



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION DENYING
PETITIONERS' MOTION FOR
SUMMARY DECISION, AND
GRANTING RESPONDENT'S
MOTION FOR SUMMARY
DECISION

OAL DKT. NO. EDS 05228-24

AGENCY DKT. NO. 2024-37265

E.P. ON BEHALF OF L.P.,

Petitioners,

v.

**NEWTON TOWN BOARD OF
EDUCATION,**

Respondent.

Jennifer N. Rosen Valverde, Esq., for petitioner (Education and Health Law
Clinic, Rutgers University, School of Law, Newark, attorneys)

Robin S. Ballard, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: July 18, 2024

Decided: July 23, 2024

BEFORE **JOSEPH A. ASCIONE**, ALJ (ret. on recall):

STATEMENT OF THE CASE
AND PROCEDURAL HISTORY

In this matter E.P. on behalf of L.P. (petitioners) seeks by summary disposition motion independent educational evaluations (comprehensive neuropsychological, educational, and auditory processing) of L.P. Petitioners seek respondent, the Newton Town Board of Education (Newton or District), to publicly fund these evaluations. Newton has cross moved to dismiss the petition. Despite Newton's conferencing with the parent regarding the student's needs on July 1, 2021, November 30, 2022, April 2023, February and April 2024; Newton determined that L.P.'s educational, emotional and social accomplishments were consistent with the student's age and progressed appropriately. Newton could find no disability which needed either an independent public educational evaluation or special educational services. In accord with that determination, no public independent educational evaluations were sought nor obtained by Newton.

This matter was transmitted to and filed with the Office of Administrative Law (OAL) on April 22, 2024, by the Department of Education for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Petitioners moved for summary disposition on May 3, 2024. Respondent cross moved for summary disposition on May 28, 2024. Petitioners opposed respondent's motion and submitted a reply brief on June 13, 2024. Respondent submitted a reply brief on June 21, 2024. Oral argument was held on July 18, 2024. The record closed on July 18, 2024. The Final Decision issued on July 23, 2024.

BACKGROUND

L.P. is nine years old and is a registered student in the Newton Public School District. According to a pediatric follow up visit report dated June 2021, a neurodevelopmental pediatrician diagnosed L.P. with "Autism Spectrum Disorder without accompanying language impairment or intellectual disability." The report also noted other diagnoses, including Attention Deficit Hyperactivity Disorder-Combined Type, Sensory Integration Dysfunction, Oppositional and Aggressive Behavior and

mood swings. The pediatrician suggested that L.P. be evaluated for eligibility for special education services and other related services. E.P. shortly after receiving the June 2021 opinion, wrote a letter to the District requesting that special education services be provided to L.P. E.P. delivered the letter along with the pediatrician report to Jennifer Pasquali, Director of Special Services for the district.

The District then held an identification meeting, at which E.P., the school psychologist and case manager, general education teacher, learning disabilities teacher consultant and school social worker were present. The District's Initial Evaluation Plan stated that the purpose of the meeting was to "determine based on the information provided whether a disability is suspected that warrants further evaluations of current levels of functioning." The Child Study Team (CST) reviewed and considered sources of data and information about L.P., including an interview with E.P., a review of L.P.'s educational developmental history including records and interviews, a review of intervention strategies used in the classroom, academic records, behavior and social history, teacher reports, and E.P.'s input. Based on this information, the District concluded that L.P. does not require any evaluations, does not evidence an educational disability defined in N.J.A.C. 6A:14-3.5, and does not require special education and related services.

Afterwards, E.P. emailed a request for an IEE at public expense, including comprehensive neuropsychological, educational and auditory processing evaluations. The District then held another Identification meeting following this request, with the same meeting purpose as the last one: to determine based on the provided information whether a disability is suspected that warrants further evaluations of current levels of functioning. At this meeting, sources used included an analysis of work, trial teaching, self-report, criterion reference list, curriculum-based assessment, an interview with E.P., review of educational and developmental history, neurological evaluations, structured observation of L.P. in non-testing settings and other classroom observations and teacher reports. Based on that information, the District again concluded that she does not "require any evaluations, does not evidence any educational disability defined in N.J.A.C. 6A:14-3.5, and does not require special education and related services." The District neither granted E.P.'s request for an IEE, nor filed a petition for due process

against E.P. within 20 days. One last identification meeting was held in April 2023, and the CST again declined to evaluate L.P. because she “achieved excellent grades and exhibited no social or emotional concerns in class.” During the 2023-2024 school year, E.P. referred L.P. to the CST two additional times, and two meetings were held in February 2024 and April 2024. Both times, the CST determined there was no evaluation of L.P. warranted, and there were no concerns with her functioning in school.

On October 24, 2023, E.P. filed a Complaint Investigation Request with the N.J. Department of Education Office of Special Education (OSE) against the District seeking in part, an IEE due to the District’s failure to provide an IEE or file for due process in response. In December 2023, the OSE found the District did not fail to provide L.P. with an IEE because “there was no evaluation to which the parent could disagree to trigger the right to an IEE at public expense.” On January 9, 2024, E.P. requested reconsideration of the December 23, 2023, final decision of the OSE. On January 25, 2024, that request was denied, and notice was provided, that petitioner could appeal the final decision to the Appellate Division.

FACTUAL FINDINGS

Based upon consideration of the documentary evidence presented, and the absence of objection to the certifications from either counsel, I **FIND** the following **FACTS**:

1. L.P. is nine-years-old and a student at Newton Town School District.
2. On June 8, 2021, Dr. Christina Farrel, M.D., a neurodevelopmental pediatrician diagnosed L.P. with “Autism Spectrum Disorder without accompanying language impairment or intellectual disability.” The report also noted other diagnoses, including Attention Deficit Hyperactivity Disorder-Combined Type, Sensory Integration Dysfunction, Oppositional and Aggressive Behavior and mood swings. Dr. Farrel suggested that L.P. be evaluated for eligibility for special education services and other related services.

3. On June 15, 2021, E.P. forwarded this diagnosis and requested special educational services for L.P.
4. On July 1, 2021, Newton conducted an identification meeting. In attendance was E.P., Megan Young, (School Psychologist and Case Manager), Ashley Woortman, (General Education Teacher), Larissa Roman, (Learning Disabilities Teacher Consultant), and Karen Thibault, (School Social Worker).
5. After that meeting, upon review of various records of L.P. the District concluded that L.P. does not “require any evaluations, does not evidence any educational disability defined in N.J.A.C. 6A:14-3.5, and does not require special education and related services.” No appeal was taken from that determination.
6. On November 14, 2022, E.P. requested of Jennifer Pasquali, the Director of Special Education for Newton, an independent evaluation of L.P.
7. On November 30, 2022, Newton again convened an identification meeting. In addition to E.P., Ms. Young, and Ms. Roman the following people attended: Jennifer Pasquali, Julie Rikon, (Parent consultant), and additional personnel of the Newton staff, representing the student’s teacher, the principal, the Child Study team social worker, and the speech and language specialist.
8. After that meeting, upon review of various records of L.P. the District concluded that L.P. does not “require any evaluations, does not evidence any educational disability defined in N.J.A.C. 6A:14-3.5, and does not require special education and related services.” No appeal was taken from that determination.
9. On April 3, 2023, Newton again convened an identification meeting. In addition to E.P., the student’s grandfather, a retired learning disabilities teacher and consultant, Ms. Young, Ms. Roman, Ms. Pasquali, and Ms. Rikon, five additional personnel of the Newton staff attended, representing the

student's teacher, the principal, the Child Study team social worker, and the speech and language specialist.

10. After that meeting, upon review of various records of L.P. the District concluded that L.P. does not "require any evaluations, does not evidence any educational disability defined in N.J.A.C. 6A:14-3.5, and does not require special education and related services." No appeal was taken from that determination.
11. On October 24, 2023, E.P. filed a complaint Investigation Request with the (OSE) against the District seeking in part, an IEE due to the District's failure to provide an IEE or file for due process in response.
12. On December 22, 2023, the OSE found the District did not fail to provide L.P. with an IEE because "there was no evaluation to which the parent could disagree to trigger the right to an IEE at public expense."
13. On January 9, 2024, E.P. requested reconsideration of the December 23, 2023, final decision of the OSE. On January 25, 2024, that request was denied, and notice was provided that petitioner could appeal the final decision to the Appellate Division.
14. On February 21, 2024, Newton again convened an identification meeting. In addition to E.P., Ms. Young, Ms. Roman, Ms. Pasquali, three additional personnel of the Newton staff attended.
15. After that meeting, upon review of various records of L.P. the District concluded that L.P. does not "require any evaluations, does not evidence any educational disability defined in N.J.A.C. 6A:14-3.5, and does not require special education and related services." No appeal was taken from that determination.

16. On April 10, 2024, Newton again convened an identification meeting. In addition to E.P., Ms. Young, Ms. Roman, Ms. Pasquali, four additional personnel of the Newton staff attended.
17. After that meeting, upon review of various records of L.P. the District concluded that L.P. does not “require any evaluations, does not evidence any educational disability defined in N.J.A.C. 6A:14-3.5, and does not require special education and related services.” No appeal was taken from that determination.
18. At no time during the period from 2021 through 2024, did Newton seek to file a petition for due process to deny petitioners an independent evaluation.
19. L.P. has shown she progresses more than adequately annually over the last few years.
20. During the time from 2021, through and including 2024, Newton never engaged an IEE in any area to make an evaluation of L.P., as Newton had determined L.P. was not eligible for special education, as her disability did not affect her intellectual, social nor, emotional well-being to sufficiently have an effect on her educational progress.

QUESTIONS PRESENTED

Did Newton err in not moving for due process on petitioners’ request for IEEs?

Did Newton conduct an evaluation of L.P. as that term is defined in 34 CFR 300.301ff?

Under the facts of this matter are petitioners entitled to an IEE at the expense of Newton?

Does petitioners' failure to appeal the December 23, 2023' OSE final decision preclude petitioners due process application herein?

The answer to all of the above questions is No.

LEGAL ANALYSIS

Summary decision, or as it is known in judicial matters, summary judgment, is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute and the application to that set of material facts of the applicable law and standard of proof lead to a determination of the case without the necessity of a hearing at which evidence and testimony need be taken. The procedure is equally applicable in judicial as well as executive branch administrative cases. N.J.A.C. 1:1-12.5. The standards for determining motions for summary judgment are contained in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74–75 (1954). The Supreme Court later elaborated on the motion and its standard in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). Under the Brill standard, as in Judson, a motion for summary decision may only be granted where there are no “genuine disputes” of “material fact.” The determination as to whether disputes of material fact exist is made after a “discriminating search” of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of “genuine” disputes of material fact. The facts upon which the party opposing the motion relies to defeat the motion must be something more than “facts which are immaterial or of an insubstantial nature, a mere scintilla, ‘fanciful, frivolous, gauzy or merely suspicious.’” Judson, supra, 17 N.J. at 75 (citations omitted). The Brill decision focuses upon the analytical procedure for determining whether a purported dispute of material fact is “genuine” or is simply of an “insubstantial nature.” Brill, supra, 142 N.J. at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. “[T]he essence of the inquiry in each is the same: ‘Whether

the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 536 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the “burden of persuasion” that would apply at trial on the merits, whether that is the preponderance of the evidence standard or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law.

The Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1487, requires States to ensure that all children with disabilities have access to a free appropriate public education (“FAPE”) which is designed to meet their unique needs, and establishes procedural due process rights for the children. Each school district’s board of education must have policies, procedures, and programs to ensure that all students with disabilities between the ages of three and twenty-one have access to a FAPE and are educated to the maximum extent appropriate in the least restrictive environment (“LRE”). N.J.A.C. 6A:14-1.2(b). Education in the LRE requires, whenever possible, the child is educated in the regular educational environment with children who are not disabled, i.e., the child is included in the mainstream education system. N.J.A.C. 6A:14-4.2; 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. 300.114. See also Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1214 (3d Cir. 1993). An education is “appropriate” if it includes “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 203 (1982). In New Jersey, a FAPE must include both special education and any necessary related services, such as counseling, occupational or physical therapy, and speech-language services. N.J.A.C. 6A:14-1.1(b)(3), (d); N.J.A.C. 6A:14-3.9(a). See also 20 U.S.C. § 1401(9), (26)(A); 34 C.F.R. 300.34(a).

Once a student is determined to be eligible for special education and related services the local educational agency (“LEA”) must develop an individualized education program (“IEP”) which establishes the rationale for a student’s educational placement and serves as the basis for program implementation. N.J.A.C. 6A:14-1.3; -3.7.

Here, though, Newton, did not determine that L.P. satisfied the threshold for special education, and did not create an IEP. Newton did not seek any public independent educational evaluation for L.P. Newton had been satisfied that L.P. performed academically, emotionally, and socially appropriate for her age. Newton staff met with E.P. on five occasions from 2021 through 2024. At each occasion, Newton saw more than adequate annual progress of L.P. academically; and did not perceive the issues raised by E.P. regarding social or emotional issues.

Petitioners maintain that because Newton did not move to deny a request for the IEEs within the twenty-day time period of the requests for the IEEs in 2021, 2022, or 2023, it is entitled to IEEs at public expense. Denying same petitioners maintain is unconscionable. Petitioners fail to address the respondent’s position that as Newton performed no outside evaluation of L.P., L.P. is not entitled to object to that evaluation, and request an IEE.

An independent education evaluation (“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.” 34 C.F.R. 300.502(a)(3)(i); N.J.A.C. 1:6A-14.4(a). According to the Supreme Court, the purpose of the IEE is to ensure that parents have “access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion.” Schaffer v. Weast, 546 U.S. 49, 60-61 (2005). The IEE further ensures that parents, in contesting a school district’s assessment, “are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.” *Id.* at 61. It is easy to imagine how difficult it would be for many parents to “match the firepower” of the government if they could not afford to pay the evaluator. Here, Newton is not seeking an outside expert to support its determination. If a hearing were held regarding whether Newton provided L.P. FAPE, Newton would rely on its

internal staff and the educational records of L.P. to satisfy they are providing L.P. with FAPE, as she is making appropriate educational, emotional, and social progress.

34 CFR 300.302 provides, “The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.”

Autism is one of the categories of disabilities which may qualify a student for special education, however 34 CFR 300.8(a)c(1) defines “autism as a developmental disability significantly affecting verbal and nonverbal communication and social interaction, ..., that adversely affects a child's educational performance.” Here, L.P. does not present with intellectual or language impairment. It cannot be said that L.P.'s autism is significantly affecting her verbal and non-verbal communication or social interactions.

Pursuant to N.J.A.C. 1:6A-14.4(a), if a district denies a parental request for an IEE, one may still be afforded to the parent by order of an ALJ. That regulation provides that “[f]or good cause and after giving the parties an opportunity to be heard, the judge may order an independent educational evaluation of the pupil.” To determine whether there is good cause, a factual determination must be made as to whether the CST conducted the appropriate evaluations, and whether those evaluations contained enough information about the pupil and his educational needs, to aid in the development of an appropriate IEP. Union Twp. Bd. of Educ. v. V.K. o/b/o R.K., EDS 5964-03, Final Decision (Nov. 5, 2003) <http://njlaw.rutgers.edu/collections/oal/>. Petitioners have failed to provide any support for this tribunal to find good cause to order IEEs, pursuant to N.J.A.C. 1:6A-14.4.

Here, Newton has on five occasions appropriately determined L.P. ineligible for special education services pursuant to N.J.A.C. 6A: 14-3.4(d). Newton conducted no independent public evaluation. “..., only a disputed public evaluation can trigger a right for a publicly funded IEE.” M.S. v. Hillsborough Twp. Bd. of Educ., No. 19-1510; 2019 U.S. App. LEXIS 37382; 2019 WL 6817169 (3d Cir. 2019).

Petitioners strongly argue that Newton's failure to file a due process petition to object to the request for an IEE is fatal to Newton's position objecting to the IEE. Petitioner relies on 34 CFR 300.502(b)(2). 34 CFR 300.502(b)(5) provides, "A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees." Respondent successfully argues, it has not conducted an evaluation.

Petitioners also cite cases pursuant to N.J.A.C. 6A:14-2.5(c) when the language of the regulation differed from its present form. At the time of Haddon Twp. Sch. Dist. v. N.J. Dep't of Educ., No. A-1626-14T4 (N.J. App. Div., 2016), the regulation permitted the District to first complete an evaluation if the parent asked for an independent evaluation in an area not yet assessed, grant the IEE or request due process to deny the request. Again, for a student who had not been evaluated, that provision would require the District to respond to a request for an IEE for any student who had never had a CST evaluation completed. Since the regulation has been revised to remove that provision, the reasoning in Haddon does not apply to the instant matter. In Haddon, the student had previously been identified as in need of special education.

In the event L.P. does not make meaningful progress educationally, socially, emotionally, Newton is subject to due process for failing to provide FAPE. Here, Newton has not conducted an independent evaluation to which the petitioners are entitled to object. That is a condition precedent to requesting an independent evaluation.

The petitioner complained to OSE regarding the determination of the Newton District. OSE did not find the complaint to be meritorious, denying any independent evaluation. Petitioners never appealed the determinations by the OSE. "An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Bd. of Educ. of the Borough of Kinnelon v. D'Amico, 477 N.J. Super. 184, 195-196 (App. Div. 2023) quoting In re Herrmann, 192 N.J. 19, 27-28, 926 A.2d 350

(2007). This is not the appropriate forum to review OSE's determination, and this tribunal will not do so.

While not precluded from instituting the within action, petitioners action in bringing this matter before this forum is forum shopping. Petitioners had the opportunity to appeal the action of the OSE in ruling against the petitioners, petitioners chose not to do so.

CONCLUSION

I **CONCLUDE** that Newton did provide an appropriate analysis of L.P. and found no disability which needed to be addressed.

I **FURTHER CONCLUDE** that Newton did not conduct any public educational evaluation with which the petitioner could object, thereby entitling the petitioner to a District paid IEE.

I **FUTHER CONCLUDE** petitioners have not shown good cause for this tribunal to direct an IEE of L.P.

ORDER

It is hereby **ORDERED** that respondent's motion for summary disposition dismissing the petition is **GRANTED**, and

It is hereby **FURTHER ORDERED** that petitioner's claim for IEEs for L.P. is **DENIED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2024) 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 (2024). 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.

July 23, 2024

DATE



JOSEPH A. ASCIONE, ALJ (Ret., on recall)

Date Received at Agency:

July 23, 2024

Date Sent to Parties:

July 23, 2024

JAA/cc

APPENDIX

LIST OF EXHIBITS

For Petitioner:

- P-1 Moving Papers and Exhibits PE 1-7
- P-2 Opposing and Reply Papers PE 8

For Respondent:

- R-1 Moving Papers and Exhibits 1-4
- R-2 Reply Papers