

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 05665-17

AGENCY DKT. NO. 2017 25681

E.T. ON BEHALF OF I.T.,

Petitioner,

v.

RIDGEWOOD VILLAGE BOARD
OF EDUCATION,

Respondent.

E.T., petitioner, pro se

David B. Rubin, Esq., for respondent

Record Closed: June 18, 2018

Decided: June 29, 2018

BEFORE MICHAEL ANTONIEWICZ, ALJ:

STATEMENT OF THE CASE

In this case, the petitioner, E.T., who is the parent of I.T., disagrees with the decision of the school district that I.T. is not eligible for occupational therapy (OT), and seeks a determination that I.T. is eligible and is entitled to OT as a special education related service. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on April 25, 2017, for hearing as a contested case. In accordance with 20 U.S.C. § 1415 and 34 C.F.R. §§ 300.500 to 300.586, the Commissioner of the Department of Education, Office of Special Education Policy and Procedure, requested that an Administrative Law Judge be assigned to conduct a hearing in this matter.

Several hearing dates were adjourned at the petitioner's request and the hearing was rescheduled for and heard on June 11, 2018. Thereafter, the parties submitted post-hearing submissions on or before June 18, 2018, and the record closed.

FACTUAL DISCUSSION

Background

E.T. is the father of I.T., who is presently twelve years of age. Petitioner resides within the Ridgewood Village School District and I.T. attends fourth grade within that district. I.T. was found to be eligible for special education and related services in the eligibility category of "Other Health Impaired." As a result, I.T. was provided with services under the applicable IEP in September 2016.

On February 1, 2017, the parent of I.T. filed a due process hearing request challenging the determination by the District that I.T. was not eligible for OT services. Over the summer of 2016, E.T. requested an independent OT evaluation which the District initially declined. (R-6.) The Child Study Team requested the opportunity to conduct its own OT evaluation by the in-district occupational therapist, but E.T. further requested an independent evaluation. The parties ultimately agreed to have an independent evaluation conducted by the Bergen Pediatric Therapy Center. (R-6.) As a result of the review of this evaluation, together with a meeting which took place on January 19, 2017 (P-1), the school district determined that I.T. was not eligible for school-based OT services based on I.T.'s ability to function successfully at school without such services despite a recommendation of some OT set forth in the independent evaluation.

TESTIMONY

Three witnesses testified at the hearing in this matter: Karen Morris, registered occupational therapist employed by the District, who testified for the school district, Susan Fink, a social worker employed by the District, and E.T., the father of I.T. Their testimony is summarized as follows:

Susan Fink

Susan Fink (Fink) is employed by the District and works as a social worker and was I.T.'s case manager. Fink also has a background as a special education teacher. Fink is licensed as a social worker in the State of New Jersey. There was an IEP for the school year 2016-2017. (R-3.) The IEP meeting date was September 8, 2016. There was a question as to whether I.T. required OT.

An IEP from September 2016 was in effect (R-3) and placed I.T. in the fourth grade at the Willard Elementary School in the Ridgewood School District. I.T. had various special education services which are not otherwise pertinent to the issues presented in this hearing. An OT assessment of I.T. was conducted in 2014 that resulted in a finding that this student was not eligible for OT services.

E.T. disagreed with the District's position that I.T. did not need OT and continued to request such services. There were a series of communications between Fink and E.T. discussing E.T.'s request for an independent OT evaluation and the District's position that it was not needed. Fink recalled that E.T. wanted an independent evaluation for I.T. It was decided by the District that I.T. was not qualified for OT. On July 21, 2016, the District so advised E.T. of this position.

On September 28, 2016, the District advised E.T. of the results of a meeting held on September 20, 2016. At that meeting, the District reviewed the proposal to conduct an OT evaluation. This evaluation was proposed after further consideration of E.T.'s request made on June 22, 2016. It was further proposed that the Willard School occupational therapist will assess the appropriateness of I.T.'s seating. The parties were still not in agreement with an independent OT evaluation.

On October 25, 2016, E.T. forwarded a letter to Fink requesting an OT Evaluation by SIPT certified OT at Bergen Pediatric Therapy (BPT). On November 22, 2016, the District then approved the OT evaluation by BPT. This evaluation was conducted on November 25, 2016, and a report was written by Lisa Koo. (R-9.) This

evaluation was the subject of a discussion between the District and E.T. at a meeting held on January 19, 2017. On that date, the District, after considering the Ms. Koo's evaluation, found that because I.T. can demonstrate proficiency of tasks in fine motor/sensory motor and because there is no impact on her ability to function within the school setting, it was the District's position that school based OT is not warranted. (R-6, p 24.) It was believed that private OT might be needed but school OT was not needed.

On cross-examination, Fink admitted that she was not an occupational therapist. Furthermore, Fink could not do an evaluation for OT. Fink did not do an evaluation of I.T. for OT. Fink confirmed that there was a discussion regarding the independent evaluation for OT done by Ms. Koo. The school recommended that a school-based OT was not warranted. There could have been a need for OT outside the school. Fink maintained that the District reviewed the evaluation and discussed the findings. The IEP team was present at the January 19, 2017, meeting.

On re-direct Fink stated that they did not preclude E.T. from engaging in discussion at the January 2017 meeting. After the meeting an IEP was drafted, dated April 21, 2017, and an IEP dated May 16, 2017. (R-4; R-5.) Fink again testified that they had no information which supported that school-based OT was necessary.

Karen Morris

Karen Morris (Morris) is a licensed and registered occupational therapist who, since January 21, 2016, was employed by the District. Morris has a Master's degree in OT and is currently pursuing a doctorate in this field. Morris continues to earn continuing education certificates for training in various OT-related matters. Morris is licensed by the State of New Jersey in OT. Morris learned of I.T. when she was hired by the District in January 2016. There was a prior O.T. evaluation done prior to Morris being hired. Morris relied on this prior evaluation.

It is conceded that Morris did not conduct a formal OT assessment of I.T. but before the January 19, 2017, meeting she reviewed all pertinent documents, including the independent OT evaluation, which was an independent OT evaluation done by Ms.

Koo dated November 25, 2016. Morris played no role in this evaluation. Morris testified that Koo did not speak to Morris.

Morris stated that she attended the January 2017 meeting the District had with E.T. Morris stated that the District did not have much notice of Ms. Koo's report prior to the January 2017 meeting. After reviewing this report, the District maintained their position that school-based OT was not needed. Morris believed that any problems that I.T. had were not academic issues. Many of the issues presented were relayed by the father, E.T. School issues were not included. Morris stated that I.T. did very well in the academic setting. They found no glaring issues with I.T.

Morris stated that she did not see any anxiety, although she described I.T. as a shy girl. The District's reasoning and ultimate decision was conveyed to E.T. by the District's IEP team. Morris testified that she does not take a refusal of services by the District lightly. E.T. was at the meeting and said that E.T. did not participate in the meeting and had no questions. Morris said that the District set up no barriers to his participation.

On cross-examination, Morris stated that they reviewed the reports prior to the meeting. Morris assessed the evaluation and then gave her opinion on same. Morris did observe I.T., but did not treat I.T.

E.T.

E.T., the father of I.T., provided brief testimony in this matter. He relied upon the report of Ms. Koo, the occupational therapist from Bergen Pediatric Therapy Center, who performed an independent OT evaluation of I.T. and created a report. E.T. expressed his position that he disagreed with the District's decision not to provide OT. E.T. went on to describe the fact that the District, at first, took the position that an independent OT evaluation was not necessary.

It must be noted that Ms. Koo did not testify at the hearing and that E.T. did not call her as a witness. In particular, he relied upon the content of this report. (R-9.)

E.T. made an attempt to introduce written statements made by Ms. Koo as well as occupational therapist Karrie Olick; however, Mr. Rubin made an objection to same as hearsay and Mr. Rubin's objection was upheld. Accordingly, neither report was admitted for purposes of the opinions in those reports.

E.T. further testified that based on his own observations, where he found that I.T. is impacted by OT deficiencies on a day-in and day-out basis. E.T. saw I.T. in school and found her to be clumsy, uncoordinated, and reacting poorly to loud sounds. E.T. found I.T. to be withdrawn and not socializing.

On cross-examination, E.T. made a request for an independent evaluation on June 22, 2016, and admitted that the school year ends in late June. The District provided an answer to the request on July 21, 2016, which was twenty-nine days after the request was made by E.T.

In assessing E.T.'s testimony, I **FIND** his testimony to be heartfelt and sincere, however, without the needed expertise to properly address the issue in this case. Based on this, I hold the evidence presented by E.T.'s testimony to be of limited probative value regarding the issue in this case. M.V. and A.V. ex rel. B.V. v. Burlington Twp. Bd. of Educ., EDS 08276-05, Initial Decision (January 5, 2006), <http://njlaw.rutgers.edu/collections/oal/>; T.R. and D.R. ex rel. J.R. v. Cherry Hill Twp. Bd. of Educ., EDS 08862-09, Initial Decision (April 8, 2011), <http://njlaw.rutgers.edu/collections/oal/>. Report of Lisa M. Koo, MA, OTR/L from Bergen Pediatric Therapy Center, LLC, dated November 25, 2016. This occupational therapy evaluation dated November 25, 2016, was conducted at the request of E.T. to assess the need for OT. This report was submitted by the District only for the basis that it was considered by the District when deciding whether to provide OT to I.T. and not for the conclusions provided therein.

Ultimately, Ms. Koo was not called as a witness in this hearing and the admission of the report (as well as E.T. testifying about the contents of the report) was objected to by the District's attorney as inadmissible hearsay. This objection was upheld by the

undersigned and Ms. Koo's report was not admitted as a basis for the facts contained in that report. The sole basis for the introduction of Ms. Koo's report by the District was for the purpose of showing that it was received and considered by the District and not for the purpose of the truth of the allegations contained therein.

LEGAL ANALYSIS

This case arises under the Individuals with Disability Education Act (IDEA), 20 U.S.C. § 1401 et seq., which makes available federal funds to assist states in providing an education for handicapped children. Receipt of those 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).

New Jersey has enacted legislation, N.J.S.A. 18A:46-1 et seq., and has adopted regulations to assure all disabled children enjoy the right to a free, appropriate public education (FAPE) as required by 20 U.S.C. §1412(1). See also Hendrick Hudson Dist. of Educ. v. Rowley, 458 U.S. 176, 181 (1982). The IDEA requires a disabled child's FAPE be designed to meet the unique needs of that child through an IEP, which is reviewed annually. Each New Jersey district board of education, therefore, is required to provide a free, appropriate public education program and related services for educationally disabled students in the least restrictive environment. N.J.A.C. 6A:14-2.1(a). An "appropriate" education does "not mean a potential-maximizing education," Rowley, 458 U.S. at 197 n. 21, merely one "sufficient to confer some educational benefit upon the handicapped child." Id. at 200.

In this case, the sole issue to be determined is whether respondent's determination not to provide OT to I.T. was appropriate under the circumstances and the petitioner never raised an issue as to the fact that I.T. was not receiving FAPE. Respondent bears the burden of proving, by a preponderance of evidence, that its action in denying such services was appropriate under the specific circumstances of this case. In opposing this decision, petitioner asserts that I.T. is eligible on the basis of the testimony that I.T. has deficits in 1) visual-motor integration; 2) visual perception; 3) sensory processing; 4) fine-motor coordination; and 5) upper limb coordination. Also on

E.T.'s self-reporting of I.T.'s deficits that negatively impact her daily activities as she experiences anxiety and avoidance in situations where she is expected to speak such as socializing, participating in class discussions, or meeting new people.

Based on the limited evidence presented by the petitioner and the testimony and other evidence submitted by the respondent, I **FIND** that the District's Child Study Team had a good basis for not recommending OT services to I.T. Morris testified in the hearing that the conclusions contained in Ms. Koo's report were arrived at with no knowledge of how I.T. performed in school. Ms. Koo's report also was focused on non-school activities rather than skills possessed by I.T. which were needed for her performance at school. Morris further testified as to her observations of I.T. at school, further confirmed by I.T.'s teachers. All of this evidence resulted in Morris's position that OT services were not necessary for any school-related purpose.

CONCLUSION

Based upon the school district's report in which they interviewed teaching staff, it was found that I.T. has been successful in her academic subjects. The District performed an OT assessment of I.T. in 2014 wherein it was determined that the student was not eligible for OT services. After the review of the independent OT evaluation done by the Bergen Pediatric Therapy Center, the CST maintained its position that OT services were not warranted based on I.T.'s ability to properly function successfully in school without such services.

Based on the foregoing, I **CONCLUDE** that the District has clearly demonstrated an appropriate and supportable basis for rejecting the recommendation contained in the independent OT evaluation. The District's rejection of same was not arbitrary and capricious. Therefore, I further **CONCLUDE** that petitioner's due process hearing request should be dismissed.

DECISION AND ORDER

For the reasons stated above, I **ORDER** that the actions of respondent school district determining that I.T. is not eligible for OT services are correct and appropriate under the circumstances and is **AFFIRMED**. I, therefore, **ORDER** that the petitioner's due process hearing petition is **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2017) 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 (2017). 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 Programs.

June 29, 2018
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency

July 2, 2018

Date Mailed to Parties:

jb

APPENDIX

LIST OF WITNESSES

For Petitioner:

E.T.

For Respondent:

Karen Morris

Susan Fink

LIST OF EXHIBITS

For Petitioner:

- P-1 Due Process Petition dated February 1, 2017
- P-2 Not in evidence
- P-3 Certificate of Completion to Lisa M. Koo, Sensory Integration Certificate
- P-4 Not in evidence
- P-5 Email from E.T. to Susan Fink regarding Occupational Therapy dated March 27, 2017
- P-6 Not in evidence
- P-7 Occupational Therapy receipts in the amount of \$19,695 (\$10,645 balance)
- P-8 Letter Motion from E.T. to Michael Antoniewicz, ALJ dated January 11, 2018

For Respondent:

- R-1 Not in evidence
- R-2 Not in evidence
- R-3 IEP, meeting date September 8, 2016
- R-4 IEP, meeting date April 21, 2017
- R-5 2016-2017 IEP Review, meeting date May 16, 2017
- R-6 Correspondences, Notices and e-mails to and from Susan Fink and parents

R-9 Occupational Therapy Evaluation of Bergen Pediatric Therapy Center, LLC,
dated November 25, 2016

R-10 Not in evidence

R-11 Petition for Due Process dated February 1, 2017