settlement and case management conference was held. Respondent was provided an opportunity to file a response to petitioner's motion and oral argument was scheduled and held on July 19, 2016. Respondent filed a response to the motion on July 12, 2016 and petitioner replied on July 18, 2016.

FACTUAL DISCUSSION

V.H. is an eight year old second grade student in Hamilton Township. After being declassified for special education services by Hamilton in 2012 she currently is classified for special education receiving speech and language services pursuant to an Individualized Education Program (IEP) for the 2015-16 school year. She also receives services through a Section 504 Plan which lists the following conditions:

Sensory Integration Dysfunction
Cefdinir, milk and red dye allergy
ADHD and left leg discrepancy
Severe limb length discrepancy

The 504 Plan states that her life activity of walking and concentrating are substantially limited and provides, among others, the following accommodations:

Teacher will refocus, redirect and repeat directions and will use visual and verbal cues.

Teacher will break down tasks for Victoria.

Second grade teacher will provide weekly progress reports via a communications log to parent.

Create a behavior plan, during first two weeks of school, to work between home and school as it relates to homework and tasks, which require completion and compliance.

V.H. will have weekly ten minutes check in with the school counselor to assist her in areas that can be carried over between home and school.

Assistance will be provided to monitor V.H. during lunch/recess for verbal curing and redirection.

Occupational and Physical Therapist will each provide one 15 minute consultation bimonthly with classroom teachers beginning September 2015 and ending June 2016.

If V.H. takes a sensory break, it should be in a location that is not a focal point for the rest of the classroom.

Occupational therapy evaluation provided by the Hamilton during the summer of 2015 to include a sensory profile –evaluation completed August 2015.

V.H. has a complex medical history as set forth on page one of a Speech and Language Evaluation conducted by Hamilton (Exhibit B of the Petition):

V.H. was born at twenty-six weeks gestation via emergency C-section due to low amniotic fluid. V.H. remained in the neonatal intensive care unit for approximately three months after birth. During that time in the NICU she developed several complications. A small brain bleed was discovered, which resolved. Additionally, she developed Reactive Respiratory Disease and subsequently asthma. She underwent left hip surgery secondary to contracting MRSA in her hip joint. As a result she has a leg length discrepancy and wears a lift on her left shoe. Surgical history includes irrigation and debriding of the left hip secondary to MRSA, bilateral myringotomy tubes (multiple sets ;..) secondary to recurrent middle ear infections, and an adenoidectomy. V.H. is additionally diagnosed with

chronic static encephalopathy, sensory integration issues, behavioral concerns, oral dysphagia and an articulation disorder . . .

On September 21, 2015, K.H. requested further child study team (CST) evaluations of V.H. to determine eligibility for special education services beyond which she was already receiving. On October 8, 2015, Hamilton held an evaluation planning meeting where it considered information provided by K.H., including medical reports, occupational therapy reports, and parent input, and reviewed V.H.'s academic records. As a result of the meeting, Hamilton determined that further evaluations were not warranted.

K.H. did not agree with Hamilton's decision and filed first for mediation, then converted the mediation to a Due Process Hearing. However, on January 7, 2016, K.H. withdrew her Petition for Due Process due to orthopedic surgery which her daughter was about to undergo. On March 4, 2016, after the surgery, K.H. again filed a request for Hamilton to hold an evaluation planning meeting. On March 15, 2016, Hamilton held the evaluation meeting. At this meeting, Hamilton considered V.H.'s new medical information. K.H. submitted documents which she contends show that her daughter's diagnoses include Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder, Oppositional Defiance Disorder, Sensory Processing Disorder, Anxiety, Articulation Disorder and Chronic Static Encephalopathy. However, Hamilton again determined that there was no new area of suspected disability that had an adverse effect on V.H.'s educational performance and denied the request to evaluate V.H.

On March 24, 2016, K.H. requested IEEs in the areas of "Occupational Therapy, Physical Therapy, Speech and Language, Social and Emotional, Learning Evaluation, Comprehensive Educational Evaluation.." and Neurological, Psychological, Behavioral and a Neuro Cognitive Learning Assessment at Hamilton's expense. In response, Hamilton filed the within Petition for Due Process to protect its right to deny K.H.'s request. On June 23, 2016, Hamilton filed a Motion for Summary Decision.

LEGAL DISCUSSION

Under the Individuals with Disabilities in Education Act (IDEA), all states receiving federal education funding must provide every disabled student in their districts with a "free appropriate public education [(FAPE)] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." G.A. v. River Vale Bd. of Educ., 2013 U.S. Dist. LEXIS 133911, *32 (D.N.J. Sept. 18, 2013); (quoting 20 U.S.C. 1412(a)(1)(A)). To accomplish this, districts must specially create a program for each handicapped child. Id. "School districts achieve this goal by first evaluating the student, and then discussing the results in a meeting with the student's parents, teachers, and a curriculum specialist from the local school district." Id. at *32-33; 20 U.S.C. 1414(d)(1)(B).

A parent or teacher may request an initial evaluation of a child for special education and related services. 34 C.F.R. 300.301(b). If a parent or teacher requests a re-evaluation, the school district must re-evaluate the child in accordance with the IDEA regulations. 34 C.F.R. 300.303(a)(2). If the District denies the request to evaluate the child, the parent may file a due process complaint challenging the District's decision. 34 C.F.R. 300.507(a).

In New Jersey, if, during a re-evaluation of a student to create an IEP, the parents of a classified student disagree with any of the evaluation reports generated as part of a school district's re-evaluation, the parents may request an independent evaluation at the District's expense. N.J.A.C. 6A:14-2.5(c). "The request for an independent evaluation shall specify the assessment(s) the parent is seeking as part of the independent evaluation request." Id.

"The Code further directs that the Board must either provide the parents with information on how to obtain an independent evaluation, or request a due process hearing within 20 days." K.R. v. Jefferson Twp. Bd. of Educ., 2002 U.S. Dist. LEXIS 13267, *22-23 (D.N.J. June 25, 2002); N.J.A.C. 6A:14-2.5(c)(1)(i-ii). "Valid and comprehensive evaluation results are required to identify and describe a student's unique educational needs, and guide the Child Study Team in the design of an IEP." Id.; 34 C.F.R. 300.324(a).

According to the Supreme Court, the purpose of the independent education evaluation is to ensure that parents have “access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion.” Schaffer v. Weast, 546 U.S. 49, 60-61 (2005). The parental right to an IEE is not an end in itself; rather, it serves the purpose of furnishing parents with the independent expertise and information they need to confirm or disagree with an extant, school-district-conducted evaluation. T.P. v. Bryan Cnty. Sch. Dist., 792 F.3d 1284, 1293 (11th Cir. 2015). The IEE ensures that parents, in contesting a school 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, *supra*, 546 U.S. at 61.

A parent has the right to an IEE at public expense only “if the parent disagrees with an evaluation obtained by the public agency.” Krista P. v. Manhattan Sch. Dist., 255 F. Supp. 2d 873, 889 (N.D. Ill. 2003); 34 C.F.R. 300.502(b). “Evaluation” is defined in the regulations as the “procedures used in accordance with §§ 300.530-300.536 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.” *Id.*; 34 C.F.R. 300.500(b)(2).

In Krista P., the school district did not conduct an evaluation of the type detailed by the IDEA. *Id.* The court decided that because there was no evaluation to disagree with, the parents’ right to an IEE at public expense was not triggered. *Id.*; *see also* F.C. v. Montgomery County Pub. Schs., 2016 U.S. Dist. LEXIS 83460, 15-16 (D. Md. June 27, 2016) (“The right to a publicly funded independent education evaluation does not obtain until there is a reevaluation with which the parents disagree.” *quoting* G.J. v. Muscogee Cty. Sch. Dist., 668 F.3d 1258, 1266 (11th Cir. 2012)).

Here, on September 21, 2015, K.H. requested a meeting to determine whether initial evaluations for expanded special education services were warranted. On October 8, 2015, Hamilton held the evaluation planning meeting and determined that evaluations were not warranted. K.H. did not agree with Hamilton’s decision. Initially, K.H. filed for mediation. K.H. then converted the mediation to a due process hearing. However, on January 7, 2016, K.H. withdrew the Petition for Due Process on this issue.

On March 4, 2016, after V.H. underwent orthopedic surgery, K.H. again filed a request for Hamilton to hold an evaluation planning meeting. On March 15, 2016, Hamilton again determined that evaluations were not warranted. On March 24, 2016, K.H. requested the IEEs at issue.

K.H. made multiple requests for Hamilton to provide initial evaluations for V.H. While Hamilton held meetings to determine whether evaluations for further special education and related services were warranted, it ultimately denied K.H.'s requests. K.H. is only entitled to an IEE if K.H. disagrees with the evaluation obtained by Hamilton. Without an evaluation by Hamilton, there is no evaluation with which K.H. can disagree. Thus, because Hamilton never evaluated V.H., K.H. is not entitled to IEEs in this matter. The appropriate relief for K.H. is to challenge Hamilton's underlying decision not to evaluate V.H. for services beyond the speech and language services she is currently receiving. As Hamilton's petition only addresses her request for IEEs and she has not filed a cross petition, Hamilton's motion for summary decision on the procedural grounds it has raised is **GRANTED**. This ruling is based solely on procedural grounds and does not address the underlying substantive issues raised by the parties regarding V.H.'s classification, services or accommodations.

ORDER

Petitioner's Motion is **GRANTED** as set forth above.

August 1, 2016

DATE

PATRICIA M. KERINS, ALJ

Date Received at Agency:

Date Sent to Parties:

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