State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
OAL DKT. NO. EDS 02167-20
AGENCY DKT. NO. 2020-31125

RINGWOOD BOARD OF EDUCATION,
Petitioner,
v.
K.W. AND G.W. ON BEHALF OF M.W.,
Respondents.

Jessika Kleen, Esq., for petitioner (Machado Law Group, attorneys)

K.W. and **G.W.** on behalf of **M.W.**, respondents, pro se

Record Closed: September 14, 2021 Decided: September 24, 2021

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Respondents K.W. and G.W. (respondents) refuse to permit petitioner Ringwood Board of Education ("District") to conduct re-evaluations of their minor child, M.W., a special-education student, as required by law. The District asserts that the proposed evaluations are necessary in order for the District to provide M.W. with an appropriate special-education and related-services program. Therefore, the District is seeking an order to compel the respondents to either 1) give consent to the District to evaluate M.W.,

or 2) waive their rights to challenge the special-education programing and related services proposed by the District for M.W.

PROCEDURAL HISTORY

The District filed a due-process petition with the Office of Special Education Programs (OSEP) on January 14, 2020. OSEP transmitted the petition to the Office of Administrative Law on February 13, 2020, and the matter was assigned to the undersigned on March 10, 2021. The District filed a motion for summary decision on August 13, 2021. Respondents filed opposition to the motion for summary decision on August 30, 2021, to which the District filed a reply brief on September 14, 2021.

ISSUES

Does the District have a legal right to perform its own evaluations? If so, must respondents K.W. and G.W. (the parents) give consent to allow the District to perform these evaluations lest they waive their right to challenge the District's programing going forward?

FACTS

Based upon the documents submitted in support of and in opposition to the motion for summary decision, I **FIND** the following as **FACT**:

1. M.W. is a thirteen-year-old student, born December 2, 2007.

2. M.W. is currently eligible for special education and related services under the classification of other health impaired.

3. The last District-conducted evaluations of M.W., performed by professionals of the District's choosing, were conducted during the 2015–2016 school year.

4. On November 15, 2019, a re-evaluation planning meeting was held for M.W. The respondents, their advocate, their attorney, and three other representatives on behalf of respondents attended the meeting via telephone.

5. The District proposed the following assessments for M.W.: occupational-therapy assessment, assistive-technology assessment, social-history update, neuropsychological assessment, reading assessment, and functional-behavior assessment.

6. On November 27, 2019, the parents were provided with a copy of the re-evaluation-planning-meeting documents, which included a consent form.

7. The District, through its attorney, followed up with the parents, through their attorney, on December 16 and 30, 2019, and on January 9, 2020, requested a response from the parents regarding the proposed assessments of M.W.

8. The parents have failed to provide consent to allow for M.W. to be re-evaluated by the District.

STANDARD OF REVIEW

A "motion for summary decision shall be served with briefs and with or without supporting affidavits." N.J.A.C. 1:1-12.5(b). A 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." Ibid. If "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.

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a

matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528–29 (1995). Moreover, "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'Fanciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Id. at 529 (quoting Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

In the case at bar, while the parents, in their opposing papers, seem to comment on the pertinent facts proposed by the District, they do not actually dispute any material fact alleged by the District in its moving papers. In their response to the District's moving papers, the parents direct the undersigned to look at the undisputed facts set forth by the District "closely" and to "consider them in light of additional facts," yet they fall short of disputing any material fact asserted by the District.

The parents note that, while M.W. has not had any evaluation performed by a professional of the District's choosing since the 2015–2016 school year (as asserted by the District), M.W. has been evaluated during that time by various professionals of the parents' choosing. The District does not dispute that the parents have had their own evaluations done; rather, the District simply asserts that it has the right to perform its own under the law.

The issue at the heart of this matter remains the parents' unwillingness to allow M.W. to be evaluated by the District and by professionals of the ***District's*** choosing. The parents do not dispute that they have withheld consent for the District to perform the evaluations, and they, in fact, admit in their opposition that they have not responded to the District's request to evaluate M.W. The parents make the distinction that, while they have certainly withheld consent to have the District perform its evaluations, they have never actually articulated a refusal. I **CONCLUDE** that this is an irrelevant distinction. Whether the parents withhold consent or actually say "no" to the District's request for consent, the relevant facts remain undisputed: the District needs the parents' consent to perform its evaluations on M.W.; the District has requested from the parents the prerequisite consent to perform the evaluations on M.W.; the parents have not provided the prerequisite consent to have the District's evaluations performed; and the parents remain steadfast in their unwillingness to consent. Based on the foregoing, I further

CONCLUDE that the "additional facts" referenced by the parents in their response to the motion and discussed above constitute facts that are immaterial or of an insubstantial nature, as contemplated by the Court in Brill, and shall, therefore, not preclude a motion for summary decision from being granted. See Brill, 142 N.J. at 528–29 (citing Judson, 17 N.J. at 75).

The New Jersey Supreme Court has encouraged courts "not to refrain from granting summary judgment when the proper circumstances present themselves." Brill, 142 N.J. at 541. Further, "when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. at 540 (citation omitted). In the present matter, as there is no material fact in dispute, I **CONCLUDE** that this matter is ripe for summary decision.

LEGAL DISCUSSION

The District asserts that it has a legal right to evaluate M.W. I agree. Pursuant to N.J.A.C. 6A:14-3.8(a), the "school district is required to re-evaluate a classified student every three years to confirm the student's classification and the appropriateness of the student's program and placement." Bordentown Reg'l Bd. of Educ. v. M.R. & M.R. ex rel. A.R., 2012 N.J. AGEN LEXIS 54 at *3. More specifically, "[w]ithin three years of the previous classification, a multi-disciplinary reevaluation shall be completed to determine whether the student continues to be a student with a disability." N.J.A.C. 6A:14-3.8(a).

The District further asserts that, prior to conducting any assessment as part of a reevaluation of a student with a disability, the district must obtain consent from the parent. I agree. N.J.A.C. 6A:14-3.8(c) states: "Prior to conducting any assessment as part of a reevaluation of a student with a disability, the district board of education shall obtain consent from the parent pursuant to N.J.A.C. 6A:14-2.3." If a parent refuses to provide consent, the district may request a due-process hearing, as in the instant matter. See N.J.A.C. 6A:14-2.3(c), -2.7(b).

As noted above, the parents here are insisting that their own independent evaluations are sufficient for the District to rely on, and no further evaluations by the

District are needed. I disagree. "Every court to consider the [Individuals with Disabilities Education Act's (IDEA's)] reevaluation requirements has concluded if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation." M.S. v. Mullica Twp. Bd. of Educ., 485 F. Supp. 2d 555, 568 (D.N.J. 2007) (quoting M.T.V. v. Dekalb Cty. Sch. Dist., 446 F.3d 1153, 1160 (11th Cir. 2006)); see also Andress v. Cleveland Indep. Sch. Dist., 64 F.3d 176, 178–79 (5th Cir. 1995); Johnson by Johnson v. Duneland Sch. Corp., 92 F.3d 554, 558 (7th Cir. 1996) ("because the school is required to provide the child with an education, it ought to have the right to conduct its own evaluation"); Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1315 (9th Cir. 1987) (holding that parents must permit mandatory reassessments under the Education of the Handicapped Act, the IDEA's predecessor, if they want their child to receive special-education services); Dubois v. Conn. State Bd. of Educ., 727 F.2d 44, 48 (2d Cir. 1984) (same). Based on the foregoing, the parents' assertion that their independent evaluations of M.W. somehow negate the need for the District to perform its own evaluations is unfounded.

Furthermore, New Jersey's regulations provide that a parent who refuses to consent to services cannot later argue that the district failed to provide a free appropriate public education (FAPE). N.J.A.C. 6A:14-2.3(c), -2.3(e)(4). Thus, "a parent cannot refuse to allow the school district to offer a FAPE, and later seek reimbursement for a unilateral placement, predicated on the school district's failure to offer a FAPE. N.J.A.C. 6A:14-2.3(c); N.J.A.C. 6A:14-2.3(e)(4)." S.W. & J.W. ex rel. W.W. v. Florham Park Bd. of Educ., 2015 N.J. AGEN LEXIS 384 at *71.

In the instant matter, it is undisputed that the parents of M.W. are withholding consent for the District to perform its evaluations. The District, thus, seeks an order requiring the parents to sign the consent form, or, in the alternative, an order reflecting that the parents have been deemed to have waived their rights to later allege that the District's placement and program for M.W. failed to provide a FAPE at any time after November 27, 2019 (the date on which the parents were first provided with the consent form at the heart of this matter, which they have since failed to sign and return). While the undersigned is hesitant to order the injunctive relief sought (ordering the parents to

sign the form), I **CONCLUDE**, as a matter of law, that the District's motion should be granted, as no issue of material fact remains.

ORDER

Based upon the foregoing, it is **ORDERED** that, as long as respondents/parents continue to withhold consent to allow the District to perform its evaluations on M.W., the parents, K.W. and G.W., will have waived their rights to challenge the District's placement and programing for M.W., or otherwise allege that the District's placement and programing for M.W. failed to provide a FAPE at any time after November 27, 2019.

It is further **ORDERED** that the Clerk return this file to the Office of Special Education Programs of the New Jersey Department of Education.

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.

September 24, 2021

DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 9/24/21

Date Mailed to Parties: 9/24/21

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