

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

GRANTING MOTION FOR

SUMMARY DECISION

OAL DKT. NO. EDS 09085-16

AGENCY DKT. NO. 2016 24502

E.P. AND J.P. o/b/o S.P.,

Petitioners,

v.

MONROE TOWNSHIP

BOARD OF EDUCATION,

Respondent.

Andrew Meltzer, Esq., for petitioners (Sussan, Greenwald & Wesler, attorneys)

John J. Armano, Jr., Esq., for respondent (Trimble & Armano, attorneys)

Record Closed: September 7, 2016

Decided: September 29, 2016

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 19, 2016, petitioners filed for due process seeking independent evaluations of their minor student, S.P. On or about July 1, 2016, the respondent, Monroe Township Board of Education (District), filed a motion for summary decision asserting that the parent's request for an independent evaluation should be denied as a matter of law because the District paid for an identical evaluation which was conducted in December 2015. Petitioner's filed an opposition to the motion on July 14, 2016,

asserting that there exists a genuine issue of material fact as to whether their request should be considered a new evaluation of a continuation of the one conducted in December 2015.

FACTUAL BACKGROUND

The following facts are undisputed unless stated otherwise. S.P. is a student of the District who is currently eligible for special education or related services under the category of “Autistic” and is diagnosed with Autism Spectrum Disorder.

S.P. attends a self-contained Autism program. Out of concern that S.P. was not making sufficient progress in the Autism program, petitioners requested that the District agree to an outside, independent program evaluation, conducted by a Board Certified Behavior Analyst, (BCBA) to observe S.P. in his current program and provide feedback to the parties. The District agreed and on December 7 and 16, 2015, Dr. Beth Glasberg, BCBA-D, conducted observations of S.P. in his program and submitted a report to both parties dated February 1, 2016. Dr. Glasberg recommended changes to S.P.’s program to ensure educational benefit. The parties met on March 1, 2016, for S.P.’s annual review and the District proposed a continuation of S.P.’s current placement and stated that they could meet his needs within his current program. The District agreed to make changes to S.P.’s Individualized Education Program (IEP) based on the recommendations of Dr. Glasberg. Petitioners requested that Dr. Glasberg be permitted to go in to observe the changes in S.P.’s program, at the District’s expense, asserting that this observation is a continuation of her independent program evaluation. The District filed the within motion contending that petitioners are not entitled to another independent evaluation under the provisions of N.J.A.C. 6A:14-2.5 and asserts they should not be responsible for payment of another independent evaluation. The petitioner opposes the motion alleging that there is a factual dispute as to whether the independent evaluation should be considered a second evaluation or a continuation of the one already agreed to and paid for by the District.

LEGAL ANALYSIS

I. Summary Decision is appropriate if there is no genuine issue as to any material fact necessary to resolve the claim as a matter of law.

Summary decision may be granted “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.” N.J.A.C. 1:1-12.5(b). The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995) (citation omitted):

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

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. “To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed ‘worthless’ and will ‘serve no useful purpose.’” Brill, supra, 142 N.J. at 541. In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2:

An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issues to the trier of fact.

In this case there appears to be only one fact in dispute. That is whether the evaluation requested by the petitioners should be considered a new evaluation or a continuation of the evaluation Dr. Glasberg started on December 2015. A review of Dr. Glasberg's February 1, 2016, report, which is attached as Exhibit B to petitioner's letter brief in opposition to the summary decision motion, appears to be a thorough and complete independent review of S.P.'s educational program. The report consists of twenty nine pages, which include nineteen specific recommendations; Dr. Glasberg feels will improve S.P.'s learning outcomes. Nowhere in the report does Dr. Glasberg suggest that additional evaluations or observations are necessary to complete her independent program review. Therefore, I **CONCLUDE** that Dr. Glasberg completed the independent program review, summarized her findings, and made recommendations in the February 1, 2016, report and any additional observations or evaluations would be a separate evaluation.

N.J.A.C. 6A:14-2.5 states that "upon completion of an initial evaluation or re-evaluation, a parent may request an independent evaluation if there is disagreement with the initial evaluation or a re-evaluation provided by a district board of education." Additionally, the school district shall permit the evaluator to observe the student in the classroom or educational setting. N.J.A.C. 6A:14-2.5(c)(6). A parent shall be entitled to only one independent evaluation at public expense each time the district board of education conducts and initial evaluation or re-evaluation with which the parent disagrees. N.J.A.C. 6A:14-2.5(c).

In Washington Twp. Bd. of Educ. v. J.T. ex rel. M.T., <http://njlaw.rutgers.edu/collections/oal/> EDS 677-07, Final Decision (May 14, 2007), a Board of Education was not required to conduct an independent evaluation of a learning disabled student where it provided testimony and documentary evidence that the evaluations it had performed on the student were valid and the parents provided no testimony or other relevant evidence to rebut such evidence.

In the current matter, it is clear that petitioners consider the evaluation performed by Dr. Glasberg to be valid. Otherwise, there would not be a request to have her conduct additional observations to determine if her recommendations are being

implemented. At the March 1, 2016, IEP meeting, the District agreed to make changes to S.P.'s IEP based on the recommendations of Dr. Glasberg. If the petitioners feel these changes have not been implemented, they have the right to file a due process appeal asserting that the district has failed to provide S.P. a Free Appropriate Public Education (FAPE). In the current due process petitioners only seek an independent evaluation to be conducted by Dr. Glasberg at district expense and do not specifically assert that the district has failed to provide S.P. a FAPE.

Pursuant to N.J.A.C. 6A:14-3.8, within three years of the previous classification, a multi-disciplinary re-evaluation shall be completed to determine whether the student continues to be a student with a disability. Re-evaluation shall be conducted sooner if conditions warrant or if the student's parent or teacher requests the re-evaluation. However, a re-evaluation shall not be conducted prior to the expiration of one year from the date the parent is provided written notice of the determination with respect to eligibility in the most recent evaluation or re-evaluation, unless the parent and district both agree that a re-evaluation prior to the expiration of one year as set forth above is warranted. Since Dr. Glasberg's independent program review was completed on February 1, 2016, I **CONCLUDE** that the District has satisfied its obligations under N.J.A.C. 6A:14-2.5 and shall not be required to provide another evaluation at the District expense.

ORDER

For the reasons set forth above, it is hereby **ORDERED** that:

1. Respondents' motion for summary decision is **GRANTED**; and
2. The petition in this matter is **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.

September 29, 2016
DATE

JOHN S. KENNEDY, ALJ

JSK/dm