State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION GRANTING
SUMMARY DECISION
OAL DKT. NO. EDS 00052-22
AGENCY DKT. NO. 2022-33691

MIDDLETOWN TOWNSHIP
BOARD OF EDUCATION,
Petitioner,
v.
R.A. AND B.A. on behalf of H.A.,
Respondents.

Eric Harrison, Esquire, for petitioner Middletown Township Board of Education (Methfessel and Werbel, P.A., attorneys)

Michael Flom, parent advocate, for respondent, H.A., pursuant to N.J.A.C. 1:1-5.4(a)(7)

B.A., for respondent H.A., pro se

Record closed: March 30, 2022 Decided: April 11, 2022

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

R.A., respondent in this matter filed a due process petition in August 2021 (OAL Dkt. No. EDS 07849-21), on behalf of her son, H.A. a twelve-year-old student at Thompson Middle School, seeking—among other things—the reclassification of H.A. for special education and related services under the Individuals with Disabilities Education Act (IDEA) and publicly funded independent educational evaluations (IEEs). The Middletown Township School District Board of Education (District or petitioner) later filed its own due process petition denying the request for IEEs made by R.A. in December 2021 during a progress review meeting for H.A.'s plan under Section 504 of the Rehabilitation Act. B.A., the father of H.A. joined R.A.'s petition as an intervenor. B.A. and R.A. share joint legal custody over H.A., and B.A. is the parent of primary residence.

This is a supplement to my Order on the motions decided March 30, 2022: (1) R.A.'s motion for summary decision on the District's due process petition; (2) District's cross-motion on its own due process petition; and (3) R.A.'s motion for two protective orders regarding retaining independent experts to observe H.A. in his educational setting and the disclosure of information to B.A. pertaining to those observations.

FACTUAL BACKGROUND

R.A.'s petition stems from the District recommending the declassification of H.A. after its triannual reevaluation of H.A. indicated that while H.A. was still a student with disabilities, those disabilities do not adversely affect his educational performance and he is not in need of special education and related services or speech-language only services. Both parents were presented with the District's recommendation to declassify, but on July 28, 2021, only B.A. signed his consent to the proposed declassification.

On or about August 8, 2021, R.A. filed a petition for due process requesting—among other things—the reclassification of H.A., a series of IEEs, a series of services with additional services to be included based on the results of the requested IEEs, and

compensatory education. The Board filed its answer on August 19, 2021, arguing that H.A. had demonstrated he was not in need of special education and related services and the evaluations properly conducted by its Child Study Team (CST) likewise indicated that H.A. was not in need of such services. The reevaluation indicated that H.A. may still need some occupational therapy (OT) services. Consequently, on September 15, 2021, a 504 Accommodation Plan was established providing H.A. with thirty-minute monthly sessions to assist him in improving his writing speed and handwriting skills.

During the December 17, 2021, 504 Plan progress review meeting R.A., through her parent advocate, requested the District fund an OT independent evaluation of H.A. Within four calendar days the District filed its own due process petition denying the request for an IEE, arguing that as H.A. was voluntarily declassified by B.A. and thus was not eligible for special education and related services under the IDEA, and so not entitled to publicly funded IEEs.

During the January 3, 2022, hearing R.A. declined to cross-examine the District's witness and indicated she would not present her own witnesses due to allegations of harassment and threats by the District and B.A against her potential expert witnesses. After a discussion on the record between all parties involved, B.A. and the District affirmed that they would continue to not interfere with any observations conducted by R.A.'s independent experts of H.A. in his educational setting so long as those experts abided by the District's policy for all such observers and visitors. B.A. also affirmed that he would not contact any of R.A.'s retained experts outside of direct or cross-examination during a hearing. R.A., through her parent advocate, indicated that after observations of H.A. were conducted she would be prepared to cross-examine the District's witness and introduce her own witnesses to present their expert testimony.

On or about January 12, 2022, R.A. filed a motion for emergent relief seeking to have H.A. reclassified for special education services pursuant to the IDEA's stay-put provision. Following oral arguments, on February 3, 2022, a decision was issued by The Honorable Carl V. Buck, III, ALJ, denying R.A.'s request for emergent relief.

Also on February 3, 2022, R.A. filed a motion for summary decision on the District's due process petition. On February 16, 2022, the District filed its cross-motion for summary decision on its own petition.

On March 24, 2022, following a status conference regarding the parties' motions for summary decision, R.A. filed a motion seeking two protective orders. The first was to prohibit the District from sharing with B.A. any information about the experts retained by R.A. to observe H.A. until after said experts began presenting their testimony at a hearing. This request included restricting the District's ability to disclose any information about such expert observations contained in H.A.'s student records. The second was to order the District to not impose any restrictions on the independent experts' observations of H.A. it would not impose on its own staff.[1] On March 25, B.A. filed a letter response with attached exhibits, arguing that such a protective order against him was improper as it would violate his rights as a custodial parent of H.A. and was not necessary as he had previously consented to observations of H.A. in his educational setting as long as such observations did not interfere with H.A.'s instruction. The District declined to respond to this latest motion by R.A. I ordered that R.A.'s motion for summary decision was denied. However, the District's motion for summary decision was granted. And R.A.'s motion for protective orders was also denied and an order reflecting the same was sent out.

The undersigned realized that after the order on the motions was issued, the order did not properly reflect the outcome of the cases and they needed to be severed. After consideration of the documents, an order denying both requests was provided. However, the District's request for summary decision was granted and an order was sent out. The hearing reconvened on April 1, 2022. After consideration of the procedural aspect of granting the District's motion, I realize that an Initial Decision was the proper form for EDS 00052-22 and had to be drafted to that end. Hence, this submission.

[1]R.A., through her advocate has been requesting protective orders to this effect since the parties were attempting settlement agreements under Mary Ann Bogan, ALJ. R.A. has already been advised by ALJ Buck during the January 3, 2022, hearing that the OAL does not have the jurisdiction to order protective orders of the type sought by R.A.

FACTUAL FINDINGS

For purposes of the present motions, the relevant facts involved are undisputed. Therefore, I **FIND** as **FACT** the following:

1. H.A. is a twelve-year-old and the marital child of R.A. and B.A.
2. Following a custody order issued by the Superior Court, Chancery Division on August 28, 2014, both R.A. and B.A. were awarded joint legal custody of H.A., with B.A. designated as the parent of primary residence.
3. An additional civil order issued on March 12, 2021, by the same presiding judge, denied R.A.'s request that she be authorized to take any and all actions necessary to immediately commence services for H.A. The order affirmed that R.A. and B.A. continue to share joint legal custody over H.A., that neither parent is to obtain medical services for H.A. without the other's consent (outside a true emergency), and that neither is to enroll their child with a therapist, counselor, or doctor without the other's agreement. The order also stated that B.A., as a parent with joint legal custody of H.A. has an absolute right to obtain records pertaining to any treatment or evaluations of H.A.
4. The District in conducting the required triannual reevaluation of H.A. in June 2021, determined that he was still a student with a qualifying disability, but was not in need of special education and related services as his disability did not adversely affect his educational performance.
5. During the subsequent CST meeting to review the results of the evaluations the District recommended that H.A. be declassified.
6. H.A. was then voluntarily declassified by his father, B.A., on July 28, 2021.
7. Since that date H.A. has continued to remain declassified and ineligible for special education and related services under the IDEA.
8. On or about September 17, 2021, R.A. retained three professionals to conduct partial evaluations of H.A.

9. On September 20, 2021, R.A., through her parent advocate, forwarded to the District copies of the reports by her retained professionals.
10. The District forwarded the reports to B.A. and included R.A.'s advocate on the email advising the parties that in the event either parent shared expert reports concerning H.A. with the District, it would share the copies with the other parent.
11. On or about September 20, 2021, after discovering the evaluations had occurred, B.A. sent letters to two of the retained professionals stating that pursuant to the standing court order H.A. was not to be examined by a doctor, therapist, or counselor without B.A.'s consent. He told the professionals they were not to see H.A. again and warned he would press charges to enforce the court order if they saw H.A. again without B.A.'s approval.
12. B.A. has not contacted these professionals since. Nor has he contacted any of the other experts R.A. proposed she may call to testify in her original five-day disclosures, which were received on December 27, 2021.
13. On January 3, 2022, in response to a request by R.A., both B.A. and the District affirmed that they would not interfere with any expert retained by R.A. to observe H.A. while in the educational setting. The District affirmed it would treat any observer retained by R.A. the same as any other observer who came to its schools.

LEGAL DISCUSSION

Summary Decision on District's Petition

In support of her motion R.A. lists the following as all the undisputed facts pertinent to her motion: (1) R.A. filed a due process petition on August 12, 2021; (2) among the relief sought in R.A.'s petition included a request for IEEs; and (3) on December 21, 2021, the District filed its own due process petition denying R.A.'s request for IEEs. R.A.'s brief also cites to the Code of Federal Regulations, namely that when a parent requests a publicly funded IEE the school district may either fund the IEE or file a due process complaint to deny it. See 34 C.F.R. § 300.502(b)(1), (2). Next, R.A. states that she is entitled to summary decision on this issue because the District did not file its due process

petition until December when R.A. requested IEEs as part of her own due process petition filed in August. Claiming that because the District's petition was filed over twenty calendar days from when R.A. first made the request for IEEs R.A. is entitled to summary decision. No additional law was provided in support of this claim, and R.A. did not include any other facts, exhibits, or affidavits in support of the motion.

The District in its cross-motion for summary decision argues that H.A. is not entitled to IEEs as at the time the request was made H.A. was not eligible for special education and related services under the IDEA as he had been voluntarily declassified by B.A. in July 2021. The District has also argued that logic dictates that a request for IEEs made as part of a parent's due process petition should not trigger the regulatory duty of the school to file a due process petition as would normally be required under 34 C.F.R. § 300.502(b). Arguing that if this were true nearly every petition for due process or request for mediation would mandate the filing of a second due process petition which would serve no benefit to protecting the rights of the students or their parents, nor would it alter the burden of proof as the school district has the burden of proof and production in both cases. In support of its cross-motion the District included exhibits of B.A.'s signed consent to H.A.'s proposed declassification, copies of both parties' petitions, R.A.'s request for emergent relief to reclassify H.A. pursuant to the IDEA's stay put provision and the order issued on February 3, 2022, denying the request for emergent relief.

Pursuant to N.J.A.C. 1:1-12.5(b), a summary decision may 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." If a motion for summary decision has been made and supported, to prevail the adverse party must "set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. The standard governing a motion for summary decision is substantially the same as a motion for summary judgment under Rule 4:46-2. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995) (citing Frank v. Ivy Club, 228 N.J. Super. 40, 62 (App. Div. 1988)).

In deciding a motion for summary judgment, the court must determine whether the evidence presented, assumed to be true, and viewed in the light most favorable to the non-moving party is "sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995). The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)). In other words, 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." Brill, 142 N.J. at 533 (citing Liberty Lobby, 477 U.S. at 250).

Based on a review of the papers submitted by the parties **I CONCLUDE** that there are no genuine issues as to any material fact on the District's due process petition denying R.A.'s request for an occupational therapy independent evaluation at public expense. As previously found, R.A.'s petition included a request for IEEs, but she did not request IEEs outside of the petition until December 2021 after H.A. had been declassified under the IDEA. The District filed a due process petition in response to R.A.'s December request within twenty calendar days.

R.A. is correct in her recitation of the general law regarding a parent's request for IEEs. A school district's CST is responsible for conducting evaluations of students who are, or may be, eligible for special education and related services under the IDEA. N.J.A.C. 6A:14-3.1(a). These evaluations are to be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the suspected eligibility category." N.J.A.C. 6A:14-2.5(b)(7). If a parent disagrees with any of the assessments conducted as part of an initial or reevaluation by the school district, they may request an independent evaluation. Id. at (c). Parents are entitled to one IEE at public expense each time the school district conducts an evaluation upon which the parent disagrees. 34 C.F.R. § 300.502(b)(5). In response to this request for an IEE, a school district may either (1) file a timely due process petition requesting a

hearing to prove that its evaluation was appropriate, or (2) provide the requested IEE at public expense. Id. at (b)(2); N.J.A.C. 6A:14-2.5(c)(2).

There appears to be no controlling case law, agency decisions, or even advisory documents from either the federal or State's Department of Education directly pertaining to this issue. However, this tribunal is persuaded by the District's argument on the practicalities of requiring a second, independent, filing by school districts every time a parent includes a request for IEEs in their due process petitions. In addition, for this particular matter, the District must prove in regard to its own petition that its evaluations were appropriate. While in response to R.A.'s petition the District must prove not only that its evaluations were appropriate but that H.A.'s disability does not adversely affect his educational performance and he does not need special education and related services. See N.J.A.C. 6A:14-3.5(c); 20 U.S.C. § 1401(3)(A). See also J.Q. v. Wash. Twp. Sch. Dist., 92 F. Supp. 3d 241, 246 (D.N.J. 2015) (holding the IDEA is written in the conjunctive and therefore coverage requires a showing that the student is (1) a child with a disability and (2) in need of special education and related services). Therefore, **I CONCLUDE**, that under these particular facts R.A. is not entitled to IEEs automatically because the District did not file its own due process petition until four months after she first made her request for such evaluations known.

Finally, as previously stated, R.A.'s petition includes in its requests for relief, a number of publicly funded IEEs, including one for OT. As this decision does not include a decision on R.A.'s underlying petition, the granting of the District's motion will not bar R.A. from receiving her requested IEEs if this tribunal later determines that H.A. should be reclassified under the IDEA.

Consequently, for the reasons stated above the District's motion for summary decision is **GRANTED**.

ORDER

I hereby **ORDER** that the District's motion for summary decision is **GRANTED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2021) 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 (2021). 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.

April 11, 2022
DATE

DEAN J. BUONO, ALJ

Date Received at Agency

Date Mailed to Parties:

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