

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION GRANTING MOTION
FOR SUMMARY DECISION

OAL DKT. NO. EDS 13275-16
AGENCY DKT. NO. 2016 24804

MONROE TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

v.

T.L. ON BEHALF OF I.L.,

Respondent.

T.L. ON BEHALF OF I.L.,

Petitioner,

v.

MONROE TOWNSHIP BOARD
OF EDUCATION,

Respondent.

OAL DKT. NO. EDS 15499-16
AGENCY DKT. NO. 2017 25165

John J. Armano, Jr., Esq., for petitioner/respondent Monroe Township Board of
Education (Trimble and Associates, attorneys)

Robert A. Robinson, Esq., for respondent/petitioner T.L. (Disability Rights New
Jersey, attorneys)

Record Closed: October 26, 2016

Decided: November 29, 2016

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF CASE

Petitioner/respondent Monroe Township Board of Education (Monroe) requests a due process hearing to show that its initial evaluation of I.L. during the 2015-2016 school year was appropriate and that respondent/petitioner T.L., I.L.'s mother, is not entitled to an independent evaluation at public expense.

PROCEDURAL HISTORY

Monroe filed for due process with the Office of Special Education Programs (OSEP) on June 28, 2016. The matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on September 1, 2016, and assigned Docket Number EDS 13275-16 (Monroe's petition).

On September 10, 2016, T.L. filed with OSEP a cross-petition seeking in part "an independent evaluation at Monroe's expense in the following areas: educational/learning and psychological." T.L.'s Cross-Petition for a Due Process Hearing, p. 1. T.L. also seeks attorney's fees as relief. Ibid.

On September 19, 2016, T.L. filed a motion for summary decision. The first hearing date, which was to be a settlement conference, was scheduled for October 11, 2016 before Administrative Law Judge Susan Scarola. Although the parties appeared, the parties advised that there was a motion for summary decision pending that would make it difficult, if not impossible to settle. Therefore, the case was assigned to the undersigned for decision on the motion and hearing, if necessary. On October 12, 2016, OSEP transmitted the cross-petition to the OAL, and it has been assigned Docket Number EDS 15499-16 (T.L.'s petition).

The settlement conference was scheduled for October 27, 2016 on EDS 15499-16, but was adjourned at the parties' request to await decision on the motion, which could decide that case as well. The hearing on both cases was scheduled for December 16, 2016 in the event that the motion was denied.

ISSUE

Whether, in this special education matter, T.L., the parent of a minor student, is entitled to an independent evaluation at public expense because the Monroe Township Board of Education failed to timely file a due process petition challenging T.L.'s request for an independent evaluation in accordance with N.J.A.C. 6A:14-2.5(c)(1)(ii)?

STATEMENT OF THE FACTS

In this special education matter, I.L. is a minor student who is seeking special education services under the Individuals with Disabilities Education Act (IDEA), 42 U.S.C.A. §§ 1400 to 1482, and State special education laws, N.J.A.C. 6A:14-1.1 to -10.2(b).

T.L. and I.L. live in Williamstown, New Jersey, which is part of the Monroe Township School District. Monroe's Due Process Petition, §§ 1-2. Upon request by T.L., Monroe's child study team met on January 19, 2016, to discuss a plan to determine whether I.L. was eligible for special education services. Id. at §§ 3-4. Then, between February and April 2016, the child study team conducted an initial evaluation, including social history, psychological, and educational assessments, to determine if I.L., who had a Section 504 Plan for ADHD during the 2015-2016 school year, was eligible for special education services. T.L.'s Motion for Summary Decision, Certification of T.L., §§ 3, 5. The child study team also reviewed an October 5, 2015, letter from Lawrence Brown, M.D., Division of Neurology, The Children's Hospital of Philadelphia, "strongly recommending that a 504 plan be instituted" for I.L.'s ADHD, with such accommodations as extended time to complete tests and "preferential seating." Monroe's Due Process Petition, § 4; Monroe's Brief in Opposition to T.L.'s Motion for Summary Decision, Exhibit A. On April 19, 2016, the child study team determined that, based on the initial evaluation, I.L. was not eligible for special education services. Monroe's Due Process Petition, § 5.

On June 1, 2016, T.L. emailed Dr. John Bersh, Monroe's Supervisor of Special Services, requesting "a complete independent evaluation on my son." Id. at § 6. By

letter dated June 6, 2016, Dr. Bersh informed T.L. that “I am in receipt of your email . . . requesting independent evaluations” of I.L. T.L.’s Motion for Summary Decision, Exhibit C. In the letter, Dr. Bersh also wrote that the child study team appropriately determined that I.L. was ineligible for special education services and advised T.L. that “[i]f after 15 days you are still requesting an independent evaluation, please be aware that the district, believing that its decision is predicated on extensive and reliable information, and meets all mandates, will be initiating a due process petition.” Ibid. By letter dated June 11, 2016, T.L. again requested “a complete independent evaluation.” Monroe’s Opposition Brief, Exhibit C.

On June 28, 2016, Monroe filed a petition for a due process hearing with the OSEP to show that its initial evaluation of I.L. was appropriate. According to the petition, “[T.L.] sent an email to [Dr. Bersh] requesting ‘a complete independent evaluation on my son’” and Monroe “responded to [T.L.’s] request stating that [Monroe] was denying the request as there was no evidence that such testing was warranted . . . and that there did not appear to be any historical evidence that I.L. may be a student in need of special education and related services.” Monroe’s Due Process Petition, §§ 6-7. In the petition, Monroe further stated that T.L.’s “request for an Independent Evaluation would not afford any additional information for determining eligibility or programming purposes” and that, therefore, Monroe “is not required to provide Independent Evaluations.” Id. at § 8.

On September 19, 2016, in response to Monroe’s petition, T.L. filed a motion for summary decision ordering that, in accordance with N.J.A.C. 6A:14-2.5(c)(1)(ii), which provides that “[n]ot later than 20 calendar days after receipt of the parental request for the independent evaluation, the school district shall request [a] due process hearing” to dispute the need for an independent evaluation, Monroe’s due process request was untimely and that, as a result, Monroe must “pay for an independent evaluation of I.L. in the following areas: psychological, educational/learning, and neurological.” T.L.’s Notice of Motion for Summary Decision, p. 2. In particular, T.L. contends that Monroe’s petition was untimely because she requested an independent evaluation on June 1,

2016, but Monroe did not request a due process hearing until June 28, 2016, or twenty-seven calendar days later.

In opposition to T.L.'s motion, Monroe argues that its petition was timely because, although T.L. requested an independent evaluation on June 1, 2016, she amended her request on June 11, 2016, and therefore, Monroe met the twenty-day filing requirement under N.J.A.C. 6A:14-2.5(c)(1)(ii) by requesting a due process hearing on June 28, 2016, or seventeen calendar days after T.L.'s amended request.

LEGAL DISCUSSION

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §§ 1400-1485, is designed to assure that disabled children may access a free appropriate public education (FAPE) that is tailored to their specific needs. 20 U.S.C.A. § 1400(c). Under the state regulations implementing the IDEA, N.J.A.C. 6A:14-1.1 to –10.2, a “school district of residence” is responsible for “the location, identification, evaluation, determination of eligibility, development of an individualized education program and the provision of a [FAPE] to students with disabilities.” N.J.A.C. 6A:14-1.3. In determining whether a student is eligible for special education services, a school district must conduct an initial evaluation, which “shall consist of a multi-disciplinary assessment in all areas of suspected disability” and “shall include at least two assessments and shall be conducted by at least two members of the child study team in those areas in which they have appropriate training or are qualified through their professional licensure or educational certification and other specialists in the area of disability as required or as determined necessary.” N.J.A.C. 6A:14-3.4(f).

If a parent disagrees with the results of an initial evaluation, he or she may request an independent evaluation and “shall specify the assessment(s) the parent is seeking as part of the independent evaluation request.” N.J.A.C. 6A:14-2.5(c). The school district shall pay for the independent evaluation “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.”¹ N.J.A.C. 6A:14-2.5(c) and (c)(1). N.J.A.C. 6A:14-2.5(c)(1)(ii) specifies 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.” Thus, “[t]he school district shall not delay either providing the independent evaluation or initiating a due process hearing to defend the school district's evaluation.”² N.J.A.C. 6A:14-2.5(c)(5). If, at a due process hearing, “an administrative law judge orders that an independent evaluation be conducted, the independent evaluation shall be obtained by the district board of education in accordance with the decision or order of the administrative law judge, and the district board of education shall pay the cost of the independent evaluation.” N.J.A.C. 6A:14-2.5(c)(7).

In several special education cases, administrative law judges have ordered a school districts to pay for an independent evaluation for failing to timely request a due process hearing in accordance with N.J.A.C. 6A:14-2.5(c)(ii). For example, in Haddonfield Bd. of Educ. v. S.R. ex rel. P.R., EDS 5392-16, Final Decision (June 24, 2016) <njlaw.rutgers.edu/collections/oal>, a school district’s due process petition challenging a parent’s request for an independent neuropsychological evaluation was dismissed because the school district filed the petition twenty-seven days after the parent’s request. The parent asked for the independent evaluation on March 10, 2016, and while, on March 18, 2016, the school district denied the request and informed the parent of its intent to file a due process petition, the school district did not actually request a due process hearing until April 6, 2016, after the twenty-day deadline under N.J.A.C. 6A:14-2.5(c)(1)(ii) had passed. The administrative law judge in that case granted the parent’s motion to dismiss in lieu of an answer on timeliness grounds and ordered the school district to pay for an independent neuropsychological evaluation. See also Wall Twp. Bd. of Educ. v. C.M. ex rel. D.M., EDS 6450-06, Final Decision (May 9, 2007) (ordering school district to provide independent evaluation for neglecting

¹ Under special education law, “[a] due process hearing is an administrative hearing conducted by an administrative law judge.” N.J.A.C. 6A:14-2.7(a).

² A parent also has the right to request a due process hearing when he or she disagrees with a school district with respect to a child’s evaluation. N.J.A.C. 6A:14-2.7(a).

to file a due process petition for nearly three months after the parent's request) njlaw.rutgers.edu/collections/oal.

Here, as in Haddonfield, it is appropriate to order Monroe to pay for independent evaluations for failing to timely file a due process petition to challenge T.L.'s request for an independent evaluation. Under the facts of this case, T.L. requested "a complete independent evaluation" on June 1, 2016, but Monroe did not request a due process hearing until June 28, 2016, or twenty-seven days after T.L.'s request. As such, Monroe violated the time requirements of N.J.A.C. 6A:14-2.5(c)(1)(ii) and must be ordered to provide I.L. with an independent evaluation at public expense.

Contrary to Monroe's contention, T.L. did not "amend" her request for an independent evaluation by letter on June 11, 2016, thereby extending the twenty-day deadline under N.J.A.C. 6A:14-2.5(c)(1)(ii). In the June 11, 2016, letter, T.L. merely confirmed her June 1, 2016, request for an independent evaluation in response to Dr. Bersh's June 6, 2016, letter, in which he stated, "[i]f after 15 days you are still requesting an independent evaluation, please be aware that the district, believing that its decision is predicated on extensive and reliable information, and meets all mandates, will be initiating a due process petition." Through the June 11, 2016, letter, T.L. let Monroe know that she was, in fact, "still requesting an independent evaluation" and that she had not changed her mind since her original request on June 1, 2016. Dr. Bersh's June 6, 2016, letter confirms both that Monroe knew that T.L. had requested an independent evaluation on June 1, 2016, and that Monroe knew that it had to file a due process petition by June 21, 2016. Monroe's failure to do so gives rise to its obligation to now pay for an independent evaluation for I.L.

However, the question becomes the type of independent evaluation to which T.L. is now entitled. While, under N.J.A.C. 6A:14-2.5(c), a parent "shall specify the assessment(s) the parent is seeking as part of the independent evaluation request," T.L. did not so specify in her June 1, 2016, request and instead vaguely asked for "a complete independent evaluation." In T.L.'s petition of September 10, 2016, she requested as relief "an independent evaluation at Monroe's expense in the following

areas: educational/learning and psychological,” but in her September 19, 2016, motion for summary decision in response to Monroe’s petition, she seeks an order requiring Monroe to “pay for an independent evaluation of I.L. in the following areas: psychological, educational/learning, and neurological.” Thus, in the subsequent motion, T.L. added a request for a neurological evaluation.

T.L.’s failure to specify the assessments she sought as part of her June 1, 2016, request for an independent evaluation should not prevent I.L. from now receiving an independent evaluation. Monroe could have raised this issue in a timely filed due process petition, but did not. However, in fairness, the independent evaluation to which T.L. is entitled should be limited to the specific assessments she first requested as part of her due process petition, i.e., “educational/learning and psychological” assessments, and not including the additional neurological assessment she requested as part of the instant motion.

CONCLUSION

Pursuant to N.J.A.C. 1:6A-14.4(a), an ALJ has authority to order that an independent evaluation be provided. That regulation provides that “[f]or good cause and after giving the parties an opportunity to be heard, the judge may order an independent educational evaluation of the pupil.” Ibid. For the reasons set forth above, I **FIND** no material facts in dispute regarding Monroe’s obligation to provide T.L.’s requested independent evaluations. T.L. is entitled to an independent evaluation at public expense because the school district failed to challenge T.L.’s request for an independent evaluation within twenty calendar days, as required by N.J.A.C. 6A:14-2.5(c)(1)(ii). Since Monroe failed to file a timely due process petition to challenge T.L.’s request for an independent evaluation, I **CONCLUDE** that T.L. is entitled to judgment as a matter of law. Monroe is to provide I.L. with an independent evaluation, consisting of “educational/learning and psychological” assessments, at its own expense. The independent evaluation shall be completed within two months of the date of this

Decision. Finally, T.L.'s petition is rendered moot through the grant of summary decision in response to Monroe's petition.³

ORDER

I **ORDER** that T.L.'s motion for summary decision is hereby **GRANTED** and her due process petition is rendered moot by virtue of this Decision. I **ORDER** that Monroe provide the requested evaluations by giving T.L. a list of evaluators in each of the areas. Monroe must pay for each evaluation, which are to take place within two months from the date of this Decision.

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.

November 29, 2016

DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

cmo

³ In T.L.'s petition, she also seeks attorney's fees. However, attorney's fees are not available in this forum. W.Z. ex rel. G.Z. v. Princeton Reg'l Bd. of Educ., EDS 2563-07, Final Decision (April 26, 2007) <njlaw.rutgers.edu/collections/oal>.