



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

SUMMARY DECISION

D.F. AND J.F. ON BEHALF OF T.F.,

Petitioners,

v.

ELIZABETH CITY BOARD OF EDUCATION,

Respondent.

OAL DKT. NO. EDS 05937-21

AGENCY DKT. NO. 2021-32982

ELIZABETH CITY BOARD OF EDUCATION,

Petitioner,

v.

D.F. AND J.F. ON BEHALF OF T.F.,

Respondents.

OAL DKT. NO. EDS 05939-21

AGENCY DKT.NO. 2021-33079

Matthew P. Crimmel, Esq., for D.F. and J.F. (John Rue & Associates, attorneys)

Richard P. Flaum, Esq., for Elizabeth Board of Education (DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, attorneys)

Record Closed: October 6, 2021

Decided: November 16, 2021

BEFORE **KELLY J. KIRK, ALJ:**

STATEMENT OF THE CASE

D.F. and J.F. (the parents) on behalf of T.F. filed a Petition for Due Process against the Elizabeth Board of Education (Board or District), seeking, *inter alia*, an independent evaluation and attorneys' fees and costs. The Board filed a Cross-Petition for Due Process seeking an order denying the independent evaluation.

PROCEDURAL HISTORY

On or about June 15, 2021, the parents, on behalf of T.F., filed a Petition for Due Process (Petition) against the Board seeking, *inter alia*, an independent evaluation. On or about June 28, 2021, the Board filed its Answer to Petition for Due Process and Cross-Petition (Cross-Petition), seeking an order denying the independent evaluation. The matters were transmitted by the New Jersey Department of Education (Department), Office of Special Education Policy and Dispute Resolution, to the Office of Administrative Law (OAL), where they were filed on July 15, 2021. On or about July 27, 2021, the parents filed an answer to the Cross-Petition. The matters were consolidated by order dated August 4, 2021.

A telephone prehearing conference was held on July 27, 2021, and hearing dates were scheduled for September 28, 2021, and October 6, 2021. On September 6, 2021, the Board filed a motion for summary decision, accompanied by a brief, certification of Richard P. Flaum, Esq., with three exhibits (Flaum Cert.), and affidavit of Diana Pinto-Gomez with one exhibit (Pinto-Gomez Affidavit). On September 23, 2021, the parents filed their opposition and cross-motion for summary decision, consisting of a brief, certification of D.F. (D.F. Cert.) with one exhibit, and certification of Matthew P. Crimmel, Esq., with one exhibit (Crimmel Cert.). The September 28, 2021, hearing date was adjourned due to the pending motion and unavailability of the Board's attorney, and the October 6, 2021, hearing date was converted to oral argument on the pending motions. On September 30, 2021, the District filed a reply letter brief and certification of Richard P. Flaum, Esq. (Flaum Reply Cert.). On October 5, 2021, the parents filed a reply brief. Oral argument on the motions was held on October 6, 2021. The hearing was rescheduled

for November 17, 2021, but said date was adjourned with consent due to the unavailability of the Board's witnesses.

FACTUAL DISCUSSION

In their verified Petition, the parents allege the following:

PARTIES

1. T.F. was born [2014¹]. He is a six (6) year old male student.
2. T.F. is currently in kindergarten.
3. T.F. resides with his father and mother, Petitioners, at [Elizabeth, New Jersey²].
4. T.F. is classified as having ADHD and other health impairments and is eligible for special education and related services.
5. The District is a public body organized pursuant to N.J.S.A. 18A:10-1 et seq. to operate the City of Elizabeth School District, serving students who are domiciled in Elizabeth.

JURISDICTION

6. The Office of Special Education Programs has jurisdiction to hear this matter pursuant to N.J.A.C. 6A:14-2.7.

STATEMENT OF FACTS

7. On April 1, 2021, Petitioners requested an independent evaluation be performed at the District's expense.
8. Per the New Jersey implementing regulations for the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. § 1400 et seq., "a parent may request an independent evaluation if there is a disagreement with the initial evaluation or a reevaluation provided by a district board of education." N.J.A.C. 6A:14-2.5(c).

¹ Birthdate omitted for privacy.

² Address omitted for privacy.

9. School districts must request due process no later than 20 calendar days after receipt of the parental request for the independent evaluation. N.J.A.C. 6A:14-2.5(c)(1)(ii).

10. Independent evaluation(s) shall be provided at the district's expense unless it initiates a due process hearing within twenty (20) days, and prevails at that hearing. N.J.A.C. 6A:14-2.5(c)(1).

11. The District did not file for Due Process within twenty days of the request for independent evaluations. Neither has it agreed to pay for the independent evaluation.

12. The District has violated the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. § 1400 et seq., 34 C.F.R. § 300 et seq.; the Rehabilitation Act of 1973 ("Section 504"), 20 U.S.C. § 794 et [s]eq., 34 C.F.R. § 104 et seq.; and New Jersey state law and regulations, N.J.A.C. § 6A:14-1.1 et seq.; and § 18A:1-1 et seq. as follows:

1. Failing to provide an independent evaluation at public expense.

PRAYER FOR RELIEF

WHEREFORE, Petitioners request that the Court enter an Order:

1. That the District provide Petitioners an independent evaluation.
2. Reimburse Petitioners for attorneys fees and costs, pursuant to 20 U.S.C. § 1415; and
3. Such other and further relief as this Court deems just and proper.

[See Flaum Cert. at R-1.]

In its unverified Cross-Petition, the District alleges, in part, the following:

2. In or around December of 2019, Cross-Petitioner Elizabeth Board of Education completed an educational evaluation related to T.F. At no time after the educational evaluation was completed until June 22, 2021 was the Board notified that the parents disagreed with the educational evaluation conducted at that time. The educational evaluation

conducted in or around December of 2019 was in connection with determining whether T.F. was eligible for special education and related services.

3. In accordance with N.J.A.C. 6A:14-1, et seq., T.F. will be reevaluated in the 2022–2023 academic year.

4. With respect to Petitioner’s claim that a request for an independent evaluation occurred on or about April 1, 2021, the request was never received by the case manager. The Elizabeth Board of Education uses a program known as PowerSchool where parents can view their children’s school related information. In this matter, the email address provided by the parents is the email address for D.F. The email requesting the independent evaluation was sent by J.F. whose email is not utilized by the parents in connection with T.F.’s education. In addition, Cross-Petitioner Elizabeth Board of Education regularly and consistently responds to all requests from D.F. whose email is in PowerSchool and known to the District. At no time prior to June 22, 2021 (when the email from J.F. was provided by counsel for Petitioners) did the District have any email correspondence with J.F.

5. The Cross-Petitioner Elizabeth Board of Education investigated the matter once the email was provided by counsel for Petitioners and learned that the email from J.F. did not go into the inbox of the case manager. The settings for the Elizabeth Board of Education email accounts did not recognize the email of J.F. because no prior emails had ever been sent by J.F. resulting in the email from J.F. being blocked. Consequently, the first notice that Cross-Petitioner Elizabeth Board of Education received related to a request for independent evaluations particularly an independent educational evaluation was on June 22, 2021.

6. The Elizabeth Board of Education is therefore not in violation of N.J.A.C. 6A:14-2.57(c)(ii).

7. There is no evidence that an independent educational evaluation is warranted at this time and request for an independent educational evaluation is not the result of any dispute related to either the initial evaluation or reevaluation of T.F.

[See Flaum Cert. at R-2.]

LEGAL ANALYSIS AND CONCLUSIONS

Independent Educational Evaluation

The parents of a child with a disability have the right under 34 C.F.R. § 300.502 to obtain an independent educational evaluation (IEE) of the child, subject to 34 C.F.R. § 300.502(b) through (e). 34 C.F.R. § 300.502(a)(1) (2021). The public agency³ must provide to parents, upon request for an IEE, information about where an IEE may be obtained, and the agency criteria applicable for IEEs is set forth in 34 C.F.R. § 300.502(e). 34 C.F.R. § 300.502(a)(2) (2021); N.J.A.C. 6A:14-2.5(c)(1)(i). For these purposes, an IEE means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question, and public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with 34 C.F.R. § 300.103. 34 C.F.R. § 300.502(a)(3)(i) and (ii) (2021). The request must specify the assessment(s) the parent is seeking as part of the independent evaluation. N.J.A.C. 6A:14-2.5(c).

A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in 34 C.F.R. § 300.502(b)(2) through (4). 34 C.F.R. § 300.502(b)(1) (2021); N.J.A.C. 6A:14-2.5(c). If a parent requests an IEE at public expense, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate or ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing pursuant to 34 C.F.R. §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. 34 C.F.R. § 300.502(b)(2)(i) and (ii) (2021); N.J.A.C. 6A:14-2.5(c)(1). If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is

³ Public agency includes the State educational agency (SEA), local educational agency (LEA), educational service agency (ESA), nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities. 34 C.F.R. § 300.2 (2021).

appropriate, the parent still has the right to an IEE, but not at public expense. 34 C.F.R. § 300.502(b)(3) (2021).

If a parent requests an IEE, the public agency may ask for the parent's reason why he or she objects to the public evaluation, but it may not require the parent to provide an explanation and may not unreasonably delay either providing the IEE at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation. 34 C.F.R. § 300.502(b)(4) (2021); N.J.A.C. 6A:14-2.5(c)(5). In New Jersey, the district board of education shall take steps to ensure that the independent evaluation is provided without undue delay, or, not later than twenty calendar days after receipt of the parental request for the independent evaluation, the district board of education must request the due process hearing. N.J.A.C. 6A:14-2.5(c)(1)(i) and (ii). A parent is entitled to only one IEE at public expense each time the public agency conducts an evaluation with which the parent disagrees. 34 C.F.R. § 300.502(b)(5) (2021); N.J.A.C. 6A:14-2.5(c).

If the parent obtains an IEE at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of a free, appropriate public education (FAPE) to the child and it may be presented by any party as evidence at a hearing on a due process complaint. 34 C.F.R. § 300.502(c)(1) and (2) (2021). If an IEE is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE. 34 C.F.R. § 300.502(e)(1) (2021).. Except for the criteria described in 34 C.F.R. § 300.502(e)(1), a public agency may not impose conditions or timelines related to obtaining an IEE at public expense. 34 C.F.R. § 300.502(e)(2) (2021).

In opposition to the District's motion, and in support of the parents' cross-motion, the D.F. Cert. reflects, in part, the following:

3. By email dated April 1, 2021, a true copy of which is attached hereto as Exhibit A, my husband and I requested that

the District provide an independent educational evaluation in the form of a neurology evaluation.

4. The District did not respond to our IEE request within twenty days and, in fact, has never provided us with information about where we could obtain the evaluation, nor has the District provided us with any specific District criteria for an independent evaluation.

5. At the time that we made the IEE request, April 1, 2021, we resided in Elizabeth, New Jersey, and had no current plans to change school districts.

6. In July, 2021, my husband obtained a new job that required that we move out of the District.

7. My husband and I, as well as T.F., now reside in the State of Maine.

8. I understand that the District contends that I requested or demanded that the neurological assessment be conducted virtually. Neither I nor my husband has ever made that demand.

The parents allege that an email request for an IEE was made on April 1, 2021, from J.F.'s email address, and that the District did not provide the IEE and did not request a due process hearing within twenty calendar days of the parents' request. Specifically, the April 1, 2021, email from J.F. to "Ms. Myers" at the District states, in pertinent part, as follows:

Have you checked about the neurology evaluation for [T.F.'s] classification? We forwarded his developmentalist's email regarding her credentials. I feel like we need more information, so we are requesting an independent educational evaluation. I hope you were able to connect with her with the consent we gave and the contact information.

[D.F. Cert., Exhibit A.]

In response, the District alleges that because J.F.'s unrecognized email address was used instead of D.F.'s recognized email address—as it was the email address on record in PowerSchool and the email address utilized in all prior correspondence relative to T.F.'s education—the April 1, 2021, email was blocked and not received by the District

representative, so the District was unaware of the request for an IEE until the parents' Petition was filed.

Although the District's Cross-Petition alleges that the District did not receive a request for an IEE pursuant to N.J.A.C. 6A:14-2.5(c)(1)(i)⁴ due to technology issues, there is no question that the April 1, 2021, email was sent by the parents to the District and therefore the request should be deemed made on that date. However, in view of the alleged blocked email, that the Board did not request a due process hearing within twenty days of April 1, 2021, should not automatically entitle the parents to an IEE or serve to waive the Board's right to file for a due process hearing. The parents' Petition was filed on June 15, 2021, and the Board alleges that it was provided a copy of the April 1, 2021, email by petitioners' attorney on June 22, 2021. Thereafter, the Board filed for a due process hearing on June 28, 2021, which was within twenty days of receipt of the parents' Petition.

Notwithstanding the foregoing, no conclusions are made with respect to the parties' disputes relative to the email address and receipt of the IEE request, as this issue is secondary to and overborne by the issue of mootness.

Mootness

In support of the District's motion, the Pinto-Gomez Affidavit reflects, in part, the following:

4. T.F. is a six (6) year-old male student who resided in the Elizabeth Public School District and was eligible for special education and related services.
5. T.F. attended an out-of-district placement at the Shepard School, a private school located at 2 Miller Rd., Kinnelon, NJ 07405 during the 2020–2021 academic year.
6. On or about June 15, 2021, the Petitioners filed a Due Process Petition demanding that the District provide an IEE at public expense.

⁴ Although the Cross-Petition references N.J.A.C. 6A:14-1 et seq. and N.J.A.C. 6A:14-2.5(c), it appears to contain typographical errors as it references N.J.A.C. 6A:14-2.57(1)(i) (and later N.J.A.C. 6A:12-2.57(c)(ii)), which do not exist.

7. On July 12, 2021, the District received an email from Dr. Katie Dulfer, Psy.D., NCSP from the Shepard School indicating T.F.'s last day at the Shepard School would be August 6, 2021 as the family was moving to Maine. See Email from Dr. Katie Dulfer attached hereto as Exhibit PG-1.

8. T.F. is not enrolled in the Shepard School for the 2021–2022 school year. Upon information and belief, Petitioners have relocated and no longer reside in the Elizabeth Public School District.

9. The Parents requested that the IEE be conducted virtually due to their relocation to Maine. However, in compliance with Department of Education and New Jersey state regulations, the District cannot conduct the IEE virtually because these regulations require the student to be observed in-person.

The District argues that the parents' move from New Jersey to Maine "renders Petitioners' application moot, as jurisdiction of T.F.'s special education and related services and the authority to conduct an evaluation of T.F. is transferred to the appropriate local educational agency in Maine" and "the District is no longer responsible for providing T.F. with an IEE at public expense."⁵ Conversely, the parents argue that the Petition is not moot because it seeks a remedy for a "past transgression," and further argue that they are entitled to the IEE because it was requested, and the Board failed to file for due process within twenty days.

In part, the purpose of special education is to ensure that all students with disabilities have available to them a FAPE as that standard is set under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400 et seq.). N.J.A.C. 6A:14-1.1(b)(1). Per 20 U.S.C. § 1401(9), a FAPE means special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

⁵ The District also argues that the Petition is moot because the parents "demanded that the IEE be conducted virtually" and that "[e]valuations of the student require in-person observation." However, this issue is not addressed herein as the parents deny making such demand and it does not appear in the Petition. Further, the criteria under which an IEE is obtained are set forth at 34 C.F.R. § 300.502(e)(1) (2001) and are not dictated by either party.

(D) are provided in conformity with the individualized education program (IEP) required under section 614(d) [20 U.S.C. § 1414(d)].

Generally, “evaluation” means procedures used in accordance with C.F.R. §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. 34 C.F.R. § 300.15 (2021). Each public agency must conduct a full and individual initial evaluation, in accordance with 34 C.F.R. §§ 300.304 through 300.306, before the initial provision of special education and related services to a child with a disability. 34 C.F.R. § 300.301(a) (2021). Consistent with the consent requirements in 34 C.F.R. § 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. 34 C.F.R. § 300.301(b) (2021). The initial evaluation must consist of procedures to determine if the child is a child with a disability under § 300.8 and to determine the educational needs of the child. 34 C.F.R. § 300.301(c)(2) (2021). In conducting the evaluation, the public agency must: (1) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability under § 300.8, and (ii) the content of the child’s IEP, including information related to enabling the child to be involved in and progress in the general education curriculum (or for a preschool child, to participate in appropriate activities); (2) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child; and (3) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 34 C.F.R. § 300.304(b) (2021); 20 U.S.C. § 1414(b)(2)(A)(i) and (ii), (B), and (C).

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a FAPE, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the LEA conducts an evaluation pursuant to subsection 20 U.S.C. § 1414(a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law. 20 U.S.C. § 1414(d)(2)(C)(i)(II).

LEA means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools. 20 U.S.C. § 1401(19)(A). Assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with § 300.301(d)(2) and (e), to ensure prompt completion of full evaluations. 34 C.F.R. § 300.304(c)(5) (2021); 20 U.S.C. § 1414(b)(3)(D). Upon completion of the administration of assessments and other evaluation measures, the determination of whether the child is a child with a disability as defined in 20 U.S.C. § 1401(3) and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child. 20 U.S.C. § 1414(b)(4)(A).

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this part, the IEP team and other qualified professionals, as appropriate, must review existing evaluation data on the child, and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child is or continues to be a child with a disability and the child's educational needs. 34 C.F.R. § 300.305(a) (2021). The public agency must administer such assessments and other evaluation measures as may be needed to produce such data. 34 C.F.R. § 300.305(c) (2021).

A parent or a public agency may file a due process complaint on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child). 34 C.F.R. § 300.507(a)(1) (2021). The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in § 300.511(f) apply to the timeline in this section. 34 C.F.R. § 300.507(a)(2) (2021).

Petitioners rely on D.F. v. Collingswood Borough Board of Education, 694 F.3d 488 (3d Cir. 2012), in support of their position that the Petition is not moot. In this regard, the Court noted that the “Supreme Court has held that if parents have paid for a disabled child’s education because the public schools were failing to provide FAPE, reimbursement of this tuition constitutes appropriate relief.” Id. at 496 (quoting Sch. Comm. of Burlington v. Dep’t of Educ., 471 U.S. 359, 370 (1985)). Additionally, quoting Lester H. v. Gilhool, 916 F.2d 865, 872 (3d Cir. 1990), the Court stated, “compensatory education is an equitable remedy that compensates a special needs student ‘for rights the district already denied him.’” Id. at 497. Continuity of residence is not a prerequisite to the grant of compensatory education. Ibid. However, a claim is moot if no case or controversy exists. Ibid. “[T]he requirement that an action involve a live case or controversy extends through all phases of litigation” Id. at 496. (quoting Cty. of Morris v. Nationalist Movement, 273 F.3d 527, 533 (3d Cir. 2001)). If “developments occur during the course of adjudication that eliminate a plaintiff’s personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be dismissed as moot.” Id. at 496–97 (quoting Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 698–99 (3d Cir. 1996)).

The IDEA works because each school district bears the obligation to educate special needs students, often at substantial cost. See Lauren W. ex rel. Jean W. v. DeFlaminis, 480 F.3d 259, 262 (3d Cir. 2007) (“It is undisputed that the District is the local education agency responsible for providing a FAPE to [the student].”). To comply with the IDEA, a school district no longer responsible for educating a child must still be held responsible for its past transgressions. . . . We therefore hold that a claim for compensatory education is not rendered moot by an out-of-district move, even if that move takes the child out of state.

[Id. at 497–98.]

Compensatory education is a remedy based on past harms. Id. at 498. Appropriate remedies under the IDEA are determined on a case-by-case basis. Ibid. “In each case, a court will evaluate the specific type of relief that is appropriate to ensure that a student is fully compensated for a school district’s past violations of his or her rights

under the IDEA and develop an appropriate equitable award.” Id. at 498–99 (quoting Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 720 (3d Cir. 2010)).

In Collingswood, the petitioner alleged a denial of a FAPE and sought compensatory education. Id. at 495. Specifically, it was alleged that: Collingswood had placed D.F. in a regular classroom and had failed to provide a one-to-one aide in violation of the IEP; that D.F. had been subject to discipline without consideration that his behavior was a manifestation of his disability; and that the IEP and behavior plan were incomplete because they did not include specific target behaviors, methods, and documentation processes, and because they were not developed from the baseline of a behavior assessment. D.F.’s due process petition sought: 1) an independent psychiatric evaluation; 2) an independent behavioral assessment and a positive behavior intervention plan designed by a consultant who would oversee it; 3) compensatory education for the period of time D.F. did not have a one-to-one aide; 4) an extended school year; and 5) a requirement that the IEP include proper goals and objectives. Id. at 492. Further, D.F.’s counsel advised Collingswood that D.F. had moved to Georgia and that D.F. would be withdrawing all claims except those for compensatory education. Ibid. Thereafter, D.F. filed a second petition for due process, nearly identical to the first except that it sought, as its sole relief, compensatory education for “the period of time Collingswood failed to provide a free and appropriate education in the least restrictive environment.”⁶ Id. at 494.

A due process complaint must allege a violation—and petitioners’ Petition alleges one violation only: “failing to provide an independent evaluation at public expense.” In contrast to Collingswood, the Petition does not allege any denial of a FAPE or any “past harm,” and it does not demand compensatory education, which is a “remedy for rights already denied.” Instead, the Petition alleges that petitioners are entitled to an IEE and it seeks only prospective relief—an IEE—and not reimbursement for the cost of a neurology evaluation already paid for by the parents. Further, while parents are not required to provide an explanation for why they object to a public evaluation, neither the Petition nor the April 1, 2021, email reflects a “disagreement” with the District’s evaluation. Instead, the April 1, 2021, email states, “I feel like we need more information, so we are requesting an

⁶ The initial petition had sought compensatory education only for the time period before the one-to-one aide was initially provided.

independent educational evaluation.” The initial evaluations were conducted in or around December 2019, and there is no indication in the pleadings, motion, or cross-motion that there was notice of any disagreement at that time or thereafter. The parents did not request an IEE until April 2021, and there is no reference to any prior neurology evaluation conducted by the Board nor reference to any disagreement that the Board’s 2019 proposed list of evaluations failed to include a neurology evaluation. Further, given the absence of any allegation beyond the failure to provide the IEE, the results of such IEE would likewise not serve as evidence at a hearing on the Petition.

The parents filed the Petition while still residents of New Jersey, but there is no dispute that they have since moved from New Jersey and are now residents of Maine.⁷ Thus, Maine is “the State educational agency” and “the State involved,” and the “board of education,” “district of residence,” “IEP team,” and child study team (CST) responsible for T.F. are all located in Maine. Accordingly, I **CONCLUDE** that Elizabeth is not T.F.’s district of residence and therefore is not the district board of education obligated to provide him with special education and related services. Further, since T.F. is no longer eligible for special education and related services in New Jersey, he has no New Jersey IEP team or CST. By law, the LEA in Maine must conduct an evaluation to determine whether T.F. has a disability and the nature and extent of the special education and related services he requires, as the LEA must provide for the examination and classification of T.F. and determine an appropriate educational program and is responsible for the provision of a FAPE. Further, in conducting an evaluation, the LEA must use, inter alia, a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child has a disability and the content of his IEP, including information related to enabling the child to be involved in and progress in the general education curriculum. If the parent obtains an IEE at public expense or shares with the District an evaluation obtained at private expense, the results of the evaluation must be considered by the District, if it meets the criteria, in any decision made with respect to the provision of FAPE. Accordingly, it is evident that the purpose of an evaluation is to determine whether the child has a disability and, if so, the appropriate educational program, which

⁷ The date the family moved was not provided, but the Petition was filed on June 15, 2021. Per the July 12, 2021, email, T.F.’s last day at Shepard School was August 6, 2021. The Petition was transmitted to the Office of Administrative Law on July 15, 2021.

determinations now lie squarely with the appropriate entities in Maine, all of which are bound to follow the federal identification, evaluation, and classification procedures.

Had there been an allegation of denial of a FAPE or other violation relating to the identification, evaluation, or educational placement of T.F., or a demand for compensatory education, then perhaps the issue of the IEE may not have been mooted by the move to Maine. However, in view of the facts and circumstances specific to this matter, I **CONCLUDE** that the IEE request is moot.

Summary Decision

Pursuant to N.J.A.C. 1:1-12.5(b), 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.” Further, “[w]hen 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. This standard is substantially similar to that governing a civil motion under R. 4:46-2 for summary judgment. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010); Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995).

In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court set forth the standard governing a motion for summary judgment:

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

[Citation omitted.]

The parties cross-moved for summary decision. Inasmuch as there is no genuine issue as to the contents of the Petition or that petitioners have moved to Maine, I **CONCLUDE** that this matter is appropriate for summary decision. I further **CONCLUDE** that the Board's motion for summary decision should be granted and the parents' cross-motion for summary decision should be denied.

ORDER

It is hereby **ORDERED** that the Board's motion for summary decision is **GRANTED** and the parents' cross-motion for summary decision is **DENIED**. It is further **ORDERED** that the parents' Petition and Board's Cross-Petition are **DISMISSED** as moot.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2021) 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 (2021).



November 16, 2021

DATE

KELLY J. KIRK, ALJ

Date Received at Agency

Date Mailed to Parties:
db
