



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 05319-21

AGENCY DKT. NO. 2017-26116

(ON REMAND)

OAL DKT. NO. EDS 15781-17

C.P. ON BEHALF OF F.P.,

Petitioners,

v.

CLIFTON BOARD OF EDUCATION,

Respondent.

Donald A. Soutar, Esq. for petitioner C.P. on behalf of F.P. (John Rue & Associates, attorneys)

Jessika Kleen, Esq. for respondent Clifton Board of Education (Machado Law Group, attorneys)

Record Closed: October 7, 2021

Decided: October 18, 2021

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On April 27, 2017, C.P. filed this petition on behalf of her son F.P. and requested a due process hearing seeking independent educational evaluations (IEE) and

reimbursement for same from respondent Clifton Board of Education (District) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. §1400 et seq.

The due process petition was ultimately heard and adjudicated by the Honorable Leslie Z. Celentano, A.L.J., on December 13, 2018. Therein, she determined that the IEEs obtained by petitioner¹, which had never been provided to the District, did not meet the comparable agency criteria for evaluations and thus were not eligible for reimbursement. Judge Celentano also found that petitioner had not supported the very high costs of the IEEs and that such would not be considered reasonable.

C.P. appealed to the United States District Court pursuant to 20 U.S.C.A. § 1415(i)(2) on March 13, 2019. The matter proceeded on motion for summary judgment in the federal court. On August 6, 2020, the Honorable Kevin McNulty, U.S.D.J., entered an Opinion and an Order partially granting summary judgment in favor of the District but remanding the matter to the Office of Administrative Law for the limited issue of whether it was liable for the reimbursement of the IEEs, as set forth in more detail below. There apparently was some post-judgment motion practice before Judge McNulty which was denied.

On June 14, 2021, petitioner advised the Office of Special Education Policy and Dispute Resolution (OSEP) that the matter had been remanded and requested further instruction if any additional action was required for the remand to be effectuated. On June 22, 2021, OSEP transmitted the matter to the Office of Administrative Law where it was filed. The matter was originally due to be assigned to Judge Celentano, but was reassigned instead to the undersigned on July 1, 2021. A telephonic case management was convened on July 12, 2021, at which time counsel for petitioner opted not to avail herself of the opportunity to produce any witnesses for an evidentiary hearing. Instead, both parties agreed to draft a joint stipulation of the relevant facts on the remand, and a briefing schedule for cross-motions for summary decision.

¹ Petitioner procured the two evaluations she sought on June 15, 2017 (central auditory processing (CAP)), and September 10, 2017 (psychological evaluation).

This matter is now ripe for determination.

STIPULATION OF FACTS

1. Respondent, the Clifton Board of Education (hereinafter “District”), is a public body organized pursuant to N.J.S.A. 18A:10-1 *et seq.* to operate in the Clifton Public School District.

2. F.P. is a minor student who, at all times relevant, was eligible for special education and related services.

3. C.P. is F.P.’s mother and natural guardian.

4. In November 2016, the District conducted a triennial re-evaluation of F.P. that included a November 21, 2016, psychological evaluation.

5. On January 18, 2017, petitioner on behalf of F.P., sought two independent evaluations (the “IEEs”): a central auditory processing (“CAP”) evaluation and a psychological evaluation, at public expense.

6. The District did not file a due process complaint within twenty days of the January 18, 2017, request.

7. The District did not, within twenty days, ensure that the requested evaluations were provided at public expense.

8. Petitioner filed a request for due process dated April 27, 2017.

9. Petitioner obtained the IEEs on her own.

10. At no point prior to the administrative hearing or during the administrative hearing were the evaluations provided to the District or to the Court. A due process hearing was held on October 24, 2018.

11. The two evaluations and/or their invoices were not introduced as evidence at the hearing in this matter.

12. Petitioner offered no evidence or witnesses at the hearing.

13. The petitioner did not attend the hearing and there was no certification of petitioner submitted to the ALJ.

14. The evaluators did not testify, and no certification of the evaluators was submitted.

15. By letter dated August 18, 2020, the Mother provided the CAP evaluation and the psychological evaluation to the District.

ISSUE ON REMAND

By Order entered on August 6, 2020, the Honorable Kevin McNulty, U.S.D.J., set forth “that the case is remanded to the administrative law judge who shall grant plaintiff the option to submit additional evidence on the issue of liability only;” and “that the administrative law judge’s decision is otherwise **AFFIRMED** and that the maximum reasonable amount of reimbursement is \$1800.” More specifically, Judge McNulty stated in the accompanying Opinion:

The ALJ’s decision was based in large part of C.P.’s stunning failure to produce evidence of any kind that these IEEs met the requirement for reimbursement at public expense. If C.P., warned of what was at stake, had make a strategic decision that she would nevertheless rely solely upon her waiver arguments – which the ALJ, and I, have

found ineffective – she would have had to live with that decision.

But the *District*, to judge from its opening statement, appears to have felt it was vulnerable for failing to respond within twenty days, and conceded the waiver arguments. It is possible to construct a scenario whereby, with fair warning to all, the ALJ could have explicitly rejected that concession. After all, it is public, not private, money at stake, and the ALJ might have felt she had a supervisory role to play. But no such ruling was sought or made.

I will therefore remand for further proceedings. At any hearing on remand, C.P. and her counsel are now on notice that if they fail to produce evidence, as they did at the first hearing, the result will very likely be the same – a finding that they are not entitled to reimbursement at all.

Accordingly, the within proceeding is limited to the issue of whether petitioner has proven that she met the criteria for reimbursement, which reimbursement will, even if she prevails, be awarded in no greater amount than \$1,800. While petitioner appears to have included arguments in her motion papers that relate to other issues raised in the earlier proceedings, those will not be considered to the extent they go beyond this limited issue on remand; that is, arguments on the amount of the reimbursement cap or the legal authority for requiring compliance with the District's criteria for obtaining comparable evaluations will be preserved for appellate review in the Third Circuit but will not be taken up herein.²

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 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. § 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,

² In addition, issues raised by petitioner only in her final responsive papers to the effect that Judge Celentano did not address certain 2018 pretrial motions before the plenary hearing completed and she entered her Final Decision will definitely not be addressed and may have been waived with the first federal district court appeal.

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 if the child is deemed eligible, a school district must conduct “a multi-disciplinary reevaluation . . . to determine whether the student continues to be a student with a disability” at least every three years. N.J.A.C. 6A:14-3.4(f); N.J.A.C. 6A:14-3.8(a).

N.J.A.C. 6A:14-2.5(c) states, in pertinent part:

Upon completion of an initial evaluation or reevaluation, a parent may request an independent evaluation if there is disagreement with the initial evaluation or a reevaluation provided by a district board of education.

The regulation governing IEEs “contemplates that parents are entitled to reimbursement for independent evaluations when they are collaborating with the local educational agency in developing an appropriate IEP, based on the district's own evaluations and any independent evaluations.” M.S. v. Mullica Twp. Bd. of Educ., 485 F. Supp. 2d 555, 574–75 (D. N.J. 2007), *aff'd*, 263 F. App'x 264 (3d Cir. 2008). Here, as found by the District Court, “[t]he regulations may require the public to pay for an IEE obtained by the parent, but the entire premise of that system is that the results of that IEE will play some role in the FAPE process. Parents may obtain any evaluation they wish at their own expense, but the taxpayers are not required to subsidize the parents’ curiosity.” [Opinion at 18.]

Under 34 C.F.R. 300.502(b) and (e) (2018), a school board has no duty to pay for an IEE demonstrated not to meet agency criteria:

. . . insignificant or trivial deviations from the letter of agency criteria may be acceptable as long as there is substantive compliance with all material provisions of the agency criteria and the IEE provides detailed, rigorously produced and accessibly presented data.

[Seth B. v. Orleans Par. Sch. Bd., 810 F.3d 961, 979 (5th Cir. 2016).]

Here, there is no dispute that the IEEs were not provided to the District until three years after they (and the first appeal) were completed. They were never made part of the prior record and they were never utilized in the IEP/FAPE process, and they are now outdated. Accordingly, I **CONCLUDE** that petitioner's claim for reimbursement of her independent evaluations must be denied.

ORDER

Based on the foregoing, it is **ORDERED** that the petitioner C.P.s' request for reimbursement from the Clifton Board of Education for IEEs obtained in 2017 is **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) 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. § 1415(i)(2); 34 C.F.R. § 300.516 (2019). 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 Policy and Dispute Resolution.



October 18, 2021

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency

10/18/21

Date Mailed to Parties:

10/18/21

id