State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
OAL DKT. NO. EDS 16901-14
AGENCY DKT. NO. 2015 22110

WASHINGTON TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
M.H. AND P.H. ON BEHALF OF A.H.,
Respondents.

Sanmathi Dev, Esq., for petitioner (Capehart & Scatchard, P.A., attorneys)

Jamie Epstein, Esq., for respondents

Record Closed: November 18, 2015 Decided: November 30, 2015

BEFORE **JOHN F. RUSSO, JR.,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The above captioned litigation was initiated by Washington Township Board of Education (Board) against M.H. and P.H. on behalf of A.H. by way of petitioner filing a petition for due process seeking an order permitting the Board to conduct certain evaluations. After an initial mediation session and settlement conference in 2015 failed to resolve the matter, the case was assigned to this administrative law judge and scheduled to be heard on January 26, 2015, for a due process hearing, during which a case management conference was conducted. Thereafter, the matter was scheduled to

be heard on April 15 and 29, 2015. On March 17, 2015, petitioner filed a motion for summary decision.

On April 6, 2015, I conducted a status conference via telephone to address petitioner's motion. During which the respondent's attorney advised that there were discovery issues that would preclude respondent from filing an opposition to petitioner's motion for summary decision. With consent of both parties, the April 15th and 29th hearings were adjourned and rescheduled to July 27, 2015, and petitioner advised that she would comply with the petitioner's discovery request.

Neither party had advised that discovery had been completed, nevertheless, on May 12, 2015, petitioner requested that the petitioner's motion for summary decision that had been pending for almost two months be decided. I asked my secretary to contact Mr. Epstein in an effort to ascertain whether he will be opposing petitioner's motion and what was going on with discovery. My secretary emailed Mr. Epstein twice on May 20, 2015, asking about his opposition. (C-1). On May 21, 2015, Mr. Epstein responded to the emails by stating "I am unaware of the due date for [his] opposition. I can file it by Monday [May 25, 2015]. I would also note that follow-ups to discovery are ongoing." (C-2).

Subsequent to May 26, 2015, I asked my assistant if we ever received Mr. Epstein's opposition, to which she replied no. I asked her to call him to find out if he was filing an opposition. On June 3, 2015, she called and left a voice mail, but we did not hear back from him and as such, I began writing the decision regarding petitioner's motion as no opposition was ever filed.

Ordinarily respondent would have been required to file an opposition within twenty days of service of the motion for summary decision pursuant to N.J.A.C. 1: 1-12.5 (b), but due to the fact that petitioner did not comply with respondent's discovery request, I relaxed this requirement. However, based upon the respondent's attorney's representation that he would be filing an opposition by May 25, 2015, and nothing was received nor were any requests for extensions made, I decided to treat the motion as being unopposed.

However, as I was writing the decision granting petitioner's motion, Mr. Epstein sent in an opposition out of time and well past the self-imposed deadline of May 25, 2015. I conducted a conference call with the parties and ask that Mr. Epstein explain in writing why I should entertain his opposition after his self–imposed deadline and/or why he did not request an extension or otherwise communicate with this tribunal.

Additional papers were filed by both parties and I determined that respondent's opposition would not be considered as it was way out of time and no compelling reason was advanced. Petitioner again respectfully requested that this tribunal grant Summary Decision in favor of the Board and compel parental consent for the Board to conduct and complete a neuropsychological assessment (which includes neurological, psychological and educational testing), a speech-language assessment, a functional behavior assessment, and an assistive technology assessment as set forth in the Identification and Evaluation Plan conference dated November 10, 2014.

As demonstrated below, there is no genuine issue of material facts in controversy and the Board is entitled to judgment as a matter of law.

FACTS

The following facts are not in dispute and as such I **FIND** the following as **FACT**, A.H. is an eight-year-old second grader (DOB: January 25, 2007) student residing within the Washington Township School District (District). A.H. is currently a special education student in an in-class resource program at the Thomas Jefferson Elementary School in the District. M.H. and P.H., husband and wife, are the parents' of A.H. (Parents). A.H has been eligible for special education and related services under the classification of autistic. In 2014, Judge Martone heard a related case involving these parties and he determined that the evaluations previously performed by the Board were defective as he determined that the parents' never consented to the evaluations. In 2015, the parent filed a due process petition that is still pending seeking among other relief that an ALJ enter an order granting the parents' right to independent evaluations.

In this petition, the Board is seeking to conduct and complete a neuropsychological assessment (which includes neurological, psychological and educational testing), a speech-language assessment, a functional behavior assessment, and an assistive technology assessment as set forth in the Identification and Evaluation Plan conference dated November 10, 2014.

STANDARD OF REVIEW IN SUMMARY DECISION MOTIONS

Motions for summary decision in administrative proceedings are governed by N.J.A.C. 1: 1-12.5. In relevant part, it states:

> (b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. 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. (Such response must be filed within twenty days of service of the motion. A reply, if any, must be filed no later than ten days thereafter. If the adverse party does not so respond, the summary decision, if appropriate, shall be entered.)

It is noted that a genuine issue of material fact exists when "the competent evidential materials . . . are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party." Piccone v. Stiles, 329 N.J. Super. 191, 194 (App. Div.2000) (quoting Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995). In addition, "an issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion; together with all legitimate inferences there from favoring the non-moving party would require submission of the issue to the trier of fact." Id. at 195.

LEGAL DISCUSSION

Applying the standard for summary decision to the facts of the instant case, it is clear that judgment must be entered in this matter in favor of the Board, and the Board's due process petition requesting that the Board be permitted to conduct and complete a neuropsychological assessment (which includes neurological, psychological and educational testing), a speech-language assessment, a functional behavior assessment, and an assistive technology assessment as set forth in the Identification and Evaluation Plan conference dated November 10, 2014, must be granted.

The Individuals with Disabilities Act (IDEA) requires a local school district to provide a free appropriate public education (FAPE) to all children with disabilities and determined eligible for special education. 20 U.S.C.A. 1412(a)(1)(A). Once the school district determines eligibility and classification of the student, the District is required to determine whether the student continues to be a student with a disability every three years, or sooner, if conditions warrant. N.J.A.C. 6A:14-3.8; 20 U.S.C.A. 1414(a)(2). To that end, the District must determine the nature and scope of the triennial reevaluation and identify what additional data/assessments, if any, are needed to determine the educational needs of the student. N.J.A.C. 6A:14-3.8(B). If the District and the parents' agree that no additional assessments are needed, then the District is not required to conduct any such assessment. N.J.A.C. 6A:14-3.8(b).

Prior to conducting any assessment as part of a reevaluation, the District must obtain parental consent from the child's parent. N.J.A.C. 6A:14-3.8(c). The District may request a due process hearing when it is unable to obtain required consent to conduct a reevaluation. N.J.A.C. 6A:14-2.7(b). "[I]f 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., 2009 N.J. AGEN LEXIS 83 at *4, February 26, 2009 (OAL Dkt. No. EDS 11958-08, Agency Dkt. No. 2009 14172) citing Shelby S ex. rel. Kathleen T. v. Conroe Indep. Sch. Dist., 454 F.3d 450, 454 (5th Cir. 2006).

The courts have held that parents' cannot refuse consent for the District to conduct assessments of the student when they are requested as part of a triennial reevaluation. See Sparta Twp. Bd. Of Educ. v. B.Y. and K.Y. o/b/o B.Y., 209 N.J. AGEN LEXIS 83 at *4, February 26, 2009 (OAL Dkt. No. EDS 11958-08, Agency Dkt. No. 2009 14172); Matawan-Aberdeen Reg'l Bd. Of Educ. V. H.G. and R.G. o/b/o S.G., 2005 N.J. AGEN LEXIS 658 at *12-4, November 5, 2005 (OAL Dkt. No. EDS 8330-05, Agency Dkt. No. 2006-10635); and Haddonfield Borough Bd. of Educ. v. S.J.B. o/b/o J.B., 2004 N.J. AGEN LEXIS 645, May 20, 2004 (OAL Dkt. No. EDS 2441-04, Agency Dkt. No. 2004-8817). In Sparta, Administrative Law Judge Irene Jones granted the Board's request to conduct assessment based on the overriding factor that the Board requested the assessments as part of a triennial reevaluation mandated by the IDEA. Sparta Twp. Bd. Of Educ. v. B.Y. and K.Y. o/b/o B.Y., 209 N.J. AGEN LEXIS 83 at *4, February 26, 2009 (OAL Dkt. No. EDS 11958-08, Agency Dkt. No. 2009 14172). Judge Jones reasoned that "if a parent wants their child to receive special education under the IDEA, they are obliged to permit reevaluation." Id. At *4-5 citing Dubois v. Connecticut State Bd. Of Educ., 727 F.2d 44, 48 (2d Cir. 1984); see also M.T.V. v. DeKalb County Sch. Dist., 446 F3d 1153m 1160 (11th Cir. 2006). Furthermore, a school district is entitled to reevaluate a student by an expert of their choice when the student's triennial reevaluation is due. Sparta at *4 citing M.T.V. v. DeKalb County Sch. Dist., 446 F3d 1153m 1160 (11th Cir. 2006). Similarly, "the decision as to who should be the evaluators is left to the District." Morris Sch. Dist. v. V.S., 1999 N.M. AGEN LEXIS 1156, March 15, 1999 (OAL Dkt. No. EDS 1937-99, Agency Dkt. No. 99-2364E (citing Andress v. Cleveland, 64 F3d, 176 (5th Cir. 1995), Johnson v. Dunneland, 92 F3d 554 (7th Cir. 1996), and Patricia P. v. Bd. Of Edu. of Oak Park, 8 F.Supp. 2d 801 (N.D.I11, 1998).

In Matawan-Aberdeen Regional Board of Education v. H.G. and R.G,. o/b/o S.G., Administrative Law Judge Richard F. Wells granted the Board's request for emergency relief to complete assessments part of a three-year evaluation when the parents' withheld consent. Matawan-Aberdeen Reg'l Bd. Of Educ. V. H.G. and R.G. o/b/o S.G., 2005 N.J. AGEN LEXIS 658 at *12-4, November 5, 2005 (OAL Dkt. No. EDS 8330-05, Agency Dkt. No. 2006-10635). Instead, Judge Wells reasoned that regardless of whether the parents' are procuring their own assessments, the District maintains a

settled legal right to conduct its own assessment for a three-year reevaluation, especially when the parents' refusal prohibits the district from complying with statutory timelines for completing such reevaluation. Id.

Even when parents' have objected to the District's request to evaluate a student with a disability prior to the expiration of the three year reevaluation mark, the courts have ordered parents' to comply with the District's requests to conduct additional assessments. See Ramsey Bd. of Educ. v. L.E. o/b/o M.S., 2007 N.J. AGEN LEXIS 121, March 8, 2007 (OAL Dkt. No. EDS 7943-06, Agency Dkt. No. 2007 11465); River Edge Bd. of Educ. v. E.F. o/b/o V.F., 2009 N.J. AGEN LEXIS 313, June 1, 2009 (OAL Dkt. No. EDS 05680-09, Agency Dkt. No. 2009-14747); and Collingswood Bd. of Educ. v. J.T., 1999 N.J. AGEN LEXIS 54, February 26, 1999 (OAL Dkt. No. EDS 199-99, Agency Dkt. No. 99-2281E). In Ramsey, Administrative Law Judge Maria Mancini La Fiandra granted the district's request to conduct assessments as part of a reevaluation when the parents' withheld consent because there was a clear disagreement between the parties as to an appropriate program for the student, the district had not conducted a compete evaluation of the student in five years, and the parents' were unwilling to share any outside assessments obtained by them. Ramsey Bd. of Educ. v. L.E. o/b/o M.S., 2007 N.J. AGEN LEXIS 121, March 8, 2007 (OAL Dkt. No. EDS 7943-06, Agency Dkt. No. 2007 11465).

As the case law demonstrates, a school district has a settled legal right to conduct formal testing/assessments of a student as part of a triennial reevaluation when a parent withholds consent and the District files for due process to compel parental consent. More salient is that understanding of the courts that even where a district proposes to perform assessments prior to the expiration of the three-year reevaluation period, the District is entitled to an order from the court overriding a parents' refusal.

As applied here, the evidence and the controlling law makes clear that the Board is entitled to conduct the requested assessments The Board is seeking to conduct and complete a neuropsychological assessment (which includes neurological, psychological and educational testing), a speech-language assessment, a functional behavior assessment, and an assistive technology assessment as set forth in the Identification

and Evaluation Plan conference dated November 10, 2014, in order to complete A.H.'s triennial reevaluation consistent with the requirements of the New Jersey Administrative Code and IDEA.

In this case the parents' refusal only impedes and prevents the Board from meeting its statutory obligation to reevaluate A.H. and offer him FAPE based on the results of the assessments. A.H. has not received a comprehensive battery of formal testing since approximately January of 2010, when A.H. was three years old – he is now eight years old. Without completing the requested assessments, the Board cannot prepare an appropriate IEP.

For the reasons set forth above, I **CONCLUDE** that the Board has a legal right to conduct the requested assessments in order to complete A.H.'s triennial reevaluation consistent with the requirements of the New Jersey Administrative Code and IDEA. To go to a hearing on this issue when the evidence and law is in favor of the Board would only serve to deprive the Board and the parties the ability to secure the necessary information from professionals to determine the appropriate manner to educate this student.

However, do to some unique factors in this case regarding evaluations, my granting of the Board's motion does not render moot the relief requested in the parents' related due process motion which is still pending pertaining to the parents' request for independent evaluations and that aspect of that due process petition shall proceed and not be affected by this decision in this case.

ORDER

Based upon all of the foregoing, I **ORDER** that the Board's motion is **GRANTED** and that the Board is entitled to perform a complete a neuropsychological assessment (which includes neurological, psychological and educational testing), a speech-language assessment, a functional behavior assessment, and an assistive technology assessment as set forth in the Identification and Evaluation Plan conference dated November 10, 2014.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2015). 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.

November 30, 2015
DATE

JOHN F. RUSSO, JR., ALJ

Date Received at Agency: November 30, 2015 (emailed)

Date Sent to Parties: November 30, 2015 (emailed)

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