State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
GRANTING MOTION FOR
SUMMARY DECISION
OAL DKT. NO. EDS 05155-23
AGENCY DKT. NO. 2023-35846

FLORENCE TOWNSHIP BOARD
OF EDUCATION,
Petitioner,
v.
R.G. ON BEHALF OF MINOR
STUDENT R.G.,
Respondent.

Joseph F. Betley, Esq., for petitioner (Capehart & Scatchard, P.A., attorneys)

R.G., respondent, pro se

Record Closed: November 8, 2023 Decided: November 17, 2023

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

Petitioner, the Florence Township Board of Education (District), filed a petition to deny respondent R.G.'s (respondent) request for independent educational evaluations,

dated April 20, 2023. Petitioner filed the within motion for summary decision on September 6, 2023.

PROCEDURAL HISTORY

On April 20, 2023, respondent requested four independent educational evaluations (IEEs): Occupational Therapy and a Sensory Evaluation, Speech and Language Evaluation, Functional Behavioral Assessment (FBA), and Neurological Evaluation. Petitioner filed a due process petition seeking to deny respondent's requests, which was transmitted to the Office of Administrative Law (OAL) and filed on or about May 10, 2023, as a contested case. N.J.S.A. 52:14B-1 to N.J.S.A. 52:14B-15; N.J.S.A. 52:14F-1 to N.J.S.A. 52:14F-13.

On September 6, 2023, petitioner filed the within motion for summary decision. Briefs were received, and an in-person oral argument was conducted on November 8, 2023, and the record closed.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Based upon the parties' moving papers and briefs, and for the purpose of deciding this motion for summary decision, I **FIND** the following:

1. Respondent is the father of student R.G. (R.G.). R.G. was born on December 3, 2016, and has started first grade at the Roebling Elementary School within the District.

2. On or about October 7, 2021, respondent filed a due process petition against petitioner (OAL Docket No. EDS 09355-2021) seeking speech services. After a hearing, the petition was dismissed pursuant to the June 29, 2023, Initial Decision by the Hon. Judith Lieberman, A.L.J.

3. In March 2022, the District began the process of reevaluating R.G. Following a March 30, 2022, meeting, the District proposed the following

evaluations: Psychological, Learning, Speech/Language, Occupational Therapy, Social History, FBA and Neurological. On April 26, 2022, respondent denied his consent for those evaluations until his due process petition was addressed, but on May 25, 2022, consented to the evaluations.

4. The Psychological Evaluation was completed on June 16, 2022. (Petitioner's Exhibit C-1.) The Learning Evaluation was completed on June 16, 2022. (Petitioner's Exhibit C-2.) The Speech and Language Evaluation was completed on June 16, 2022. (Petitioner's Exhibit C-3.) The Occupational Therapy Evaluation was completed on June 16, 2022. (Petitioner's Exhibit C-4.) The Social History Evaluation was partially completed only, due to respondent's failure to participate, on July 19, 2022. (Petitioner Exhibit C-5.) The FBA was completed on July 5, 2022. (Petitioner Exhibit C-6.) The Neurological Evaluation with Dr. Adel Amer was completed on August 25, 2022. (Petitioner Exhibit D.)

5. The District's reevaluation plan for R.G. added a Neuropsychological Evaluation, consented to by respondent on August 3, 2022.

6. On September 30, 2022, respondent requested eight IEEs: Social History, Psychological, FBA, Occupational Therapy, Speech and Language, Learning, Neurological, and a Neuropsychological Evaluation (which had not yet been completed by the District).

7. Respondent consented to a date of October 14, 2022, for a Neuropsychological Evaluation with Dr. Ager at Bancroft Neuro Health (Bancroft).

8. On October 2, 2022, respondent submitted to the District an undated "Letter of Medical Necessity/Diagnosis Letter" from Children's Specialized Hospital (CSH), which indicated that R.G. has been seen at CSH for the following neurodevelopmental diagnoses: 1) Autism; 2) Mixed receptive-expressive language disorder; 3) Social pragmatic language disorder, 4)

Echolalia; 5) Fine motor delay; and 6) Feeding difficulties. CSH also conducted a feeding evaluation on September 19, 2022. (Petitioner Exhibit E.) That same date, respondent withdrew his request for IEEs from September 30, 2022.

9. On October 4, 2022, Christopher Butler, the District's Director of Special Services, responded to respondent's submission of the letter from CSH by requesting copies of the evaluation reports used by CSH, and attached a records release form that would permit the District to contact CSH directly for that documentation. On October 6, 2022, respondent revoked consent for employees of the Board to communicate with Bancroft.

10. On October 7, 2022, respondent renewed his request for the eight IEEs.

11. Mr. Butler responded on October 7, 2022, informing respondent that by revoking consent for the District to communicate with Bancroft, he was essentially revoking consent to perform the Neuropsychological evaluation, and asking respondent to renew his consent for the evaluation. On October 9, 2022, respondent told Mr. Butler that R.G. would not attend the October 14, 2022, Neuropsychological Evaluation with Bancroft.

12. On October 27, 2022, petitioner filed a due process petition denying respondent's requests for IEEs, dated October 7, 2022. (OAL Docket. No. EDS 10544-2022.) That petition was settled on December 21, 2022, pursuant to a Settlement Agreement in which respondent agreed to cooperate with the Neuropsychological Evaluation, the District would not require respondent's participation in the Social History, and respondent gave consent to allow the District to communicate with the provider conducting the Neuropsychological Evaluation The December 21, 2021, Settlement Agreement was accepted by the Hon. Mary Ann Bogan, ALJ, on January 3, 2022. (Petitioner Exhibit H.)

13. The Neuropsychological exam and report were completed by Dr. Bridget Mayer of RSM Psychology Center on March 23, 2023. (Petitioner Exhibit I.)

14. On or about March 29, 2023, respondent emailed petitioner a revocation of his consent to allow communication between the District and RSM Psychology.

15. The District conducted an eligibility and IEP meeting with respondent on April 19, 2023. The District's Child Study Team (CST) determined that R.G. continued to be eligible for special education, pursuant to N.J.A.C. 6A:14-3.53.5(c)(5)), under the category of emotional regulation impairment, not under the autism category.

16. On April 20, 2023, respondent requested the four IEEs which were the subject of the within matter: Occupational Therapy and a Sensory Evaluation, Speech and Language Evaluation, FBA, and Neurological Evaluation.

Testimony at Oral Argument

Petitioner counsel

This dispute was about the four IEEs sought by respondent: Occupational Therapy and a Sensory Evaluation, Speech and Language Evaluation, FBA, and Neurological Evaluation. The current Occupational Therapy Evaluation was completed on June 16, 2022. The Speech and Language Evaluation was completed on June 16, 2022. The FBA was completed on July 5, 2022. The Neurological Evaluation with Dr. Adle Amer was completed on August 25, 2022. As respondent's requests for these same

evaluations was submitted on April 20, 2023, all of the evaluations conducted by petitioner were less than one-year old and were therefore current.

The case of D.S. v. Trumball stated that an FBA did not trigger the right to IEEs, because an FBA, which finds the causes of behaviors, was not actually an "evaluation" but rather was an assessment tool. Regardless, respondent had offered no evidence that the FBA was not conducted correctly.

All four evaluations were performed by experts, were performed correctly, were current and were scored correctly. The testing tools were accurate. All results of these evaluations were taken into consideration by the CST when creating the current IEP.

Respondent has offered only generalized statements and allegations of trickery, without any proof. Respondent claimed the District's Speech and Language Evaluation was tainted because, in his opinion, it was similar to a private evaluation from December 2021 and it was not permitted for a test to be repeated within six months. But there was no evidence of any of these claims or that the District's evaluation was tainted.

Regarding the Occupational Therapy Evaluation, respondent simply did not like the results of the evaluation wherein it showed that R.G. had not been motivated to do the "RSM" portion of the test. Regarding the neurological exam, respondent claimed it was tainted because Dr. Amer had been pressured to do his report a certain way.

Respondent wanted a classification of autism, not emotionally impaired. Petitioner was never provided any report stating that R.G. had autism. Petitioner saw that R.G. had emotional issues but had no proof of autism.

The FBA results were all written as if based on direct observation of R.G. The observations were noted to have taken place between May through June 2022 and the report was dated July 5, 2022.

Respondent

Respondent understood that this case was not about FAPE. He intends on filing a due process petition to challenge whether the District has provided R.G. a FAPE.

The Trumball case stated that if an FBA is part of an initial evaluation or a reevaluation, then the FBA did trigger a right to an IEE. It was only when an FBA alone was at issue that there was no right to an IEE. Respondent disagreed with petitioner's interpretation of the case.

Respondent claimed that "every outside evaluator noted [Echolalia] but not the District." Petitioner's Neuropsychology Evaluation, performed by an outside firm, did indicate scripting and echolalia, citing petitioner's Exhibit I, the same document as respondent's Exhibit R-A. Because the Neuropsychology Evaluation said R.G. had echolalia and the Speech and Language did not, the Speech and Language Evaluation was therefore flawed.

Petitioner claimed R.G. had no communication issues but the Neuropsychology Evaluation said his behavior was due to communication issues.

The FBA (Petitioner Exhibit C-6) reported no direct observations of R.G.

The Neurological Evaluation by Dr. Adel Amer was flawed because Dr. Butler, the District's Director of Special Services, wrote on the cover letter sending respondent the report that Dr. Amer's report "was concerning" because it did not list the assessment tools relied on.

Credibility

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo

v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

Respondent presented lay testimony as his principal case during oral argument. At no time did he ever specify what genuine issues of material fact there were which could only be addressed in an evidentiary proceeding, instead assuming that allegations of impropriety against petitioner would suffice to raise doubts as to the appropriateness of petitioner's evaluations. He offered no expert reports to prove that the petitioner's evaluations were inappropriate or were conducted improperly. At no time did he offer any evidence to contradict the undisputed statement of facts proffered by petitioner. He attempted to prove flaws in the petitioner's Neurological Evaluation by relying on a statement by the District's Director of Special Services in a cover letter to him, but that

statement was contradicted by the actual language in the evaluation report itself. No other evidence or expert analysis of the efficacy of the neurological evaluation was offered by respondent. He offered the argument that because one evaluator reached a certain conclusion, another evaluation that did not reach the same conclusion was necessarily flawed. By example, respondent provided one evaluation that mention echolalia while insinuating that numerous evaluators had reached the same conclusion, and therefore the District's evaluation was flawed for not concluding that R.G. experienced echolalia. His assertions that petitioner had not dealt with the evaluations in good faith was offset by the various proofs offered by petitioner that it was respondent who had not been cooperative throughout the process. I ultimately could not give much weight to the testimony provided by respondent.

LEGAL ANALYSIS AND CONCLUSION OF LAW

The issue is whether the District was entitled to a summary decision in the within matter, or whether a full hearing should be held.

Summary decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). No evidentiary hearing needs to be held if there are no disputed issues of material fact. Frank v. Ivy Club, 120 N.J. 73, 98, cert. denied, 498 U.S. 1073 (1991). "When the evidence is so one-sided that one party must prevail as a matter of law, the [tribunal] should not hesitate to grant summary [decision]." Della Vella v. Bureau of Homeowner Protection, OAL Dkt. No. CAF 17020-13, 2014 WL 1383908 (N.J. Adm. 2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)).

Further, the non-moving party has the burden "to make an affirmative demonstration . . . that the facts are not as the movant alleges." Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div. 1962). This requirement, however, does not relieve the moving party from having to initially establish in its moving papers that there was no genuine issue of fact and that they were entitled to prevail as a matter of

law. It is the "movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of fact." Conti v. Board of Education, 286 N.J. Super. 106 (App. Div. 1995) (quoting Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954)).

For an adverse party to a motion for summary decision to prevail they must, by responding affidavit, set forth specific facts showing that there was a genuine issue which could only be addressed in an evidentiary proceeding. N.J.A.C. 1:1-12.5(b).

Respondent, the adverse party to the petitioner's motion for summary decision, failed to provide an affidavit setting forth specific facts showing that there was a genuine issue which could only be addressed in an evidentiary proceeding, as required by N.J.A.C. 1:1-12.5(b). Instead, respondent submitted a brief in opposition to petitioner's motion for summary decision in which he made numerous arguments relying on his personal opinion that the petitioner ignored certain information when choosing a special education eligibility designation for R.G. and when it created and implemented an IEP for R.G., all of which he claimed had denied R.G. a FAPE.

Respondent's arguments made it clear that he disagreed with petitioner's determination that R.G. continued to be eligible for special education under the category of emotional regulation impairment. Respondent believed that R.G. should be designated eligible under the autism category, and that therefore the current IEP is flawed and R.G. was being denied FAPE. However, FAPE was not the issue before this court. Further, it was outside the purview of this case for this court to make a determination as to whether or not R.G. had autism. The within case concerned petitioner's petition for due process dealing with its denial of certain IEEs to respondent. The focus herein must be on whether the evaluations conducted by petitioner were appropriate and were conducted pursuant to the pertinent regulations.

Conversely, petitioner argued that its evaluations were comprehensive and appropriately addressed R.G.'s areas of concern. Petitioner offered its evaluations into evidence, which appeared to be compiled by qualified, duly certified professionals. Respondent offered no arguments or evidence in contravention. Petitioner's evaluations

were performed less than one year from the date of respondent's IEE request, and therefore were current. Its evaluations appeared professionally created, and technically sound in terms of testing protocols, scoring and interpretation of results; aside from respondent's open displeasure with the ultimate conclusions therein, respondent offered no expert analysis to indicate otherwise.

In addition to respondent seemingly requesting IEEs then withdrawing his requests, only to file them again, it was also concerning that respondent did not offer full cooperation with petitioner's evaluation process. Respondent had issued consents to have information shared only to shortly thereafter revoke said consent. By example, on April 26, 2022, respondent communicated to the District that he would not consent to any evaluations of R. G. until respondent's Initial Due Process Petition was resolved. This form of gamesmanship was not only improper as far as litigation procedure, but also served to unduly delay the re-evaluation process, particularly as respondent eventually consented to the evaluations a month later, after communications back and forth between respondent, Judge Lieberman, and petitioner.

Another example of the poor manner in which respondent conducted himself throughout the evaluation process was from October 6, 2022, when respondent revoked consent for employees of the District to communicate with Bancroft, the provider conducting the Neuropsychological Evaluation. The parties had to resort to a Settlement Agreement, on December 21, 2022, whereby respondent agreed to cooperate with the Neuropsychological Evaluation, in exchange for the District dropping its attempts at having respondent participate in the Social History Evaluation. Part of respondent's duty to cooperate was the obligation to allow the District to communicate with the providers that were to conduct the Neuropsychological Evaluation. However, on or about March 29, 2023, respondent emailed to petitioner a withdrawal of consent for any communications between the District and RSM Psychology. This violated the Settlement Agreement, with the end effect of making the evaluation process much more difficult for the District.

Respondent approached the evaluation process relying almost solely on his own non-expert, lay opinions. Respondent merely disagreed with the District's evaluation conclusions, leading him to make self-serving, generalized statements that the evaluations did not meet the requirements set forth in the regulations. Respondent had not submitted a report from an expert stating what the District's evaluators failed to do, or rebutting the manner in which the testing was performed or scored, and he did not point to any specific statutory or regulatory deficiencies in petitioner's evaluations.

Respondent argued that the FBA (Petitioner Exhibit C-6) reported no direct observations of R.G. However, the FBA results were all written as if based on direct observation of R.G. The observations were noted to have taken place between May through June 2022 and the report was dated July 5, 2022. Accordingly, respondent raised no genuine issue of material fact regarding the FBA.

Respondent argued that the case of D.S. v. Trumbull Board of Education, 120 L.R.P. 28133 (2d Cir. 2020), stated that if an FBA was part of an initial evaluation or a reevaluation, then the FBA triggered a right to an IEE, and that only when an FBA alone was requested was there no right to an IEE. Respondent disagreed with petitioner's interpretation of the case that an FBA was not an "evaluation" and therefore provided no right to an IEE. Respondent's general interpretation of Trumball was correct, that an FBA combined with other evaluations would make a requesting parent eligible for an IEE. However, respondent failed to note from Trumball that a school district still had the right to deny an IEE request by an eligible parent by proving that the evaluations already conducted were appropriate. Petitioner in the instant case had proven that its evaluations were current and appropriate, and therefore respondent was not entitled to the IEEs he sought.

Respondent also argued that the Neurological Evaluation by Dr. Adel Amer was flawed because Dr. Butler, the District's Director of Special Services, wrote on the cover letter sending respondent the report that Dr. Amer's report "was concerning" because it did not list the assessment tools relied on. However, in Dr. Amer's "Diagnosis" section he clearly stated that the diagnosis was based on his review of previous evaluations, previous testing, respondent's own statements, his observations of R.G. and his physical

examination of R.G. Dr. Amer explained the interactions and observations he conducted which led to his conclusions. Accordingly, respondent raised no genuine issue of material fact regarding the Neurological Evaluation.

Respondent claimed that "every outside evaluator noted [Echolalia] but not the District." However, respondent provided only one report where it stated that R.G. had echolalia. (Respondent's Exhibit R-A). Dr Amer's report, dated August 25, 2022, did not find that R.G. had echolalia. The mere fact that two different tests had different results did not prove that the evaluation conducted on behalf of the District was flawed or inappropriate. The issue at hand was whether Dr. Amer's evaluation and resulting report were conducted appropriately; respondent offered no expert or technical opinion to argue that Dr. Amer's evaluation was conducted or scored in a manner that was flawed or inappropriate.

Thus, respondent failed to argue that there were any genuine issues in dispute for which a full due process hearing was warranted and failed to specifically cite any such facts in dispute. Respondent, as the non-moving party, had the burden to make an affirmative demonstration that the facts were not as the movant alleged, per Spiotta, 72 N.J. Super. at 581, but petitioner failed to do so.

Accordingly, I **FIND** that there are no genuine issues of fact which would require a full due process evidentiary hearing and **CONCLUDE** that this matter is ripe for a summary decision. I **CONCLUDE** that the petitioner's motion for summary decision is **GRANTED**.

ORDER

I hereby **ORDER** that the petitioner's motion for summary decision is **GRANTED** and that the within petition is hereby **DISMISSED** with a finding in favor of **PETITIONER**. There are no issues remaining in this matter for which a full due process hearing would be required.

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.

November 17, 2023

DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency:

Date Mailed to Parties:

JNR/jm/lam

APPENDIX

BRIEFS

For petitioner

Motion for summary decision with brief, dated September 6, 2023

Reply brief, dated October 2, 2023

For respondent

Brief, dated September 26, 2023