State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
OAL DKT. NO. EDS 01265-22
AGENCY DKT. NO. 2022-33784

B.K. and B.K. ON BEHALF OF S.K.,
Petitioners,
v.
EDISON TOWNSHIP BOARD OF EDUCATION,
Respondent.

Michael I. Inzelbuch, Esq., for petitioners (Law Office of Michael I. Inzelbuch, attorneys)

R. Scott Eveland, Esq., for respondent (Inglesino, Webster, Wyciskala & Taylor, LLC, attorneys)

Afshan T. Amiri-Giner, Esq. for respondent on the brief and appearance at oral argument (Inglesino, Webster, Wyciskala & Taylor, LLC, attorneys)

Record Closed: May 11, 2022 Decided: June 23, 2022

BEFORE **DAVID M. FRITCH, ALJ**:

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STATEMENT OF THE CASE

The petitioners, on behalf of their child, S.K., filed a Due Process Petition with the Office of Special Education, Department of Education seeking reimbursement for a unilateral placement of S.K. at his present educational program and placement along

with continued placement and transportation, development of an Individualized Education Program (IEP), and reimbursement of all costs. The respondent, the Edison Township Board of Education (Board), filed a motion for summary decision seeking dismissal of the petitioners' complaint on the grounds that S.K.'s parents have refused their consent to the Board's request for evaluations to determine S.K.'s continued eligibility for special education services and development of an appropriate IEP while filing for due process claiming the Board failed to provide an appropriate IEP to S.K.

PROCEDURAL HISTORY

The petitioners filed a Due Process Petition with the Office of Special Education, Department of Education, on January 17, 2022. The respondent filed an answer to the petitioners' Petition on January 27, 2022. The matter was transmitted to the Office of Administrative Law (OAL) 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 where it was filed on February 17, 2022. The respondent filed a motion for summary decision to dismiss the petitioners' Petition on March 16, 2022. The petitioners' response to the motion was received on March 30, 2022, and the respondent's reply brief was received on April 21, 2022. The parties requested oral argument, which was held on May 11, 2022, via the Zoom video teleconferencing platform, and the record on the motion closed following oral arguments.

FACTUAL DISCUSSION

Based on the papers submitted and arguments of counsel and the parties therein, I make the following findings of **FACT** as uncontested by the parties:

1. S.K. is a fifteen-year-old child who resides with his mother (B.K.I), and father (B.K.II), within the geographic parameters of the Edison Township School District (District). (Toohey Cert. at ¶ 3.)

2. S.K. transferred to the District in July 2016, prior to the commencement of the 2016-2017 school year. (Id. at ¶ 4.)

3. Prior to transferring to the District, S.K. attended the Rabbi Pesach Raymon Yeshiva. (Id. at ¶ 5.)

4. In August 2016, the District held an annual review meeting for a transfer student including a reevaluation meeting with proposed evaluations for S.K. (Id. at ¶ 6.)

5. In September 2016, the District held an IEP meeting where S.K. was deemed eligible for special education and services under the category of Other Health Impaired. (Id. at ¶ 7.)

6. The District proposed an IEP for S.K. in September 2016 which included in-class resource class setting for Language Arts, Math, and Science as well as group speech-language therapy twice a week and group occupational therapy once a week. (Ibid.)

7. S.K.'s parents unilaterally placed S.K. at the Sinai School (Sinai) at the Joseph Kushner Hebrew Academy in Livingston, New Jersey, for the 2016-2017 school year (id. at ¶ 8) and filed a due process petition in January 2017 seeking reimbursement for the costs of S.K.'s education at Sinai. (Id. at Ex. A.)

8. The January 2017 Due Process Petition was resolved by a settlement agreement between the parties entered into in April 2017. (Id. at Ex. B.)

a. Under the terms of that agreement, the District paid fifty-one thousand dollars per year for S.K.'s tuition at Sinai for the 2016-2017, 2017-2018, and 2018/19 school years and twelve thousand dollars for the petitioners' legal costs. (Ibid.)

b. S.K.'s parents agreed to waive rights to have the District prepare or execute an IEP for S.K. for the 2016-2017 school year through the 2018-2019 school year. (Ibid.)

c. The agreement provided that the parties would convene an IEP meeting to develop an appropriate placement for S.K. for the 2019-2020 school year. (Ibid.)

9. In August 2019, the parties entered into another settlement agreement extending S.K.'s educational placement at Sinai for the 2019-2020, and 2020-2021 school years. (Toohey Cert. at Ex. C.)

a. Under the terms of that agreement, the District paid up to fifty-eight thousand five hundred dollars per year of non-sectarian tuition costs per school year to Sinai for the 2019-2020 and 2020-2021 school years, which comprised S.K.'s seventh and eighth grades. (Ibid.)

b. The agreement further waived any rights S.K. had for the District to develop or provide an IEP for S.K.'s seventh and eighth grade education and waived any entitlement to a Free and Appropriate Education (FAPE) from the District while S.K. was attending Sinai. (Ibid.)

10. On July 13, 2021, the petitioners notified the District of their intent to re-enroll S.K. at Sinai for the 2021-2022 school year and sought reimbursement for S.K.'s continued educational placement at Sinai. (Pet. Br. at Ex. J.)

11. In July 2021, the District contacted the petitioners to schedule a reevaluation meeting for S.K. (See Pet. Br. at Ex. K.) Due to "conflicting schedules" with the petitioners, the meeting was not scheduled between the parties. (Pet. Br. at 2. See also Wahl Cert. at ¶¶ 5-6; Id. at Ex. C.)

12. In August 2021, the District received the following private evaluations of S.K. from the petitioners: a Neuro-Developmental Assessment, dated June 15, 2021; Speech and Language Testing, dated April 16, 2021; and a Psychiatric Evaluation, dated April 21, 2021. (Toohey Cert. at ¶ 14; Wahl Cert. at ¶ 7; B.K. II Cert. at ¶ 19.)

13. At the start of the 20212022 school year, S.K. remained enrolled at Sinai. (Toohey Cert. at ¶ 13. See also Due Process Petition at 12 (noting parents have unilaterally placed S.K. at Sinai and seek his continued placement there).)

14. The parties met on November 1, 2021 to discuss S.K.'s educational needs and placement. (Wahl Cert. at ¶¶ 8-11; Toohey Cert. at ¶ 15.) At that meeting, the District proposed that an Educational Evaluation, Occupational Therapy Evaluation,

Psychological, and Neurodevelopmental Evaluation needed to be conducted to assess S.K.'s present levels and education needs, including S.K.'s continued eligibility for special education and related services. (Ibid. See also Wahl Cert. at ¶¶ 17-20; Id. at Ex. G.)

15. On November 4, 2021, B.K.II sent the following email to the District regarding the November 1, 2021 meeting:

> Thank you for meeting with us on November 1st.
> I have reviewed what occurred at the meeting, and, again request why the Evaluations we presented were not even reviewed, let alone accepted, nor was our son's educational experience at SINAI discussed.
>
> We want to collaborate with the District but to insist that our children be enrolled, makes no sense based on the prior Agreements between the District and ourselves and our previous request to continue at SINAI.
>
> I again ask to please explain why you do not accept the Evaluations provided and why you would only talk about program and placement if you could do your own Evaluations.
>
> As we did not conduct an OT Evaluation we consent to this Evaluation being completed.
>
> [Pet. Br. at Ex. L.]

16. As documented in B.K.II's November 4, 2021, email to the District (ibid.) S.K.'s parents provided consent for the District to perform an Occupational Therapy Evaluation on S.K. (Id. at ¶ 16. See also Pet. Br. at Ex. L; Wahl Cert. at ¶ 22.) This evaluation was performed and a report produced on January 20, 2022. (Toohey Cert. at Ex. D.)

17. S.K.'s parents did not provide consent for the District to perform any other evaluations of S.K. (Wahl Cert. at ¶ 22; Toohey Cert. at ¶ 17.) The District believed that an additional Educational, Psychological, and Neurodevelopmental Evaluation were necessary to fully reevaluate S.K. (Id. at ¶ 18; Wahl Cert. at Ex. G.)

18. The petitioners filed a Due Process Petition on January 17, 2022, alleging that the District has failed to provide S.K. with a FAPE and seeking continued out-of-district placement for S.K. (Pet. Br. at Ex. E.)

19. On February 18, 2022, the District held an Eligibility Conference for S.K. (Pet. Br. at Ex. M; Toohey Cert. at ¶ 21.) At that conference, the District found that S.K. was not eligible for special education and related services. (Id. ¶ at 22.)

a. The District asserts that it lacks evidence that S.K.'s disability adversely effects his educational performance such that he requires special education and services. (Id. at ¶ 23; Wahl Cert. at ¶¶ 24-27.)

b. At that meeting, the District renewed its request to conduct a psychological evaluation, functional behavioral analysis, and review the Sinai School's comprehensive student plan for the 2019-2020 and 2020-2021 school years. (Toohey Cert. at ¶ 23; Wahl Cert. at ¶¶ 27-28.)

c. The District received the Sinai School's student plan it requested, but did not receive consent to perform the requested psychological evaluation or functional behavioral assessment of S.K. (Id. at ¶ 24.)

20. At the February 2022 meeting, the parties reached an agreement to perform a psychological evaluation and functional behavioral assessment on S.K. in February 2022, conditioned upon the parties mutually agreeing to the evaluator being used by the District to perform these evaluations. (B.K.II Cert. at ¶ 3. See also Pet. Br. at 3 (noting consent to evaluations was conditioned upon evaluations being done by "mutually agreed upon evaluators").)

a. The District and S.K.'s parents did not agree on an evaluator to perform these evaluations and the District was not able to perform these evaluations without S.K.'s parents' consent. (Id. at ¶ 19.)

b. S.K.'s parents had their own psychological evaluation and behavioral assessment conducted on S.K. which they provided to the District in February 2022. (Ibid.)

21. At oral argument on May 11, 2022, the District stated that they still sought a functional behavioral assessment and psychological assessment of S.K. as well as the opportunity to observe S.K. in his current placement. The parties orally agreed, on the record, to work towards accommodating the District observing S.K. at his current placement since parental consent was not required for that activity and the District will follow up with the Sinai School to set up that observation. The parties also agreed to an independent functional behavioral assessment if the District provides names of potential evaluators to conduct this assessment for the petitioner to select an evaluator to do that assessment and, during oral argument, the parties jointly agreed to an specific evaluator to perform that assessment. The parties also agreed to have a psychological assessment for S.K. performed, conditioned on the District sending two names of potential evaluators to the petitioners' counsel for them to pick from for an evaluator to perform the psychological assessment.

LEGAL DISCUSSION

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, the salient facts of the case 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 parties in their respective motions, are supported by tangible, undisputed evidence and, as detailed below, the petitioners' 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.

Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act (IDEA) provides federal funds to assist participating states in educating disabled children. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982). One of purposes of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. §1400(d)(1)(A). To qualify for this financial assistance, New Jersey must effectuate procedures that ensure that all children with disabilities residing in the State have available to them a FAPE through a uniquely tailored individualized education program (IEP) in the least restrictive environment. 20 U.S.C. §§1401(9)(D), 1412(a)(1); Honig v. Doe, 484 U.S. 305, 338 (1988). The responsibility to provide a FAPE rests with the local public school district, which bears the burden of proving that a FAPE has been offered. 20 U.S.C. § 1401(9); N.J.A.C. 6A:14-1.1(d); N.J.S.A. 18A:46-1.1; see also G.S. v. Cranbury Twp. Bd. of Educ., 2011 U.S. Dist. LEXIS 44933, *6 (D.N.J. 2011) (New Jersey uniquely places the burden of proof and production on the school district).

Before a child with a disability may begin receiving services under the IDEA, "[a] State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation." 20 U.S.C. § 1414(a)(1)(A). N.J.A.C. 6A:14-3.4. Subsequent evaluations must be conducted "if conditions warrant a reevaluation or if the child's parent or teacher requests a reevaluation, but at least once every three years." 20 U.S.C. § 1414(a)(2)(A). N.J.A.C. 6A:14-3.8(a). G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1263 (11th Cir. 2012). The last District IEP for S.K. was in September 2016, where S.K. was deemed eligible for special education and services under the category of Other Health Impaired. (Toohey Cert. at ¶ 7.) S.K. has not been reevaluated since September 2016, and has been attending Sinai under a series of settlement agreements between his family and the District covering the 2016-2017 through 2020-2021 school years. (Toohey Cert. at Ex. B & C.)

The District has the right, under the IDEA, to have reevaluations necessary to provide S.K. with an adequate IEP performed by evaluator(s) of the District's choosing, and by withholding that consent, the petitioners improperly interfered with the District's rights and responsibilities in providing necessary reevaluations to create an adequate IEP for S.K.

While S.K.'s parents want him to continue receiving special education services from the District, "if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student." Andress v. Cleveland Indep. Schl. Dist., 64 F.3d 176, 178-79 (5th Cir. 1995). G.J., 668 F.3d at 1263. S.K.'s last IEP deeming him eligible for special education and services was from September 2016 (Toohey Cert. at ¶ 7), making his triennial evaluation for continued special education and services eligibility due in 2019. 20 U.S.C. § 1414(a)(2)(A); N.J.A.C. 6A:14-3.8(a). As a result of settlement agreements between the parties which alleviated the District of its obligations to provide IEPs for S.K. during his tenure at Sinai, this reassessment process was not addressed until the expiration of those settlement agreements at the start of the 2021-2022 school year. (See Toomey Cert. at Ex. B & C.)

"Valid and comprehensive evaluation results are required to identify and describe a student's unique educational needs, and guide the Child Study Team in the design of an IEP." K.R. v. Jefferson Twp. Bd. of Educ., 2002 U.S.Dist. LEXIS 13267, *22-23 (D.N.J. June 25, 2002). As part of the reassessment process, the IEP team must identify what additional data, if any, is needed to determine whether the student continues to have a disability, the student's present levels of academic and functional performance, whether special education and services are needed and how they can be appropriately addressed in the student's IEP, and whether additions or modifications to the special education and related services are needed. N.J.A.C. 6A:14-3.8(b)(2). If additional data is needed, the IEP team must determine what additional assessments are needed to make the required determinations for the student's reevaluation. N.J.A.C. 6A:14-3.8(b)(4). The IEP team must also determine "which child study team members and/or specialists shall administer tests and other assessment procedures." Id.

The District's IEP team determined that they required assessments to complete S.K.'s reevaluation in November 2021. (Toohey Cert. at ¶ 15; Wahl Cert. at Ex. G.) The IEP team sought to conduct assessments an Educational Evaluation, Occupational Therapy Evaluation, and Neurodevelopmental Evaluation of S.K. (Ibid.) Prior to conducting any assessment, however, the District must obtain parental consent. N.J.A.C. 6A:14-3.8(c). If a parent withholds consent to the reevaluation, the school district "may, but is not required to, pursue the reevaluation by using the consent override procedures" in the regulations. G.J., 668 F.3d at 1263 (citing 34 C.F.R. § 300.300(c)(1)(ii)). See also N.J.A.C. 6A:14-3.4(c).

The petitioners assert that "[a]t no point did the father of S.K. [(B.K.II)] ever refuse any District evaluation, and, in fact, the father agreed to having an Occupational Therapy Evaluation completed by the District." (Caplan Cert. at ¶ 14.) B.K.II provided consent on December 9, 2021, for the District to perform an Occupational Therapy Evaluation (Wahl Cert. at ¶ 21), and that evaluation was completed. (Toohey Cert. at Ex. D.) While the petitioner claims that S.K.'s parents did not "ever refuse" any of the District's evaluation requests, this play on words does not refute the fact that there is nothing on this record to demonstrate that S.K.'s parents ever provided the required consents for the District to perform the remaining requested evaluations of S.K. prior to filing for Due Process in January 2022. (Toohey Cert at ¶ 18. See also Due Process Petition at 10 (documenting B.K.II's November 4, 2021, email response to District requests for evaluations that he "want[s] to collaborate with the District but [ ] insist[s S.K.] be enrolled" at Sinai consistent with prior agreements, the District should "accept the Evaluations provided" by the petitioners, and providing consent only for an occupational therapy evaluation).) The District avers that it has not been able to fully evaluate S.K. because the petitioners have never provided consent for the District to perform the necessary evaluations of S.K. and nothing presented by the petitioners on this record contests the fact that the required consent for the District to conduct these evaluations was not provided by S.K.'s parents prior to S.K.'s parents filing the present Due Process Petition in January 2022. (Toohey Cert. at ¶ 18; Wahl Cert. at ¶¶ 17-20.)

At a subsequent IEP meeting in February 2022, held a month after the petitioners filed for Due Process, the District renewed its request to conduct evaluations of S.K. – seeking consent to conduct a psychological evaluation and functional behavioral assessment. (Toohey Cert. at ¶ 23; Wahl Cert. at ¶¶ 27-28.) B.K.II asserts that he agreed to allow the District to conduct a psychological evaluation and functional behavior assessment of S.K. at the February 2022 IEP meeting. (B.K. II Cert. at ¶ 19.) This consent, however, was the product of an agreement between the parties to exchange "names of individuals who could possibly complete the agreed upon Evaluations" leaving the petitioners with the authority to approve or disapprove of the District's proposed evaluators to conduct these evaluations. (Ibid. See also B.K. II Cert. at Ex. A (February 18, 2022, email from petitioners' attorney suggesting two psychologists to perform psychological evaluation); Pet. Br. at 3 (noting parental consent for psychological evaluation and functional behavioral assessment was limited to those completed by "mutually agreed upon evaluators").) The parties also orally agreed on May 11, 2022, to have a psychological evaluation and functional behavioral assessment conducted by mutually agreed upon evaluators.

This consent to have "independent" evaluations performed, while reached by mutual agreement of the parties, is not the same as providing parental consent to the evaluations originally sought by the District prior to the petitioners filing for Due Process in January 2022. In conducting a reevaluation, the District is entitled to "reevaluate [a child] by an expert of its choice." G.J., 668 F.3d at 1263 (citing M.T.V. v. Dekalb County Schl. Dist., 446 F.3d 1153, 1160 (11th Cir. 2006). As the 11th Circuit has held, parental consent to evaluations, when that consent comes with a "number of conditions appended" is not effective consent where it "vitiate[s] any rights the school district [has] under the IDEA for the reevaluation process, such as who is to conduct the interview." G.J., 668 F.3d at 1264-65. More importantly, however, these agreements to permit these evaluations to proceed with mutually-agreed upon evaluators were not reached until AFTER the petitioners had filed for Due Process challenging the District's provision of a FAPE for S.K. for the 2021-2022 school year, leaving the assertion that the petitioners' parents did not grant consent to have these evaluations performed on S.K.

to give the District the opportunity to provide S.K. with a proper FAPE prior to filing their Due Process Petition in January 2022 unchallenged.

The petitioners providing their own expert reports to the District does not deprive the District of their rights under the IDEA to perform their own reevaluations of S.K. and the District cannot be forced to rely solely on the petitioners' own evaluations in developing an IEP for S.K.

The petitioners contend that they provided "numerous" current evaluations of S.K. to the District and the District, by failing to "consider and/or review" these evaluations "violates the law (and common sense) in that the Child Study Team may treat any such report 'as [fulfilling] a required assessment." (Pet. Br. at 4-5 (citing N.J.A.C. 6A:14-3.4).) N.J.A.C. 6A:14-3.4(i) permits third-party reports to be "submitted by the parents to the child study team for consideration" and those reports "shall be reviewed and considered." The documents from the November 1, 2021, IEP meeting show that the reports provided by S.K.'s parents, including their neurodevelopmental evaluation (dated 6/15/21) (Pet. Br. at Ex. I), speech and language evaluation (dated 4/23/21) (Pet. Br. at Ex. H), psychiatric evaluation (dated 5/21/21) (Pet. Br. at Ex. G), and educational evaluation (dated 4/16/21) (Caplan Cert. at Ex. C) were all reviewed by the study team as part of S.K.'s November 1, 2021, reevaluation by the District. (Caplan Cert. at Ex. D.)

While these parent-provided reports and evaluations "may be utilized as a required assessment," N.J.A.C. 6A:14-3.4(i), there is no requirement that these parent-provided reports must be substituted for required assessments in the reevaluation process nor does the provision of a parent-provided report otherwise deprive the District of its right to conduct its own evaluations under the provisions of the IDEA. In other words, while the petitioners provided the District with a number of evaluations that they had performed on S.K. between April and June 2021 (Toohey Cert. at ¶ 14) and in February 2022 (B.K. II Cert. at ¶ 19), a parent cannot force a school to rely solely on their own evaluations. M.T.V., 446 F.3d at 1160 (citing Andress, 64 F.3d at 178-79; Johnson by Johnson v. Duneland Sch. Corp. 92 F.3d 554, 558 (7th Cir. 1996); and Gregory K. v. Longview Schl. Dist., 811 F.2d 1307, 1315 (9th Cir. 1987)); M.S. v. Mullica Twp. Bd. of Educ., 485 F. Supp. 2d 555, 568 (D.N.J. 2007). Because the District is

required to provide S.K. with an education, it is axiomatic that the District has the right to conduct its own evaluation in furtherance of their delivery of those mandatory educational services. Johnson by Johnson, 92 F.3d at 558. Further, the District noted specific information needed to assess S.K. that was not provided in the petitioners' evaluations. (Wahl Cert. at ¶¶ 24-26 (noting petitioners' evaluations lack of information on S.K.'s functional performance or how his disability affects him in the classroom as well as lacks a Behavioral Assessment Scale for Children (BASC) to assess S.K.'s functional behavior in school).)

After the end of the settlement agreement between the petitioners and the respondent for the 2020-2021 school year (see Toohey Cert. at Ex. C), the petitioners continued S.K.'s enrollment at Sinai. (Due Process Petition at ¶ T.) The petitioners' Due Process Petition seeks, in part, to continue S.K.'s classification and eligibility for special education and related services and contends that the District is unable to offer S.K. a FAPE in-district, requiring S.K. to continue his placement at Sinai school, along with transportation and other related expenses, at District expense for the 2021-2022 school year and beyond. (Due Process Petition at 16.)

Following the expiration of the last settlement agreement between the parties (Toohey Cert. at Ex. C), the District resumed its responsibility for providing S.K. with an appropriate IEP and FAPE. To do so, the District must conduct a "full and individual initial evaluation" or a reevaluation of S.K. 20 U.S.C. § 1414(a)(1)(A); N.J.A.C. 6A:14-3.4; 20 U.S.C. § 1414(a)(2)(A); N.J.A.C. 6A:14-3.8(a). In an effort to fulfill its obligations to S.K., the District identified specific assessments they determined were needed to determine whether S.K. continues to have a disability, his present levels of academic and functional performance, whether special education and services are needed and how they can be appropriately addressed in S.K.'s IEP, and whether additions or modifications to the special education and related services are needed. N.J.A.C. 6A:14-3.8(b)(2). See Washington Twp. Bd. of Educ. v. H.M. obo R.M., OAL Dkt. No. EDS 08328-19, Final Decision (September 9, 2019), http://lawlibrary.rutgers.edu/oal/search.html (finding that District has legal right to conduct student evaluations as well as obligation to conduct them in an environment ensuring the integrity of the testing process to provide FAPE to a student). To perform

these required assessments, however, the District needed the consent of S.K.'s parents. N.J.A.C. 6A:14-3.8(c). That consent was withheld, denying the District the opportunity to conduct its assessments of S.K. for the 2021-2022 school year—as S.K.'s parents seek the District to accept their evaluations of S.K. and continue to fund S.K.'s current placement while denying the District the opportunity to do its own evaluations of S.K. (Toohey Ex. at ¶ 17. See also Due Process Petition at 10 (documenting B.K.II's November 4, 2021, email response to District requests for evaluations that he "want[s] to collaborate with the District but [ ] insist[s S.K.] be enrolled" at Sinai consistent with prior agreements and the District should "accept the Evaluations provided" by the petitioners).)

While the petitioners contend that they are "not objecting to evaluation of their son" and "are willing and eager for that evaluation to take place if needed" (Pet. Br. at 5) this willingness to have S.K. evaluated appears to apply exclusively to examinations conducted by selected evaluators of the petitioner's choosing. The undisputed record in this matter demonstrates that the petitioners have withheld the necessary consent for the District to conduct evaluations needed to prepare an appropriate IEP for S.K. by evaluators of the District's choosing. While the petitioners contend that the District should not be permitted "to consider only the evaluations it wants to consider" (Pet. Br. at 5) it is similarly clear that the petitioners should not be permitted to withhold consent for the District to conduct evaluations and force the District to consider only those evaluations the petitioners want them to consider. (Pet. Br. at 9 (asserting that the evaluations provided by the parents at the start of the 2021-2022 school year "were sufficient" for the District to make an eligibility determination of S.K.).)

To date, S.K. has undergone a neuro-developmental assessment in June 2021 (Pet. Br. at Ex. I), speech and language testing in April 2021 (Pet. Br. at Ex. H), a psychiatric evaluation in April 2021 (Pet. Br. at Ex. G), an occupational therapy evaluation in January 2022 (Toohey Cert. at Ex. D), as well as a psychological evaluation and a behavioral assessment conducted after the meeting between the District and S.K.'s parents in February 2022. (B.K. II Cert. at ¶ 19.) With the exception of the occupational therapy evaluation (Toohey Cert. at Ex. D), none of these assessments were conducted by evaluators chosen by the District despite the District's

request to conduct additional assessments of S.K. with evaluators of the District's choice going back to the parties' meeting on November 1, 2021. (Wahl Cert. at ¶¶ 17-20; Id. at Ex. G.) As of May 2022, the parties have further agreed to conduct a second psychological assessment and a functional behavioral assessment of S.K., but even these assessments are conditioned upon the petitioners first consenting to the evaluators that will be performing the assessments. Despite all the evaluations being conducted on S.K., the record demonstrates that the District has been consistently obstructed from exercising their right to conduct evaluations of S.K. utilizing assessors of their choosing. For example, while the District sought permission to conduct a psychological evaluation of S.K. in November 2021 (Toohey Cert. at ¶ 15), rather than grant the District consent to perform the assessment they sought, S.K.'s parents produced a psychological assessment conducted by an evaluator of their choosing in February 2022 (B.K. II Cert. at ¶ 19) and subsequently agreed to a second psychological assessment of S.K. to be conducted by a mutually-agreed upon evaluator. By the time this process is complete, S.K. will have undergone two separate psychological assessments, yet the District will still not have received consent to conduct the psychological assessment they deemed necessary to re-evaluate S.K. and requested consent to conduct back in November 2021.

By withholding their consent and denying the District the right to conduct the assessments found necessary by the IEP team by their own evaluators, I **CONCLUDE** that S.K.'s parents have not cooperated with the District in creating an appropriate IEP for S.K. for the 2021-2022 school year. See M.T.V., 446 F.3d at 1160 (school districts have the right to condition continued special education services upon a reevaluation by an expert of the district's choice). As the Third Circuit aptly noted, the requirements of IDEA were not intended to act merely as "a hook on which to hang a tuition reimbursement claim." CH. v. Cape Henlopen Sch. Dist., 606 F. 3d 59, 70 (3d Cir. 2010). Where parents are found to have unreasonably failed to cooperate in the development of an IEP, they may be denied reimbursement for private special education and related services provided during the year where they failed to cooperate with the District in providing an appropriate IEP for the school year. M.S., 485 F. Supp. 2d at 568. The respondent presented a request to S.K.'s parents to conduct what they believed were necessary assessments to complete their reevaluation to furnish S.K.

with an IEP for the 2021-2022 school year. Beyond asserting that they felt it would be "ridiculous" to put S.K. through further testing and assessments (Due Process Pet. at ¶ J), the petitioners have not identified any harm that would result to the student from such assessments. While the petitioners assert that the additional testing of S.K. sought by the District "may very well be unnecessary" in light of the "voluminous testing already completed" on S.K. (Caplan Cert. at ¶ 15), the record reflects petitioners have subsequently subjected S.K. to a psychological assessment and functional behavioral assessment with their chosen evaluators in February 2022, after the petitioners' Due Process Petition was filed. (B.K. II Cert. at ¶ 19.) The parties have also agreed to subject S.K. to what will amount to a second psychological and functional behavioral assessment with evaluators mutually agreed to by the parties. From the record presented, it is clear that the petitioners' objections to the additional assessments were not based on the propriety or necessity to conduct the assessments, but rather on a desire to limit assessments of S.K. to those conducted by evaluators selected by the petitioners. Such conduct serves only to improperly impede the District's rights under the IDEA to conduct those evaluations with evaluators of their own choosing. M.T.V., 446 F.3d at 1160.

The petitioners cannot unreasonably withhold consent from the District to conduct evaluations of a student by evaluators of the District's choice as necessary to create an appropriate IEP for the 2021/22 school year, while pursuing a due process petition asserting that the District failed to provide an appropriate IEP and seeking financial remuneration for a unilateral placement of the student for the same 2021-2022 school year. M.S., 485 F. Supp. 2d at 569. See also C.H., 606 F.3d at 72 ("The IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations"); A.P. and T.F. obo J.F.-P. v. Clifton Bd. of Educ., OAL Dkt. No. EDS 07754-09, Final Decision (June 25, 2010), http://lawlibrary.rutgers.edu/oal/search.html (finding parents' failure to cooperate in a reevaluation of student grounds to deny tuition reimbursement for unilateral placement in private school). Because S.K.'s parents have deprived the District of its opportunity to reevaluate S.K. prior to continuing their unilateral placement of S.K. at Sinai for the 2020-2021 school year with evaluators of the District's choosing, I **CONCLUDE** that the petitioners' claim for reimbursement of costs for this continued

placement at Sinai without the District having had the opportunity to conduct the necessary evaluations of S.K. must also be denied.

ORDER

Accordingly, the respondent's motion for summary decision is **GRANTED** and the petitioners' January 17, 2022, Due Process Petition is **DISMISSED**.

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.

June 23, 2022
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: June 23, 2022

Date Mailed to Parties: June 23, 2022

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