State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDS 01541-22
AGY REF NO. 2022-33830

B.N. ON BEHALF OF B.N.,

Petitioner,

v.

CITY OF ORANGE TOWNSHIP BOARD OF EDUCATION,

Respondent

_____

B.N., petitioner, pro se

Jessika Kleen, Esq., for Respondent (Machado Law Group)

Record Closed: June 15, 2022 Decided: June 21, 2022

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

In this request for due process hearing, petitioner seeks the continuation of an out-of-district placement for her son at the Essex Valley School, implemented by another school district. Petitioner further requests the development of B.N.'s next

individualized education program (IEP) with the new school district reflecting the same out-of-district placement.

PROCEDURAL HISTORY

On January 26, 2022, petitioner filed an emergent relief application and due process petition against the City of Orange Board of Education (Orange) on behalf of her son, B.N. The Office of Special Education (OSE) first transmitted the emergent matter to the Office of Administrative Law (OAL). On February 7, 2022, an Order denied petitioner's request for emergent relief and directed B.N. and petitioner to participate in evaluations and an IEP meeting to permit Orange an opportunity to assess B.N.'s current educational levels and need for special education and related services.

On February 25, 2022, the OSE transmitted the due process petition, which arises under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C.A. §§1401 to 1484(a) and C.F.R. §§300.500, to the OAL for hearing and final decision. Petitioner has consent to act upon her son B.N.'s behalf in this case.

I scheduled a telephone prehearing conference for March 7, 2022. At the conference, I advised petitioner to discuss with her son B.N. whether he wishes to undergo necessary evaluations and pursue an IEP with the District.

I scheduled another conference for March 14, 2022, but no party appeared. I rescheduled the conference to March 31, 2022. I conducted an additional conference to allow petitioner to speak with her son and collaborate with Orange to schedule an evaluation planning meeting if he wished to pursue an IEP for special education and related services.

Next, I scheduled a telephone prehearing for May 9, 2022. The OAL sent the notice dated April 20, 2022, by electronic and regular mail advised that:

> If you do not participate in the prehearing conference, the file will be returned to the transmitting agency for appropriate action which may include

imposition of the proposed penalty or granting relief requested by the other party.

Petitioner failed to appear for the May 9, 2022, prehearing conference. Having failed to appear, under my direction, my judicial assistant emailed petitioner on May 10, 2022, inquiring whether she was withdrawing her petition and to respond by email. Petitioner failed to respond.

On May 16, 2022, my judicial assistant again emailed petitioner, inquiring whether petitioner would be withdrawing her petition or to advise if she wished to move forward with a hearing. To date, the OAL received no response from petitioner.

On May 19, 2022, I granted Orange leave to file a motion for summary decision, and Orange filed its motion on May 26, 2022. Despite notice to petitioner, she neither withdrew her petition nor filed opposition to Orange's motion. On June 15, 2022, I closed the record.

FINDINGS OF FACT

Based on the documents submitted in support of the motions for summary decision, and when viewed in the light most favorable to the non-moving party, I **FIND** the following as **FACT:**

B.N. is a nineteen-year-old student found eligible for special education and related services under the classification Emotionally Disturbed under the Individuals with Disabilities Education Act (IDEA). No evidence exists that petitioner obtained guardianship status over her son B.N., but she has his consent to act on his behalf in this case.

In 2009, the East Orange School District (East Orange) enrolled B.N. and determined his initial eligibility. B.N.'s most recent Individualized Education Program (IEP) expired on April 1, 2021, and B.N.'s last evaluations took place in 2016. That IEP provided for an out-of-district placement at the Essex Valley School.

On September 10, 2020, petitioner disenrolled B.N. from East Orange, and B.N. did not attend school for the 2020-21 school year.

Petitioner and her son moved to Orange, and petitioner enrolled B.N. in the Orange school district on October 21, 2021. East Orange forwarded records upon B.N.'s enrollment that included only IEPs dated April 12, 2019, and April 9, 2020. Notably, East Orange supplied Orange with no evaluations or progress reports.

Orange offered general education classes, its twilight program, or home instruction. Petitioner, on behalf of B.N., refused these proposed placements and demanded an out-of-district placement at Essex Valley School.

On November 19, 2021, petitioner's former counsel requested a meeting with the Child Study Team (CST). Orange complied, scheduling an appointment for December 15, 2021. Since B.N.'s IEP expired, Orange requested to evaluate B.N. to develop an appropriate program and could not consider an out-of-district placement without obtaining necessary evaluations. Moreover, because B.N. is an adult student, Orange asked B.N. to participate in the CST meeting. B.N. was not available.

Orange rescheduled the CST meeting on February 7, 2022. B.N. advised Orange that he refuses special education or related services and therefore does not consent to evaluations or the implementation of an IEP.

To date, B.N. has not authorized Orange to conduct evaluations or provide him with special education and related services.

DISCUSSION AND CONCLUSIONS OF LAW

Summary Decision

A party may move for summary decision upon any or all substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion for summary decision shall include briefs and necessary supporting affidavits. Ibid Under N.J.A.C. 1:1-12.5(b), "[t]he

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."

Even where a statute calls for a "hearing," if a motion for summary decision is made and supported by documentary evidence and the objector submits no evidence to demonstrate a genuine issue of material fact, then the motion procedure constitutes the hearing. No trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120-21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

To determine whether there exists a "genuine issue" of material fact that precludes summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to demonstrate that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

When a motion for summary decision is made and supported, the burden shifts to the adverse party to set forth, by affidavit, specific facts showing there is a genuine issue resolvable only by an evidentiary proceeding. N.J.A.C. 1:1-12.5(b). Given this burden shift, a party opposing a summary judgment motion "who offers no substantial or material facts in opposition to the motion cannot complain if the court takes as true the uncontradicted facts in the movant's papers." Burlington Cnty. Welfare Bd. v. Stanley, 214 N.J. Super. 615 (App. Div. 1987). Even if the non-movant comes forward with some evidence, the Courts must grant summary judgment if the evidence is "so one-sided that [movant] must prevail as a matter of law." Brill, 142 N.J. at 540. If the non-moving party's evidence is merely colorable or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

Indeed, the Brill decision seeks to "liberalize the standards so as to permit summary judgment in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Brill, 142 N.J. at 539 (citation omitted).

Here, petitioner presents no opposition to the facts Orange asserts to support its motion. Still, the materials facts are undisputed; B.N. withholds consent for evaluations and refuses to create an IEP to implement special education and related services. Further, B.N.'s last IEP expired, and he received no educational services last year, having disenrolled in September 2020. Therefore, I **CONCLUDE** that this matter is ripe for summary decision.

Transfer Students

Although "stay put" provisions under N.J.A.C 6A:14-2.7(u) ordinarily require that "no change shall be made to the student's classification, program or placement" pending the outcome of a due process hearing, these considerations yield to the intra-state school district transfer provisions of N.J.A.C. 6A-14-4.1(g). See JF v Byram Township Bd. of Educ., 629 F. App'x 235 (3rd Cir. 2015).

N.J.A.C. 6A-14-4.1(g) addresses when a student transfers from one New Jersey school district to another New Jersey school district and provides that:

> (g) When a student with a disability transfers from one New Jersey school district to another or from an out-of-State school district to a New Jersey school district, the child study team of the district into which the student has transferred shall conduct an immediate review of the evaluation information and the IEP and, without delay, in consultation with the student's parents, provide a program comparable to that set forth in the student's current IEP until a new IEP is implemented as follows:
>
> 1. For a student who transfers from one New Jersey school district to another New Jersey school district, if the parents and the district agree, the IEP shall be implemented as written. If the appropriate school district staff do not agree to implement the current IEP, the district shall conduct all necessary assessments and, within 30 days of the date the student enrolls in the district, develop, and implement a new IEP for the student.

N.J.A.C. 6A:14-4.1(g) is modeled after the federal provision addressing public school district transfers of special education students, 20 U.S.C. §1414 (d)(2)(C)(i)(I), which also uses the term "comparable." In adopting changes to the federal regulation, the Office of Special Education and Rehabilitative Services noted that "[s]everal commenters requested that the regulations clarify the meaning of 'comparable services.'" 71 F.R. 46540, 46681 (August 4, 2006). However, according to the agency:

> [W]e do not believe it is necessary to define "comparable services" in these regulations because the Department interprets "comparable" to have the plain meaning of the word, which is "similar" or "equivalent." Therefore, when used with respect to a child who transfers to a new public agency from a previous public agency in the same State (or from another State), "comparable" services means services that are "similar" or "equivalent" to those that were described in the child's IEP from the previous public agency, as determined by the child's newly-designated IEP Team in the new public agency.
>
> [Ibid.]

Orange need not agree to B.N.'s placement at Essex Valley upon his enrollment in Orange; "stay-put" does not restrict Orange. Instead, Orange correctly looked to B.N. to meet, determine what evaluations to complete, and formulate a new IEP for special education and related services. Notably, B.N. did not receive these services during the 2020-21 school year. B.N.'s last evaluations took place in 2016. Petitioner rejected all educational options offered by Orange, and B.N. does not consent to evaluations or the provision of special education or related services. Further, petitioner chose not to oppose this motion or participate meaningfully in this case.

Students Over the Age of Eighteen

Regulations provide adult students with disabilities more input in their education and impart responsibilities for that education when they reach eighteen. Notably, under N.J.A.C. 6A:14-2.3(m), unless a parent obtains legal guardianship, all special education rights a parent may assert "shall transfer to the student upon attainment of the

[eighteenth] birthday." This rights transfer requires Orange to obtain consent to perform the necessary reevaluations directly from B.N. N.J.A.C. 6A:14-2.3(m)(2).

Still further, upon reaching the age of majority, in the absence of guardianship, adult students must attend all IEP, review, and evaluation planning meetings. See N.J.A.C. 6A:14-2.3(m)(1). Petitioner is not entitled to make educational decisions on B.N.'s behalf outside of proceedings in the OAL. See N.J.A.C. 6A:142.3(m)(4). To date, the only input the District received from B.N. was that he refuses special education and related services and does not consent to evaluations.

Significantly, when an adult student refuses special education and related services, "the district board of education shall not be determined to have denied the student a free, appropriate public education" based on its failure to provide the refused services. See N.J.A.C. 6A:14-2.3(c). B.N.'s refusal prohibits Orange from making an eligibility determination and it may not develop or implement an IEP without his consent. Therefore, as a matter of law, I **CONCLUDE** that Orange cannot be held to have denied B.N. a FAPE. I further **CONCLUDE** that Orange is entitled to summary decision as a matter of law, and the petition is hereby **DISMISSED**.

ORDER

I **ORDER** that the Orange Board of Education is granted summary decision and that the petition be **DISMISSED.**

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) 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 (2019). 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 Policy and Dispute Resolution.

June 21, 2022

DATE

NANCI G. STOKES, ALJ

Date Received at Agency June 21, 2022

Date Mailed to Parties: June 21, 2022

ljb