State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

MOTION SUMMARY DECISON

H.D. and N.R. ON BEHALF OF N.D.,
Petitioners,
v.
WEST ORANGE TOWN
BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 13583-19
AGENCY DKT. NO. 2020-30639

WEST ORANGE TOWN
BOARD OF EDUCATION,
Petitioner,
v.
H.D. and N.R. ON BEHALF OF N.D.
Respondents.

OAL DKT. NO. EDS 15447-19
AGENCY DKT. NO. 2020-30839

H.D. and N.R. ON BEHALF OF N.D.,
Petitioners**,**
v.
WEST ORANGE TOWN
BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDS 11246-20
AGENCY DKT. NO. 2021-32244

H.D. and N.R., petitioners, appearing pro se

Jared S. Schure, Esq., for respondent, West Orange Town Board of Education, (Methfessel & Werbel, P.C., attorneys)

BEFORE **JULIO C. MOREJON,** ALJ:

Record Closed: September 12, 2022 Decided: September 13, 2022

STATEMENT OF THE CASE

H.D. and N.A. (Petitioners), the parents of N.D., a fourteen-year-old student who resides in the West Orange School District and is eligible for special education and related services, are in dispute with the West Orange Board of Education (Board) over N.D.'s Individualized Education Plan (IEP). Among other claims, the Petitioners dispute the Board's decision to place N.D. in language and learning disability (LLD) classes for all his academic subjects in the 2019-2020 school year. The Board filed a cross-petition in this matter. In a separately filed action, the Petitioners challenge the Board's placement of N.D. in LLD for Language Arts and Social Studies, and a pullout resource room for Mathematics and Science for the 2020-2021 school year. All petitions have been consolidated herein.

PROCEDURAL HISTORY

On September 9, 2019, Petitioners' filed for due process (2019 Petition) with the Office of Special Education Programs (OSEP).[1] Petitioners' challenge the August 2019 IEP. They argue that (1) the District violated the IDEA's stay-put mandate by changing N.D.'s placement in the middle of due process proceedings; (2) the District retaliated against them for filing for due process by unilaterally changing N.D.'s placement during the pendency of due process proceedings; (3) the District denied their meaningful participation in the IEP process, compounding the denial of Free Appropriate Public Education ("FAPE"); and (4) N.D.'s 2019-2020 IEP is not calculated to provide N.D. with a FAPE.

[1] Petitioners were initially represented by Bradley Flynn, Esq., of the law firm Montgomery Law, L.L.C.

On October 29, 2019, the Board filed its answer to the Petitioners' 2019 Petition and also filed a cross-petition for due process (Cross-Petition), arguing that the IEP proposed for N.D. in September 2019 offers N.D. a FAPE in the least restrictive environment, as required by the IDEA. Additionally, the Board requested a due process hearing and a final order compelling the Petitioners to consent to the evaluations proposed by the Child Study Team (CST) at the September 19, 2019 re-evaluation planning meeting, pursuant to N.J.A.C. 6A:14-2.3(a)(3) and N.J.A.C. 6A:14-2.7(b).

OSEP transmitted the 2019 Petition and the Cross-Petition as contested cases to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The same where filed on the following dates: 2019 Petition filed September 26, 2019 and the Cross Petition filed on October 31, 2019, and the matters were assigned to Administrative Law Judge, Thomas Betancourt. On June 16, 2021, Judge Betancourt entered an Order consolidating the 2019 Petition and Cross-Petition. On or about June 21, 2021, following a motion for the recusal of Judge Betancourt filed by petitioners, an Order was entered recusing Judge Betancourt, and this matter was transferred to the undersigned.

On October 6, 2020, petitioners, the Board's representative, Kristin Gogerty (Gogerty), the Executive Director of Special Services, and Jared S. Schure, the Board's attorney, appeared before Judge Betancourt. At that time, the parties agreed to a settlement that were outlined on the record (oral settlement). Thereafter, following a series of communications between petitioners and respondent and a subsequent appearance before Judge Betancourt regarding the terms of the oral settlement, the matter did not settle, and the proceedings continued.

On or about October 29, 2020, the Petitioners' filed another Petition for Due Process (2020 Petition), challenging the Board's October 16, 2020 proposed IEP for N.D. that would place him in the LLD program for the duration of the 2020-2021 school year; that the proposed placement of N.D. in the LLD program would not have provided N.D. with FAPE, and that the Board violated N.D.'s "stay-put" rights when it placed him in the

LLD program in September 2019. The 2020 Petition was assigned to Administrative Law Judge Ernest Bongiovanni.

On or about June 21, 2021, following petitioners'' motion for the recusal of Judge Betancourt in the 2019 Petition and Cross-Petition, an Order was entered recusing Judge Betancourt, and the two matters were assigned to the undersigned.

On September 10, 2021, the Board filed a motion for summary decision on the 2019 Petition and Board's Cross-Petition. In January 2022, the Board requested to file a new motion for summary decision in light of a recent District Court decision, which the Board stated had an impact on the underlying proceedings. The Board's request was granted, and the motion for summary decision filed by the Board, and the Petitioners' opposition to the same, were withdrawn. The hearings scheduled for March 2022, were adjourned to September 20 and 21, 2022, pending the filing of the Board's motion for summary decision and petitioners' opposition thereto.

Thereafter, by letter of February 10, 2022, petitioners filed what appeared to be a motion for my recusal in this matter. By letter dated February 11, 2022, I denied petitioners' request for my recusal, and a revised motion schedule was entered as requested by petitioners. On February 15, 2022, a Final Order on Motion to Recuse was entered by the OAL Acting Director, denying petitioners' motion.

On February 7, 2022, petitioners filed a motion to enforce the terms of the oral settlement that was placed on the record on October 6, 2020, before Judge Betancourt. On February 17, 2022, the district filed its opposition to petitioner' motion and on March 4, 2022, petitioners' filed their reply. Oral argument was held on March 16, 2022. On June 9, 2022, an Order was entered denying petitioners' motion to enforce the terms of the oral argument. [2]

[2] On or about July 5, 2022, petitioners filed with the New Jersey Superior Court, Appellate Division, a Notice of Motion for Interlocutory Appeal of the Order of June 9, 2022 (Interlocutory Appeal), denying petitioners motion to enforce the oral settlement. On or about September 7, 2022, petitioners filed with the undersigned a Notice of Motion to Stay the underlying proceedings pending the Interlocutory Appeal. A ruling was not made on the motion to stay the proceedings, as this is not to proper venue to file said motion.

By letter of February 10, 2022, petitioners filed what appeared to be a motion for my recusal in this matter. On February 11, 2022, I denied petitioners' request. Thereafter, petitioners' filed a formal motion for my recusal. The same was heard by then OAL Acting Director, Ellen Bass, and on February 15, 2022, Judge Bass entered an Order denying petitioners'' motion for my recusal.

On May 13, 2022, the Board filed the within motion for summary decision, seeking an Order for Summary Decision allowing the Board to conduct re-evaluations of N.D. and compelling Petitioners' cooperation with same, and determining that the Board provided N.D. with a free appropriate public education and did not violate his stay-put rights during the 2019-2020 school year. Petitioners' opposition to the motion was filed on June 20, 2022. Oral argument was held on August 18, 2022.

On June 8, 2022, the Board filed a motion to consolidate Petitioners' 2019 Petition, the Board's Cross-Petition and Petitioners' 2020 Petition. On August 31, 2022, an Order granting the Board's motion to consolidate all three matters was entered. On September 2, 2022, an Order consolidating the three dockets was entered.

The August 31, 2022, Order found that each petition filed herein satisfied the standards for consolidation as set forth in N.J.A.C. 1:1-17.3, because the facts in all three cases are substantially related and the law is the same, a single administrative hearing is the best medium for the disposition of these appeals. Therefore, the Board's motion for summary decision will also address the Board's proposed IEP of October 16, 2020, place N.D. in the LLD program for the duration of the 2020-2021 school year. [3]

A hearing is presently scheduled for September 20, 2022 and September 21, 2022.

[3] On or about October 16, 2020, the District's IEP Team proposed an IEP for N.D. that would place him in the LLD program for the duration of the 2020-2021 school year. Shortly thereafter, on or about October 29, 2020, the Petitioners filed another Petition for Due Process, alleging, among other things, that the proposed placement in the LLD program would not have provided N.D. with FAPE. This Petition was assigned OAL Docket No. EDS 11246-2020. In addition to the propriety of the proposed LLD placement, both of the Petitioners' Requests for Due Process contained allegations that the Board violated N.D.'s "stay-put" rights when it placed him in the LLD program in September 2019.

FACTUAL SUMMARY

N.D. is a 14-year-old eighth grader who attends eighth grade at the Board Liberty Middle School. He has been continuously eligible for special education and related services since preschool. At all relevant times, he has been deemed eligible for special education and related services under the classification category of Communication Impaired. N.D. has serious learning disabilities and suffers from a range of deficits.

A July 2013 independent Neuropsychological Evaluation by Dr. Joel Morgan (Dr. Morgan) found that N.D. had a full-scale IQ of 54, corresponding to the "Mild Mental Retardation range." Dr. Morgan also diagnosed N.D. with mixed receptive-expressive language disorder, attention deficit hyperactivity disorder – combined type, and dysgraphia. Board Ex. B.

In October 2016 the CST conducted a Speech/Language Evaluation. This evaluation found that "receptive language, expressive language, pragmatic language and processing skills are of clinical concern." Board Ex. C. The Evaluation also stated that:

> The educational impact of the disability presents as the following: [N.D.] finds abstract/critical thinking questions more challenging and may be hesitant to answer abstract questions. [N.D.] demonstrates difficulty in understanding how to build upon writing assignments, without assistance. [N.D.] may miss pertinent verbal instructions at times. Although some progress is noted, concerns continue to persist regarding [N.D.'s] expressive and receptive language skills. Formal testing and functional assessment support this claim. [N.D.] is performing in the below average range both expressively and receptively. Weakness[es] were noted in semantics, syntax, and processing skills, which adversely effect[s] his performance in the classroom.
>
> [Ibid.]

In the Board Psychoeducational Evaluation, also conducted in October 2016, the evaluators found that N.D. had a full-scale IQ of 53, which corresponded into the Very Low range of functioning. Board Ex. D. Standardized testing in the evaluation revealed results in the Very Low range for broad reading, basic reading skills, reading

comprehension, reading fluency, math calculation, math problem solving, vocabulary, letter-pattern matching, phonological processing, and story recall. Ibid.

In the educational portion of the October 2016 Psychoeducational Evaluation, N.D.'s overall academic achievement was found to be in the very low range. He manifested serious weaknesses in broad reading (very low), basic reading skills (low), reading comprehension (very low), reading fluency (very low), broad math (low), math calculation (low average), math problem solving (very low), broad written language (low), and written expression (low). Id.

N.D. also underwent an Occupational Therapy Evaluation in October 2016. Board Ex. E. N.D. has and continues to receive occupational therapy as a related service due to his prior triennial evaluations. The evaluator noted:

> [w]eaknesses . . . with fine motor skills, attention to ask and handwriting. Due to upper body/hand weakness, [N.D.] tends to have difficulty and rush fine motor and coloring tasks. This is evidence with cutting tasks as well. [N.D.] has trouble focusing and remaining focused on tasks, even when working in a quiet environment. Although [N.D.'s] handwriting is legible, he has difficulties remembering upper and lower case letters, writing on the lines, sizing the words appropriately, forming the letters properly and spacing between words. The areas of concern mentioned above will continue to impact on [N.D.'s] performance in the classroom and with school related tasks.
>
> [Ibid.]

In June 2017, N.D. underwent an independent neuropsychological evaluation conducted by Dr. Michael Steinhardt. Board Ex. F. Dr. Steinhardt found that N.D. had a full-scale IQ of 68, a score which fell within the second percentile when compared to other students his age. Dr. Steinhardt concluded upon formal assessment that:

> although there was some variability in his performances, [N.D.'s] general cognitive functioning was judged to be in the extremely low range, based upon his performance on a

> comprehensive measure of intellectual functioning. This finding is fully consistent with [N.D.'s] performances on all previously administered comprehensive measures of intelligence . . . [N.D.] also demonstrated compromised functioning in all underlying neurocognitive domains, including measures of attention, executive functioning, learning and memory, language functioning, visual perception/construction/organization, fine-motor skills, and in the academic areas of reading, mathematics, and written expression. With regard to his behavioral/emotional status, [N.D.'s] teachers reported concern regarding the presence of behaviors associated with inattention, learning problems, atypical/unusual behaviors, depressed mood, anxiety, and social withdrawal[.]
>
> [ibid.]

During the 2015-2016, 2016-2017, 2017-2018, and 2018- 2019 school years, N.D.'s program consisted of placement in a general education classroom for Science and Social Studies; a pull-out resource replacement classroom in Mathematics; and a self-contained classroom for English and Language Arts. Based on N.D.'s academic struggles and the results of standardized testing, the District proposed placing N.D. in an LLD classroom for all major academic subjects in the 2016-2017, 2017-2018, and 2018-2019 school years. See Proposed 11/17/2016 IEP, Board Ex. G; proposed 10/19/2017 IEP, Board Ex H; and proposed 11/2/2018 IEP, Board Ex I.

The Petitioners did not consent to the implementation of any of the above proposed IEP's by the Board and instead filed for due process to use the IDEA's stay-put mechanism to block the District from implementing them. The 2016-2017 and 2017-2018 petitions were consolidated (Board Ex. J), and the 2018-2019 petition was not (Board Ex. K). The District defended all three IEPs in two separate due process hearings before the OAL.

Administrative Law Judge Kimberly Moss presided in both matters and issued two separate Final Decisions dismissing the Petitioners' due process petitions in their entireties on June 28, 2019 and December 19, 2019, respectively. Board Ex. J and Ex. K. On June 28, 2019, the Judge Moss found that "the IEPs of November 2016 and

October 2017 would provide N.D. with a free and appropriate education." Judge Moss specifically found that the Districts' programs, which proposed placing N.D. in LLD for Math, Language Arts, Science and Social Studies, provided N.D. with a FAPE. (Ibid). On December 19, 2019, Judge Moss dismissed the Petitioner's due process petition, finding that the Board program would provide N.D. with a free and appropriate education (Board Ex. K).

At the beginning of the 2019-2020 school year, and continuing into the 2020-2021 school year, N.D.'s seventh and eighth grades, the District placed N.D. in the LLD program for all major academic subjects in accordance with the June 28, 2019 Final Decision. On September 24, 2019, the Petitioners filed a motion for emergent relief regarding the Board change in placement of N.D., which was opposed by the District. On October 1, 2019, the Petitioner's motion for emergent relief was denied.

On October 11, 2019, Petitioners filed a civil action in the United States District Court seeking injunctive relief returning N.D. to his general education placement, and a remand of Judge Moss's June 28, 2019 Final Decision. The parties then each filed a motion for summary judgment on this issue with District Court. On January 10, 2022, the District Court issued an Order and Opinion granting the Board's Motion for Summary Judgment. The District Court held that the Board did not violate N.D.'s stay-put rights by placing him in the LLD for all his academic subjects. Board Ex.T.

Petitioners now allege that the Board violated N.D.'s stay-put rights under the IDEA by moving him to the LLD classroom for all his academic subjects after the Final Decision on June 28, 2019. N.D. remained in the LLD program for all major academic subjects during the 2020-2021 school year. The District and Petitioners attended a re-evaluation planning meeting on September 19, 2019. As a result of this meeting, the CST proposed to conduct an educational evaluation, a psychological evaluation, a speech/language evaluation, an occupational therapy evaluation, and a neurological evaluation. To date, Petitioners have refused to consent to any of the proposed evaluations, resulting in the Board seeking permission to perform these evaluations.

On October 16, 2020, the District's IEP Team proposed an IEP for N.D. that would place him in the LLD program for the duration of the 2020-2021 school year. (Board Ex. M). As a result of the proposed October 16, 2020 IEP, petitioners filed the 2020 due process petition. This petition alleged, among other things, that the proposed placement of N.D. in the LLD program would not provide the student with FAPE.

In addition to the propriety of the proposed LLD placement, both of the Petitioners' Requests for Due Process (2019 and 2020 petitions) levelled allegations that the Board violated N.D.'s "stay-put" rights when it placed him in the LLD program in September 2019.

LEGAL DISCUSSION AND CONCLUSION

The Board makes the following legal arguments in their motion, which will be addressed below:

I. As a matter of law, the board is entitled to summary decision in its favor;

II. The board should be permitted to conduct triennial evaluations of N.D. as a matter of law;

III. The board provided N.D. with a free appropriate public education in the least restrictive environment during the 2019-2020 school year;

IV. The doctrines of *res judicata* and collateral estoppel require that the petitioners' due process petition be dismissed to the extent it alleges the board violated N.D.'s stay-put rights

I Summary Decision Standard

N.J.A.C. 1:1-15.5 provides that summary decision should 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." This language is substantially similar to summary judgment under New Jersey Court Rule 4:46-2(c). Though not required to do so, the OAL uses the

standards for summary judgment, as set forth by the New Jersey Supreme Court, as our standards for summary decision. "[S]ince there are pronounced similarities in the exercise of judicial and 'quasi-judicial' powers, . . . court fashioned doctrines for the handling of litigation do in fact have some genuine utility and relevance in administrative proceedings." City of Hackensack v. Winner, 82 N.J. 1, 29 (1980). It is recognized that the OAL performs many "quasi-judicial" or adjudicative functions and that, in doing so, "[j]udicial rules of procedure and practice are transferable to [the OAL] when these are conducive to ensuring fairness, independence, integrity, and efficiency in administrative adjudications." Matter of Tenure Hearing of Onorevole, 103 N.J. 548, 554-55 (1986).

Summary decision is granted if, after considering the evidence presented in the light most favorable to the non-moving party, there exists no genuine issue of material fact. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995). The essential question is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." Id. at 533. The Brill Court recognized that this necessarily involves the judge in the process of weighing the evidence presented. Id. When determining whether a genuine issue of material fact exists, "the court should be guided by the same evidentiary standard of proof . . . that would apply" at a hearing. Id. This weighing differs from the weighing the judge would perform after a hearing in that "on a motion for summary [decision] the court must grant all the favorable inferences to the non-movant." Id. at 536. It is not the judge's function in determining these motions "to weigh evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)).

"When 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." N.J.A.C. 1:1-12.5(b). "If an adverse party does not so respond, a summary decision, if appropriate, shall be entered." Id.

Following a review of the briefs and submissions of the parties in this action and parsing the salient facts of the case that are undisputed and, for the reasons detailed

below, I **CONCLUDE** that, under the Brill standards, this matter is appropriate for summary disposition. The material facts, as set forth by the respondent in their motion, are supported by tangible, undisputed evidence and, as detailed below, the petitioners' opposition to the Board's motion fails to raise any genuine dispute of the material facts on the record regarding the merits of the respondent's motion. LoRusso v. State-Operated Sch. Dist. Of Jersey City, Essex County, 97 N.J.A.R. 2d (EDU) 505, 506 (citing Borough of Franklin Lakes v. Mutzberg, 226 N.J.Super. 46, 57 (App. Div. 1988)). Accordingly, as there are no disputed material facts, the matter is ripe to be determined for summary decision.

Moreover, a review of petitioners' opposition papers reveals that they have failed to submit any certification or report from any expert to support their position contained in the 2019 Petition and 2020 Petition. I **CONCLUDE** that since petitioners have failed to submit any affidavits – even one from themselves – all material facts set forth in the District's motion, which are supported by certifications, are not rebutted.

II. The District is entitled to conduct triennial evaluations for N.D. as a matter of law.

In support of its motion, the Board first contends that updated educational, psychological, speech/language, occupational therapy, and neurological evaluations are necessary to determine N.D.'s present classification category, placement, and program. The Board and Petitioners attended a re-evaluation planning meeting on September 19, 2019. As a result of this meeting, the CST proposed to conduct these evaluations. As of yet, the Petitioners have refused to consent to these evaluations, arguing that the District is not entitled to triennial evaluations of N.D.

The Individuals with Disabilities Act (IDEA) requires local school districts to provide a Free Appropriate Public Education (FAPE) to all children with disabilities and determined eligible for special education. 20 U.S.C. 1412 (a)(1)(A). New Jersey regulations set the requirement that a local school district must provide FAPE as is required under the IDEA. N.J.A.C. 6A:14-1.1. New Jersey regulations also set forth the rights and responsibilities of a district and parent with regards to reevaluations. Once a

school district determines eligibility and classification of the student, the district is obligated to determine whether the student continues to be a student with a disability. N.J.A.C. 6A:14-3.8(a). To this end, the district must maintain accurate, up-to-date evaluation data on the student, gathered at least once every three years, or sooner if the situation warrants it, to ensure that an IEP is appropriate. N.J.A.C. 6A:14-3.8(a). However, triennial evaluations may be waived "if the parent provides written consent and the district board of education agrees that a reevaluation is unnecessary." N.J.A.C. 6A:14-3.8(a)(1).

The IEP team must determine the nature and scope of the reevaluation and identify what additional data, if any, are needed to determine the student's present academic, developmental, functional, and behavioral needs and how they should be appropriately addressed in the IEP. N.J.A.C. 6A:14-3.8(b)(2). "Evaluation" under the IDEA is defined as such assessments as may be needed to produce the data needed to determine (i) whether a child is a child with a disability and (ii) what are the educational needs of the child. See 34 C.F.R. 300.305(a), (c). The Federal Regulations further require that the district ensure that "[i]n evaluating each child with a disability ... the evaluation is sufficiently comprehensive to identify all of the child's special education and related services' needs, whether or not commonly linked to the disability category in which the child had been classified." 34 C.F.R. 300.304(c)(6). A district must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. 34 C.F.R. 300.304(c)(4).

Prior to conducting a reevaluation of a child with a disability, the local educational agency shall obtain informed parental consent. N.J.A.C. 6A:14-3.8(c). If a parent refuses to give consent, the agency "may, but is not required to, pursue the reevaluation by using the consent override procedures," which include mediation or due process. 34 C.F.R. 300.300(c)(ii). Accordingly, if a parent refuses to give consent, the district may request a due process hearing. N.J.A.C. 6A:14.2.7(b); 34 C.F.R. 300.300(c)(ii). Additionally, if a school district articulates "reasonable grounds" to conduct a reevaluation of a student, a lack of parental consent will not bar it from doing so. Sparta Twp. Bd. of Educ. V. B.Y. and K.Y. o/b/o B.Y, EDS 11958-08, Final Decision (Feb. 26, 2009)(citing Shelby S ex. rel. Kathleen T. v. Conroe Independent School Dist. 454 F.3d 450, 454 (5th Cir. 2006)). In

Sparta, the ALJ granted the board's request to conduct its mandated triennial psychoeducational and speech/language evaluations pursuant to the IDEA against the wishes of the student's mother, who disputed that it was time for the triennial evaluation.

Courts have made clear that if a parent wants their child to receive special education under the IDEA, they are obligated to permit reevaluation. Washington Twp. Bd. of Educ. v. H.M. o/b/o R.M, EDS 08328-19, Final Decision (Aug. 19, 2019) (citing Dubois v. Connecticut State Bd. of Educ. 727 F.2d 44, 48 (2d Cir. 1984)). This is so, the court in Dubois reasoned, because "before a school system becomes liable under the [IDEA] for special placement of a student, it is entitled to up-to-date evaluative data." Dubois, 727 F.2d. at 48. In Washington, the ALJ granted the Board motion for summary decision compelling a student's parent to consent to triennial re-evaluations in an environment deemed appropriate by the CST. The parent had refused to provide consent unless her terms and conditions for testing accommodations were provided for. The ALJ concluded that the district had the legal right and authority to conduct the evaluations in question in their chosen environment, one that "ensures the integrity of the testing process and provide FAPE to [the student]." Ibid.

Furthermore, a school district is entitled to reevaluate a student by an expert of their choice when the student's triennial reevaluation is due. Matawan-Aberdeen Reg'l Bd. of Educ. v. H.G. and R.G. o/b/o S.G., EDS 08330-05, Final Decision (Nov. 5, 2005). In Matawan, the ALJ granted emergent relief in favor of a local school district, permitting the CST to conduct triennial evaluations of a student. The parents had refused consent because they preferred a private assessment and evaluation. The ALJ was satisfied that the assessments and evaluations proposed by the CST were well thought out, appropriate, justified, and necessary to understand the student's needs, strengths, weaknesses, and progress in conformity with the requirements of N.J.A.C. 6A:14-2.5. In granting the relief sought by the district, the ALJ concluded that the private assessments sought by the parents would in fact put the district at a disadvantage in performing its educational obligations.

Even when parents have objected to a Board request to evaluate a student with a disability *prior to* the expiration of the three-year reevaluation period, courts have ordered

parents to comply with the Board requests to conduct any additional assessments that it deems necessary. See Ramsey Bd. of Educ. v. L.E. o/b/o M.S., EDS 7943-06, Final Decision (March 8, 2007) (Board request to conduct assessments as part of a reevaluation granted against parents' withholding of consent where there was a clear disagreement between the parties as to the student's appropriate program; the district had not conducted a complete evaluation of the student in five years; and parents' were unwilling to share any outside assessments obtained by them); River Edge Bd. of Educ. v. E.F. o/b/o V.F., EDS05680-09, Order (June 1, 2009) (request for emergent relief granted compelling a psychiatric evaluation for a student over her mother's objection because conditions warranted an evaluation sooner than the three year period in light of an escalation of the student's behavior and because ALJ deemed this evaluation necessary to develop and implement an appropriate placement for student in the least restrictive environment).

Here, the Board is required by law to conduct triennial evaluations of N.D. to determine whether he continues to be a student with a disability. While there may be situations where assessments are not needed during a triennial reevaluation period when there is sufficient existing data on a student, here, triennial evaluations are necessary to ensure sound and up-to-date educational decision making. The most recent evaluation conducted for N.D. was his May 30, 2019 Psychoeducational Evaluation, completed by Dr. Woldoff. See 2019-2020 IEP, Board Ex. L; 2020-2021 IEP, Board Ex. M. All other evaluations have not been conducted since 2016 or 2017, well over the three-year evaluation period that is required by the IDEA and New Jersey law. See Board Ex. L & Board Ex. M.

Further, the Board has articulated "reasonable grounds" to conduct an evaluation. Gogerty, the Executive Director of Special Education for the District, stated in her certification that "members of the CST agree unanimously that the District cannot properly determine N.D.'s classification category, placement, and program" without conducting the proposed evaluations. Gogerty Cert. at ¶31. Gogerty, who has firsthand knowledge of the Board work with N.D. in her role as supervisor of the Board Child Study and IEP Teams, further stated that, in her expert opinion, the proposed evaluations are necessary

and appropriate and that without them, the CST cannot draw any meaningful conclusions about N.D.'s present strengths and weaknesses. Id. at ¶32, 34.

In opposing the Board's motion, petitioners have failed to provide any report or affidavit from anyone with knowledge of special education needs, let alone an expert's report. Petitioners' denials contained in their opposition simply attacks Gogerty's special education credentials, as well as arguing that Gogerty's Executive Director position prevented her from knowing N.D.'s special education needs. Pet.'s Opp. At 3-5.

Accordingly, **I CONCLUDE** that Petitioners are compelled to make N.D. available for educational, psychological, speech/language, occupational therapy, and neurological evaluations to determine N.D.'s present needs and ensure that his IEP is appropriate.

III. The Board provided N.D. with a FAPE in the Least Restrictive Environment during the 2019-2020 and 2020-2021 school year.

The IDEA requires that any student who is eligible for special education and related services be provided with a free appropriate public education (FAPE) in the least restrictive environment. 20 U.S.C. 1412(a)(1). Receipt of IDEA funds is contingent upon a state's compliance with the goals and requirements of the IDEA. Lascari v. Bd. of Educ. of Ramapo-Indian Hills Reg. Sch. Dist., 116 N.J. 30, 33 (1989). As a recipient of Federal funds under the IDEA, New Jersey must have a policy that assures that all children with disabilities will receive FAPE, which includes special education and related services. 20 U.S.C. 1401(9); 20 U.S.C. 1412; N.J.A.C. 6A:14-1.1 et seq. This responsibility rests with the local public-school district. N.J.A.C. 6A:14-1.1(d).

FAPE is primarily defined to be such "special education and related services" that "are provided in conformity with [a student's] individualized education program," or "IEP." 20 U.S.C. 1401(9)(D). Thus, in order to provide a FAPE, a school district must develop and implement an IEP. N.J.A.C. 6A:14-3.7. An IEP is "a comprehensive statement" of the educational needs of a child with disabilities, and the "specially designed instruction

and related services to be employed to meet those needs." Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 368 (1985).

The IDEA also requires that students must also be educated in the least restrictive environment. 20 U.S.C. 1412(5). This means that, "to the maximum extent appropriate, children with disabilities . . . are [to be] educated with children who are not disabled" and that children with disabilities are not to be placed in special classes or otherwise removed from "the regular educational environment" except when "the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." Ibid.

The U.S. Supreme Court has held that the district must offer the student "an educational program reasonably calculated to enable him to make progress appropriate in light of his circumstances." Endrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. 988 (2017). To meet the requirements of FAPE under the IDEA, the education "must be tailored to the unique needs of the disabled student through [the] individualized education program [IEP]." Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238, 247 (3d Cir. 1999), superseded by statute on other grounds as recognized by P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (3d Cir. 2009)(citing Bd. of Educ. v. Rowley, 458 U.S. 176, 181-82 (1982). Similarly, the Third Circuit's long-established FAPE standard requires a school district provide an educational program that is "reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential and individual abilities." Dunn v. Downingtown Area Sch. Dist. (In re K.D.), 904 F.3d 248, 254 (3rd Cir. 2018) (quoting Ridley Sch. Dist. v. M.R., 680 F.3d 260, 269 (3rd. Cir. 2012)).

The Third Circuit has made clear that, while a state is not required to maximize the potential of every student with a disability, it must supply an education that provides "significant learning" and "meaningful benefit" to the child. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010) (citing Ridgewood 172 F.3d at 247). The IEP requires more than a "trivial" or "de minimis" benefit to the student. L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006). Hence, the Third Circuit test requires an educational program to "produce progress, not regression or trivial educational advancement." Dunn, 904 F.3d at 254 (quoting Ridley, 680 F.3d at 269).

The appropriateness of an IEP must be determined as of the time it is made, and the reasonableness of the school Board proposed program should be judged only on the basis of the evidence known to the school district at the time at which the offer was made. D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 564–65 (3d. Cir. 2010) citing Susan N. v. Wilson Sch. Dist., 70 F. 3d 751, 762 (3rd Cir. 1995). An IEP is "based on an evaluation done by a team of experts prior to the student's placement." Fuhrmann v East Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3rd Cir. 1993) (emphasis in original). Thus, "in striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable [when] the IEP was drafted." Ibid. Third Circuit courts have confirmed that "neither the statute nor reason countenance 'Monday morning quarterbacking' in evaluating a child's placement." Susan N., 70 F.3d at 762, citing Fuhrmann, 993 F.2d at 1040. The IDEA requires an IEP based on the student's needs and "so long as the IEP responds to the needs, its ultimate success or failure cannot retroactively render it inappropriate." Scott P., 62 F. 3d at 534.

Here, it is clear that the 2019-2020 IEP provided FAPE to N.D. in the least restrictive environment. While the IEP may not be "optimal" or what the Petitioner's want for N.D., that is not what is required of the IDEA. An IEP at its core must provide the student with "a 'basic floor of opportunity,' [but] it does not have to provide 'the optimal level of services,' or incorporate every program requested by the child's parents." Ridley, 680 F.3d at 269. A court reviewing an IEP must determine whether it is "reasonable, not whether the court regards it as ideal." Endrew F., 137 S. Ct. at 999.

It is beyond dispute that N.D. made significant and meaningful academic progress during the 2019-2020 school year, as reflected in N.D.'s report cards and progress reports. During Quarter 4 of the 2019-2020 school year, N.D. received all A's or B's in all of his academic subjects. See Quarter 4 Report Card, Board Ex. M. As of September 2020, N.D. was making progress on all his 2019-2020 IEP goals -- N.D. had met the criteria of either "Progressing Gradually" or "Progressing Satisfactorily" towards the goals stated in his IEP for the 2019-2020 school year. See 2019-2020 Progress Report, Board Ex. N. N.D. even met the criteria of "Achieved" for some of his goals in math and motor skills. See Id.

N.D. also made significant progress during the 2020-2021 school year in the LLD program, during which time he received nearly all A's in his academic subjects. See Board Ex. O. N.D.'s teachers felt that he made such significant progress in the LLD program during the 2020-2021 school year that the CST proposed to place him in a less restrictive, pull-out resource replacement setting for his major academic subjects for the 2021-2022 school year. See 2021-2022 IEP, Board Ex. Q.

In opposition to the within motion, the Petitioners have provided only bald assertions that the District did not provide FAPE for 2019-2020 without providing any evidence that creates genuine issues of material fact. Petitioners primarily assert that, by placing N.D. in the LLD program for the 2019-2020 school year based on the ALJ's June 28, 2019 determination that the IEPs of November 2016 and October 2017 would provide N.D. with FAPE, the District "ignore[ed] N.D.'s disability, his current academic levels, needs, goals, and services needed, while the District knows the magnitude of the damage that will be caused to N.D." Pet.'s Opp. at 43. However, as discussed below, this argument is without merit, as the District was obligated by the IDEA and New Jersey regulations to keep N.D.'s in the LLD program as his new stay-put placement.

In sum, the Petitioners have failed to set forth any disputes of material fact that the 2019-2020 IEP and 2020-2021 IEP did not provide N.D. with FAPE in the least restrictive environment. The District has supplied an education that provided "significant learning" and "meaningful benefit" to N.D. D.S., 602 F.3d 553, 556 (citations omitted). N.D.'s educational program has clearly "produce[d] progress, not regression or trivial educational advancement." Dunn, 904 F.3d at 254 (citations omitted). N.D. made significant progress during the 2019-2020 and 2020-2021 school years in his placement in the LLD program, so much so that the CST proposed a much less restrictive program for the 2021-2022 school year. See 2021-2022 IEP, Board Ex. R.

For the reasons set forth above, I **CONCLUDE** that the Board provided N.D. with a FAPE in the Least Restrictive Environment during the 2019-2020 and 2020-2021 school year.

IV. The issue of whether the Board violated N.D.'s stay-put placement is moot. Even if it were not, the claim is barred by the doctrines of *res judicata* and collateral estoppel because the issue has already been litigated.

The Petitioners argue that the Board violated N.D.'s stay-put placement for the 2019-2020 school year by placing him in the LLD program for all his academic subjects. The IDEA's stay-put provision, 20 U.S.C. 1415(j), provides that: during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

Mootness "is a threshold issue that prevents a federal court from hearing a case where there is no live case or controversy as by Article III of our Constitution." Honig v. Doe, 484 U.S. 305, 317 (1988). Courts have characterized this constitutional requirement as containing three elements: "(1) a legal controversy that is real and not hypothetical, (2) a legal controversy that affects an individual in a concrete manner so as to provide the factual predicate for reasoned adjudication, and (3) a legal controversy with sufficiently adverse parties so as to sharpen the issues for judicial resolution." Dow Chemical Co. v. Environmental Protection Agency, 605 F.2d 673, 678 (3d Cir. 1979). The Third Circuit has long recognized that "the central question of all mootness problems is whether changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief." Jersey Central Power and Light Co. v. State of New Jersey, 772 F.2d 35, 39 (3d Cir. 1985).

On June 16, 2021, the Petitioners consented to the implementation of a new IEP for N.D. which would place him in pull-out resource replacement classrooms for all his academic subjects. See 2021-2022 IEP, Ex. R. At this point, because the Board and the Petitioners were in agreement with regard to N.D.'s educational program, the 2021-2022 IEP became N.D.'s "then-current educational placement" under the IDEA and New Jersey's stay-put provisions. 20 U.S.C. 1415(j); N.J.A.C. 6A:14-2.6(d)(10); N.J.A.C. 6A:14-2.7(u).

I **CONCLUDE** that even if I were to find that the stay-put placement was violated, which, as discussed below, is an issue barred by *res judicata* and collateral estoppel, I would be unable to grant the relief sought by the Petitioners. This changed circumstance, a new stay-put placement, prevents the relief sought by the Petitioners - for N.D. to return to a general education setting. As such, **I CONCLUDE** that the requirements of the mootness doctrine have been met.

Moreover, the doctrines of *res judicata* and collateral estoppel bar the Petitioners from relitigating this issue. The doctrine of *res judicata* "refers broadly to the common-law doctrine barring re-litigation of claims or issues that have already been adjudicated." Velasquez v. Franz, 123 N.J. 498, 505 (1991). *Res judicata*, like its relative collateral estoppel, serves "important policy goals" of "'finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness.'" Hennessey v. Winslow Twp., 183 N.J. 593, 599 (2005) (quoting Hackensack v. Winner, 82 N.J. 1, 31-33 (1980))

Res judicata customarily refers to claim preclusion. United States v. 5 Unlabeled Boxes, 572 F.3d 169, 174 (3d Cir. 2009). It "requires a showing that there has been (1) a final judgment on the merits in a prior suit involving (2) the same claim and (3) the same parties or their privies." EEOC v. United States Steel Corp., 921 F.2d 489, 493 (3d Cir. 1990). Collateral estoppel, or issue preclusion, "is intended to avoid repetitive litigation, permit parties to rely on prior judgments, and allow an adversary a sense of repose following the resolution of an issue by the courts." Hailey v. City of Camden, 650 F. Supp. 2d 349, 354 (D.N.J. 2009) (citations omitted). It requires of a previous determination that "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action." Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc., 458 F.3d 244, 249 (3d Cir. 2006) (internal citations omitted).

The record reflects that on September 20, 2019, the Petitioners filed an emergent motion at the OAL, seeking an order declaring that the District violated the IDEA by changing N.D.'s placement and compelling the District to return N.D. to the general education placement. The ALJ denied the Petitioners' motion. Then on October 11, 2019, Petitioners filed a civil action in federal district court seeking injunctive relief returning N.D. to his general education placement.

On January 10, 2022, Judge Esther Salas of the district court issued an Order and Opinion granting the Board's Motion for Summary Judgment and holding that the Board did not violate N.D.'s stay-put rights by placing him in the LLD for all his academic subjects. Board Ex. T. Judge Salas specifically held that "the Board obligation to keep N.D. in the general education placement -- the stay-put placement – lasted "until *a new placement* [wa]s established by either an actual agreement between the parents and the District, or *by an administrative decision upholding the Board proposed placement which [Plaintiffs] chose not to appeal,* or by a court." Ibid. (quoting Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 484 (2d Cir. 2002)).

Since the ALJ upheld the Board placement, and the Petitioners' did not appeal the ALJ's decision, it became final and binding, and as such, the new stay-put placement. Accordingly, that issue was fully litigated and decided, and Petitioners cannot attempt to relitigate this matter herein. In addition, that issue became moot on June 16, 2021, when the Petitioners' consented to the implementation of a new IEP which placed N.D. in pull-out resource replacement classrooms for his major academic subjects for the 2021-2022 school year. See 2021-2022 IEP, Board Ex. Q.

For the reasons set forth above, I **CONCLUDE** that the Board's motion for summary decision is granted, allowing the Board to conduct re-evaluations of N.D. and compelling Petitioners' cooperation with same, and determining that the Board provided N.D. with a free appropriate public education and did not violate his stay-put rights during the 2019-2020 school year.

In granting the Board's motion for summary decision I **CONCLUDE** that Petitioners have failed to set forth any disputes of material facts that the Board did not provide N.D.

with FAPE in the least restrictive environment for the 2019-2020 school year; failed to show why the Board should not be permitted to conduct triennial evaluations of N.D. as is required by the IDEA and New Jersey law, and therefore, I **CONDLUDE** that Petitioners are compelled to consent to these evaluations.

Finally, I **CONCLUDE** that the issue of whether the Board violated N.D.'s stay-put rights when it moved him from general education classes to the LLD program for the 2019-2020 and 2020-2021 school year is moot given his new stay-put placement. Moreover, I **CONCLUDE** that even if said issue were not moot, the issue has been fully litigated, and Petitioners are barred from relitigating it based on the doctrines of *res judicata* and collateral estoppel.

ORDER

It is **ORDERED** that the Board's motion for summary decision is **GRANTED,** and the Petitioners due process petitions filed under OAL docket numbers EDS 13583-19 and EDS 11246-20 are **DISMISSED.**

It is **FURTHER ORDERED** that the Board's Cross-Petition filed under OAL Docket Number EDS 15447-19 is **GRANTED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2022) 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 (2022). 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.

September 13, 2022
DATE

Julio Morejon
JULIO C. MOREJON, ALJ

Date Received at Agency: September 13, 2022

Date Mailed to Parties: September 13, 2022

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