

**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**DECISION**

**MOTION TO DISMISS**

OAL DKT. NO. EDS 06949-16

AGENCY DKT. NO. 2016 24274

**J.L. AND B.L. ON BEHALF OF B.L.,**

Petitioners,

v.

**CHERRY HILL BOARD OF**

**EDUCATION,**

Respondent.

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**J.L. and B.L., petitioners, pro se**

**Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)**

Record Closed: September 12, 2016

Decided: September 19, 2016

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

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

On April 7, 2016, petitioners filed a due process complaint with the Department of Education, Office of Special Education Programs (OSEP). The sole issue raised in the compliant is the Cherry Hill Board of Education's (Board's) failure to consider petitioner's request to retain B.L. at the Horace Mann Elementary School for the 2016-2017 school year. On July 29, 2016, respondent filed a Motion to Dismiss. Petitioner filed opposition to the motion on August 10, 2016, and respondent filed a reply on

August 19, 2016. On August 31, 2016, petitioner submitted ex-parte correspondence to this tribunal, which I forwarded to respondent and allowed a reply to that correspondence by September 12, 2016, and the record closed on that date.

### **STATEMENT OF FACTS**

It is undisputed and I therefore **FIND** as **FACT** that the sole issue raised in the Petition for Due Process is the Board's failure to consider petitioners request to retain B.L. at the Horace Mann Elementary School for the 2016-2017 school year. It is further undisputed and I therefore **FIND** as **FACT** that petitioners dispute respondent's assertion that B.L. has appropriately matriculated from the fifth grade to the sixth grade.

### **LEGAL ANALYSIS AND CONCLUSION**

For the following reasons, the respondent's motion to dismiss will be treated as a motion for summary decision. While N.J.A.C. 1:1-12.1 does not specifically limit the types of motions that may be made in administrative hearings, and a motion to dismiss is not otherwise precluded under the Uniform Administrative Procedure Rules, the more common method for resolving a case on the papers without a plenary hearing in administrative proceedings is by a motion for summary decision under N.J.A.C. 1:1-12.5.

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision may 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." Further, "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. This standard is substantially similar to that governing a civil motion under New Jersey Court Rule 4:46-2 for summary judgment. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010); Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995).

In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court set forth the standard governing a motion for summary judgment:

[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 factfinder to resolve the alleged disputed issue in favor of the non-moving party. The “judge’s function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

[Brill, supra, 142 N.J. at 540 (citation omitted.)]

It is clear in this case that no issue of material fact exists that precludes summary decision. The sole issue to be determined is whether petitioner's due process petition presents a disagreement regarding any of the special education issues described in N.J.A.C. 6A:14-2.7(a).

N.J.A.C. 6A:14-2.7(a) outlines the limited circumstances in which a due process hearing may be requested in a special education setting. A due process request must be based upon a disagreement regarding identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education or disciplinary action. Where no such disagreement exists, a request for due process should be dismissed for lack of jurisdiction based upon the failure to assert a special education claim pursuant to N.J.A.C. 6A:14-2.7(a). In their opposition to the motion, petitioner asserts that B.L. has not satisfied all of the academic requirements necessary to advance to the sixth grade but asks this tribunal to refrain from ruling on this until independent evaluation can be conducted. Whether B.L. should be in fifth grade or sixth grade is not a special education claim under N.J.A.C. 6A:14-2.7(a) and does not relate to a right afforded to petitioner under the IDEA.

I therefore **CONCLUDE** that the relief requested in the petition is not appropriately addressed in a due process hearing pursuant to N.J.A.C. 6A:14-2.7(a).

**ORDER**

Based on the foregoing, I **ORDER** that the petition be **DISMISSED**.

This decision is final pursuant to 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 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.A. § 1415(i)(2); 34 C.F.R. § 300.516 (2016). 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.

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September 19, 2016

DATE

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**JOHN S. KENNEDY, ALJ**

Date Received at Agency:

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Date Sent to Parties:

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JSK/dm