State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
M.S. ON BEHALF OF G.S.,
Respondent.

OAL DKT. NO. EDS 16215-18
AGENCY DKT. NO. 2019-29001

Marc G. Mucciolo, Esq., for petitioners (Methfessel & Werbel, attorneys)

No appearance by or on behalf of respondent.

Record Closed: March 13, 2019 Decided: March 18, 2019

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE

Petitioner, Middletown Township Board of Education (Middletown, Board), seeks completion of an initial child study team (CST) evaluation regarding the student identified as G.S. Respondent M.S., the mother of G.S., consented to three of the four required assessments; the Board seeks an order to compel M.S. to consent to a neurological evaluation of G.S.

PROCEDURAL HISTORY

This Special Education case arises under the Individual with Disabilities Education Act (IDEA), 20 U.S.C.A. §1401 to 1484a. Petitioner filed it as a request for due process. The Office of Special Education Programs (OSEP) transmitted the matter to the Office of Administrative Law

(OAL) where it was filed on November 8, 2018, for final determination in accordance with 20 U.S.C.A. §1415 and 34 CFR 300.500 to 300.587.

This matter was assigned to the Honorable John R. Futey, ALJ, who scheduled a settlement conference with the parties on November 20, 2018, written notice of which was sent to the parties by the Clerk of the OAL on November 9, 2018. M.S. did not appear for the settlement conference and this matter was reassigned to the undersigned and scheduled for telephonic hearing on November 26, 2018. During the telephonic hearing, M.S. stated that she had made an appointment for G.S.'s neurological evaluation for the morning of December 10, 2018. M.S. agreed to provide written notice to the Board that G.S. appeared for the evaluation by the close of business on December 10, 2018. Upon receipt of such notice, the Board agreed to withdraw this petition. If, however, M.S. failed to provide such notice, the parties were directed to appear for the due process hearing on December 13, 2018.

On December 5, 2018, at the request of petitioner and with the consent of respondent, the hearing was adjourned for one day and rescheduled for December 14, 2018. On December 11, 2018, the Board submitted a copy of an appointment confirmation showing that G.S. would be evaluated by the Board's neurologist on February 5, 2019. (P-13.) Therefore, the Board requested, and I approved, the adjournment of the December 14, 2018, hearing. Consistent with the earlier direction to the parties, I scheduled a telephonic hearing for February 7, 2019, to confirm that G.S. appeared for the evaluation, and scheduled the due process hearing for March 13, 2019. Written notice of both hearings was sent to the parties by the Clerk of the OAL on December 11, 2018.

G.S. did not appear for the neurological evaluation on February 5, 2019, and M.S. did not appear for the telephonic hearing on February 7, 2019. M.S. did not contact the OAL to explain her absence or to request that the telephonic hearing be rescheduled. On March 13, 2019, only petitioner appeared at the OAL, Mercerville, New Jersey, for the due process hearing. No one appeared on behalf of respondent. Petitioner asked the undersigned for permission to conduct a proof hearing, which I granted. After waiting approximately one hour from the scheduled hearing time, I confirmed that respondent had received notice from the OAL, the Board had made

numerous attempts by telephone and email to contact respondent, and respondent had made no response. The proof hearing was held on March 13, 2018; petitioner appeared and presented proofs relative to the issue of whether the Middletown School District (District) is entitled to conduct a neurological evaluation of G.S., and the record closed.

UNDISPUTED FACTS

Based upon the totality of the evidence presented, both testimonial as well as documentary, the following constitute the undisputed facts in this matter and I **FIND:**

Robert H. Dunn testified that he is the Director of Student Services in the District. He reviewed his credentials as set forth in his curriculum vitae. (P-17.)

The student, G.S., is eleven-years old and enrolled in fifth grade at Harmony Elementary School (Harmony) in the District. She has only attended general education classes and is not classified as eligible for special education and related services.

During the first half of the 2015-2016 school year, when G.S. was in second grade at Harmony, her performance in the classroom began to deteriorate, her grades dropped, she was easily distracted, disturbed other students, and was disrespectful toward her teachers. (P-4.) Harmony staff developed an Intervention and Referral Services (I&RS) Plan for G.S., the first step in identifying and resolving academic and/or social issues that may not result from a disability or disabling condition. (P-4.) I&RS considers whether general education supports and services may be sufficient to address the student's school-related issues [and ensure the child receives Free Appropriate Public Education (FAPE)] before and/or without a referral to a CST. Subsequent I&RS plans were developed for G.S. for the 2016-2017 school year and the 2017-2018 school year. (P-5 and P-6.) Despite the I&RS services, the District staff working with G.S. remained concerned regarding her classroom performance and lack of academic progress, specifically her inability to concentrate, the ease with which she is distracted, and the difficulty she has completing both classroom and homework assignments.

On February 23, 2018, the principal of Harmony sent written notice to M.S. that G.S. had been referred to the CST to determine her eligibility for special education services. (P-3.) On February 27, 2018, the CST sent M.S. an invitation to an initial identification and evaluation planning meeting scheduled for March 15, 2018. (P-7.) M.S. did not appear for this meeting, or the second scheduled meeting on March 19, 2018. M.S. came to the third scheduled meeting, on March 29, 2018, during which the CST explained to M.S. the reasons for an evaluation and the scope of the proposed evaluation. (P-8.)

The CST proposed to conduct, and asked M.S. to consent to, a psychological evaluation, an educational evaluation with functional assessment, a social history, and a neurological evaluation. (P-8.) M.S. returned the signed consent form on April 19, 2018, with the hand-written notation that she did not consent to the neurological evaluation of G.S. (P-8.) The other three assessments were completed by the District in May and June, 2018. (P-9; P-10; and P-11.) Based on the results, the CST concluded that G.S. was not eligible for special education and related services, but also stated that the absence of a neurological evaluation prevented consideration of "pertinent information."[1] (P-12.) In other words, the CST believed that the neurological evaluation would answer the question of why G.S. continued to struggle in the classroom.

On June 8, 2018, petitioner filed a due process petition with OSEP to compel M.S. to consent to a neurological evaluation of G.S.[2] On July 19, 2018, the parties appeared before the Honorable Edward J. Delanoy, Jr., ALJ, for a settlement conference during which they mutually agreed to resolve the matter by settlement agreement. (P-2.) By the terms of this agreement, M.S. consented to a neurological evaluation of G.S. on or before August 15, 2018, and the Board agreed to withdraw its petition upon receipt of the report of the neurological evaluation. (P-2.) M.S. did not comply with the terms of the settlement agreement.[3]

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[1] The CST held a meeting to discuss its decision on G.S.'s eligibility for special education services but M.S. failed to attend. (P-12.)

[2] OAL Docket No. EDS 08479-18; Agency Ref. No. 2018-28225.

[3] Petitioner conceded that it withdrew its first petition prematurely.

During the 2018-2019 school year, G.S. continued to struggle. After numerous attempts to assist M.S. in scheduling the neurological evaluation, the Board filed the due process petition in the present matter on November 6, 2018.

The Board contends that M.S.'s refusal to consent to the neurological evaluation and her unwillingness to participate in the present proceedings has compromised the CST's ability to make an informed decision regarding the diagnoses, abilities and needs of G.S. The subsequent delay in determining whether G.S. is eligible for special education and related services has delayed the formulation of an individual education program (IEP) for the 2018-2019 school year, to G.S.'s detriment. Even if the results of a neurological evaluation do not change the CST's conclusion that G.S. is not eligible for special education services, she is not well served by the delay in exploring other means of addressing her classroom-related challenges.

In sum, the Board feels strongly that a neurological evaluation of G.S. is necessary to ensure a proper and comprehensive evaluation of the true nature and extent of her needs and to ensure that G.S. is provided FAPE. M.S. has not submitted documentation to the District (or to the undersigned) regarding the basis for her objections to the neurological evaluation and/or disputing District staff reports regarding how G.S. has been struggling in school; she has not raised questions (formally or informally) about any of the reports and/or evaluations prepared by District staff on G.S.

As described above, M.S., the mother of G.S., failed to appear at the due process hearing to provide input regarding G.S.'s on-going academic problems. In that regard, I **FIND** the District has provided ample evidence that from second grade to the present, G.S. has struggled in the classroom. In particular, G.S.'s teachers reported that she is unable to follow directions, has difficulty paying attention and staying on task, is disorganized and careless, engages in task-avoidance behaviors, and has trouble completing assigned work. I **FIND** that G.S. has shown the same problems each year from the 2015-2016 school year, when she was in second grade, to the present, and the general education supports provided to her through the I&RS Plans in these school years have not addressed these issues. Accordingly, I **FIND** that G.S.'s continuing problems can only be resolved by a thorough and proper

evaluation, as recommended by the CST, of her eligibility for special education services. M.S.'s failure to cooperate is resulting in the inability of the District to provide G.S. a FAPE. Further, I **FIND** that this process has been delayed for more than one year due to M.S.'s failure to cooperate, underscoring the need to complete the evaluation quickly.

LEGAL ANALYSIS AND CONCLUSIONS

The regulations provide that the District must obtain consent "prior to conducting any assessment as part of an initial evaluation." N.J.A.C. 6A:14-2.3(a)(1). Accordingly, the CST invited M.S. to the introductory evaluation planning meeting (and rescheduled the meeting twice due to M.S.'s failure to participate) for the purpose of explaining the need for and scope of an evaluation of G.S. After completing three of the evaluations deemed necessary to properly determine G.S.'s eligibility for special education services, the CST renewed its request to conduct the neurological evaluation. M.S. refused, relented, and then failed to cooperate. In such a case, the regulations provide that "the district board of education or public agency responsible for the development of the student's IEP may request a due process hearing when it is unable to obtain required consent to conduct an initial evaluation[.]" N.J.A.C. 6A:14-2.7(b).

Therefore, I **CONCLUDE** that completing the evaluation of G.S.'s eligibility for special education services is necessary under the provisions of N.J.A.C. 6A:14-3.3, and is otherwise consistent with the requirements of the regulations governing special education services. Further, I **CONCLUDE** that M.S. has received ample notice, but failed to comply with the District's reasonable requests, despite her child's ongoing problems in the classroom. The CST evaluation of G.S.'s eligibility for special education services must be completed as soon as possible. For all the foregoing reasons, I **CONCLUDE** that completion of the neurological evaluation is warranted and necessary at this time.

Petitioner's request for an Order to compel M.S. to consent to the neurological evaluation of G.S. as requested by the CST is **GRANTED** due to the proofs submitted and respondent's failure to appear to refute any of the testimony or documentary evidence, pursuant to N.J.A.C. 1:1-5.4.

ORDER

It is therefore **ORDERED** that the Middletown Township School District shall complete a CST evaluation regarding G.S. as soon as possible. M.S. is **ORDERED** and **DIRECTED** to consent to and cooperate with the District in scheduling and completing the neurological evaluation of G.S. Based upon the results of that evaluation, the parties are **ORDERED** and **DIRECTED** to then meet and review the results of the full CST evaluation and plan for G.S.'s placement within the Middletown Township School District in the 2019-2020 school year.

This decision is final pursuant to 20 U.S.C.A. §1415(i)(1)(A) and 34 C.F.R. §300.514 (2015) 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 (2015). 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.

March 18, 2019
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency

Date Mailed to Parties:

/nd

APPENDIX

WITNESSES

For Petitioner:

Robert Dunn

For Respondents:

None

EXHIBITS

For Petitioner:

P-1 Letter from Joseph D. Castellucci, Jr., Esq., Methfessel & Werbel, P.C., to John Worthington, Acting Director, Office of Special Education, Petition for Due Process, dated November 6, 2018

P-2 State of New Jersey, Office of Administrative Law, Final Decision Approving Settlement, OAL Docket Number EDS 8479-18, Middletown Township Board of Education v. M.S. on behalf of G.S., Edward J. Delanoy, Jr., ALAJ, and Settlement Agreement, dated July 23, 2018

P-3 Middletown Township Board of Education, Intervention and Referral Services, CST Referral Letter, from Principal, dated February 23, 2018

P-4 Middletown Township Board of Education, Intervention and Referral Services, Staff Data Collection Form, Confidential, dated November 18, 2015

P-5 Middletown Township Board of Education, Intervention and Referral Services, SMART Plan, Confidential, dated June 13, 2017

P-6 Middletown Township Board of Education, Intervention and Referral Services, SMART Plan Follow-up, Confidential, dated February 12, 2018

P-7 Notice from Bree Twill, Learning Disability Teacher-Consultant, Middletown Township Public Schools, Invitation to an Initial Identification Meeting, dated February 17, 2018

P-8 Notice from Bree Twill, Learning Disability Teacher-Consultant, Middletown Township Public Schools, Parental Notice Following an Initial Identification/ Evaluation Planning Meeting, dated March 28, 2018

P-9 Middletown Township Public Schools, Office of Pupil Services, Psychological Evaluation, Confidential, dated May 29, 2018

P-10 Middletown Township Public Schools, Department of Student Services, Educational Evaluation-Confidential, dated June 15, 2018

P-11 Middletown Township Public Schools, Office of Student Services, Social Assessment Report, dated June 28, 2018

P-12 Middletown Township School District, Eligibility Meeting Sign-in Sheet, dated July 10, 2018

P-13 Middletown Township Public Schools, Office of Student Services, Medical Evaluation Appointment Confirmation, dated December 6, 2018

P-14 Dorothy M. Pietrucha, M.D., Evaluation, dated January 8, 2019

P-15 State of New Jersey, Department of Education, Grade 3 ELA English Language Arts/Literacy Assessment Report, 2016-2017, dated Spring 2017

P-16 Standards Report Card, Middletown Township School District, Garde Level: 4, School Year 2017-2018

P-17 Robert H. Dunn, Resume and Supporting Documents

For Respondents:

None