



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**ORDER GRANTING PARTIAL**  
**SUMMARY DECISION**

OAL DKT. NO. EDS 05402-20

AGENCY DKT. NO. 2020-31607

**E.N. AND M.N. ON BEHALF OF A.N.,**

Petitioners,

v.

**GLOUCESTER TOWNSHIP**

**BOARD OF EDUCATION,**

Respondent.

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**Jaimie Epstein, Esq.,** for petitioners

**Brett E.J. Gorman, Esq.,** for respondent (Parker McCay P.A., attorneys)

BEFORE **ELAINE B. FRICK, ALJ:**

**STATEMENT OF THE CASE**

Petitioners, E.N. and M.N., on behalf of a minor child, A.N., filed for due process seeking an appropriate Independent Educational Program (IEP) and compensatory education. Respondent, Gloucester Township Board of Education (the District) opposes the petition. Petitioners filed a motion for partial summary decision, asserting the District shall provide a Reading Independent Evaluation (IEE) at the public expense, for having failed to initiate a petition opposing their request for an IEE within twenty days of the request. The District opposes the motion, asserting it had not opposed the request,

rather, it sought clarification as to the type of IEE requested and did not have to file for due process by advising the parents it would only reimburse the cost of the evaluation according to the monetary cap schedule previously determined by the District and the parents would be responsible to pay the difference.

### **PROCEDURAL HISTORY**

Petitioners requested due process and their petition was transmitted to the Office of Administrative Law (OAL), where it was filed on June 12, 2020, as a contested matter. N.J.S.A. 52:14B-1 to 14B-15; N.J.S.A. 52:14F-1 to 14F-13. During a pre-hearing telephonic conference on July 23, 2020, petitioners' counsel advised they intended to file a motion for partial summary decision. A filing and briefing schedule was set and the parties submitted their documentation. Oral argument was heard on October 7, 2020. Respondent submitted correspondence thereafter, advising this tribunal of recent case law. Petitioners submitted correspondence objecting to consideration of the information, and then submitted a sur-reply to the District's correspondence. The District submitted a letter reply to the sur reply by petitioners, on October 27, 2020.

### **FACTUAL DISCUSSION AND FINDINGS**

The following undisputed facts were gleaned from the submissions of the parties and I **FIND** as **FACTS** the following:

Petitioners are the parents of a child, A.N., who is a classified disabled student, and a resident within respondent's school district. On April 27, 2020, the parents notified the District of their request for Independent Educational Evaluations (IEE) of A.N., to be completed "by Ellen Topiel, Reading Specialist and by Technology for Education & Communication Consulting in Assistive Technology paid for by the BOE." (Certification by petitioner, MN, attachment Pa1 and Respondent's Brief in Opposition to Petitioners' Motion, attachment Ra004.) They requested same because they "disagree with the BOE's most recent evaluation." (Id.)

The District's Director of Special Services responded by email on April 28, 2020, seeking clarification as to what evaluations the parents sought and the purpose for the request. The parents responded by email on April 29, 2020, giving no further explanation of their request, and attached their original letter request of April 27, 2020. (Pa3, attaching Pa1 a/k/a Ra004.)

The District forwarded correspondence of April 28, 2020, notifying the parents of a meeting to occur on May 26, 2020, regarding A.N. Petitioners responded by letter, dated May 4, 2020, that they did not see any reason for participating in a meeting regarding their request for an IEE. They declined to participate in the meeting.

The district provided a "Cost Criteria for Independent Evaluations" sheet, outlining the maximum fees to be paid for IEEs. The District also sent an email on May 7, 2020, to the parents, indicating the BOE had an approved cap of \$600 for an educational evaluation and that if the requested IEE exceeded that amount, the cost would not be borne by the District. Petitioners responded by letter of May 13, 2020, indicating they did not agree and expected the BOE to pay for the reading evaluation they requested.

On May 13, 2020, the District responded by email to the parents, confirming receipt of information from petitioner's proposed Reading evaluator, Ellen Topiel. The Director of Special Services reiterated that the District "agreed to the independent evaluation in an amount not to exceed the caps in place for those types of evaluations. The cap for this evaluation is \$600. It appears that the cost of this evaluator is \$3,200. Unfortunately, that cost will not be borne by the District and will be your responsibility. We have a list of evaluators who can complete this evaluation for an amount less than the \$600 cap. Please advise if you would like to see that list." (email attached at Pa10 to petitioner's Certification by M.N.)

On May 18, 2020, the parents initiated their due process request. The District has not filed a due process petition objecting to the requested IEE.

## LEGAL ANALYSIS AND CONCLUSION

In an administrative law matter, a “party may move for summary decision upon all or any of the substantive issues in a contested case.” N.J.A.C. 1:1-12.5(a). The motion “shall be served with briefs and with or without supporting affidavits” and the decision “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.” N.J.A.C. 1:1-12.5(b). The non-moving party will prevail if they “set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.” Id.

This standard is also set forth in New Jersey Court Rule 4:46-2, regarding a motion for summary judgment, which is substantially equivalent to an administrative law summary decision motion. In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court stated:

[A] determination whether there exists a “genuine issue” of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

Brill, 142 N.J. at 540.

The Individuals with Disabilities Education Act (IDEA) established “a substantive right to a ‘free appropriate public education’ [FAPE] for certain children with disabilities.” Endrew F. v Douglas County School District RE-1, 137 S. Ct. 988, 993 (2017), citing Board of Education of Hendrick Hudson Central School District, Westchester County v Rowley, 458 U.S. 176 (1982). The IDEA provides for federal funds to be offered to States to assist the States in educating children with disabilities. Endrew F., at 993. A State receiving such funds must, in turn, comply with statutory conditions, including the overriding focus that a State must provide FAPE to eligible students. Id. A State must also provide a disabled student with special education and related services that conforms

with the child's individualized education program [IEP]. Id. at 994, citing 20 U.S.C. §1401(9)(D).

The IEP is drafted in compliance with statutory authority by the "IEP team" which consists of teachers, school officials, and the student's parents. Andrew F. at 994. Evaluations are utilized to craft the IEP to the student's specific needs. Parents are entitled to obtain an independent educational evaluation of their child. Schaffer v. Weast, 546 U.S. 49, 53 (2005), citing 20 U.S.C. § 1415(b)(1). The pertinent federal regulation provides that "a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 CFR § 300.502(b)(1) (2005). The IDEA ensures parents have access to an expert who can evaluate the school records and render an independent evaluation. Schaffer at 60-61. This is done so that parents "are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." Id. at 61.

The New Jersey Administrative Code sets forth the procedure for requesting independent educational evaluations of a disabled child. N.J.A.C. 6A:14-2.5(c). The relevant portion of the regulation provides:

(c) Upon completion of an initial evaluation or reevaluation, a parent may request an independent evaluation if there is disagreement with the initial evaluation or a reevaluation provided by a district board of education. A parent shall be entitled to only one independent evaluation at the district board of education's expense each time the district board of education conducts an initial evaluation or reevaluation with which the parent disagrees. The request shall specify the assessment(s) the parent is seeking as part of the independent evaluation.

1. Such independent evaluation(s) shall be provided at no cost to the parent unless the district board of education initiates a due process hearing to show that its evaluation is appropriate and, following the hearing, a final determination to that effect is made.
  - i. Upon receipt of the parental request, the district board of education shall provide the

parent with information about where an independent evaluation may be obtained and the criteria for independent evaluations according to (c)2 and 3 below. In addition, the district board of education shall take steps to ensure that the independent evaluation is provided without undue delay; or

- ii. Not later than 20 calendar days after receipt of the parental request for the independent evaluation, the district board of education shall request the due process hearing.

N.J.A.C. 6A:14-2.5(c).

The procedure set forth in the New Jersey regulation is consistent with the federal regulation entitled “Independent Educational Evaluation,” which provides:

(a) General.

- (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.
- (2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.
- (3) For the purposes of this subpart—
  - (i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and
  - (ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.103.

- (b) Parent right to evaluation at public expense.
  - (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.
  - (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—
    - (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
    - (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.
  - (3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
  - (4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

34 C.F.R. § 300.502 (2020).

Here, petitioners contend they are entitled to an order for partial summary decision regarding their pending due process, directing the District to provide an IEE for the student, at the public expense, because the District never filed a petition objecting to the requested evaluation. The District objects to the request for partial summary decision,

asserting they were not required to file a petition because they agreed to provide an IEE and were seeking to clarify what type of evaluation petitioners sought, and that it would be paid for in accordance with the cost criteria fee cap schedule developed by the District.

It seems contrary to the fundamental public policy in the State of New Jersey, which encourages settlement of matters, to require a District to incur litigation expenses to file a petition challenging an IEE request, if the District purportedly is willing to provide the IEE, but has basic inquiries regarding the requested evaluation. See, Harrington v Harrington, 281 N.J. Super. 39, 46 (App. Div. 1995) and Lahue v Pio Costa, 263 N.J. Super 575 (App. Div.), cert. denied, 134 N.J. 477 (1993). However, the federal and state regulations squarely place the burden on the shoulders of school districts in the State of New Jersey with respect to special education matters, including the procedural burden to act “without unnecessary delay” and file a petition if it is challenging a parent’s request for an IEE. 34 C.F.R. § 300.502(b)2 (2020).

The twenty day rule has been firmly construed against school districts, without exception. In the matter of Haddonfield Board of Education v. S.R. ex rel. P.R., OAL Dkt. No. EDS 05392, Final Decision (June 24, 2016), a school district’s due-process filing was late by seven days because the school was closed for spring break. The ALJ determined that the IDEA provided no additional time for such extenuating circumstances. In another final decision, the district’s filing of its due process petition one day after the time limit was considered beyond the time limit. Northern Highlands Regional Board of Education v. C.E. and A.E. ex rel. C.E., EDS 10891-16, Final Decision (January 19, 2017), <<http://njlaw.rutgers.edu/collections/oal/>>. In another matter concerning a request for an evaluation to determine whether the child was eligible for special education services, the ALJ ordered payment of the IEE because the BOE did not file for due process until day twenty seven. Monroe Township Board of Education v. T.L. ex rel. I.L., OAL Dkt. No. EDS 15499-16, Final Decision (November 29, 2016). Thus, the case law from this tribunal supports that this provision is strictly construed against school districts.

The District is not disputing the twenty day requirement. Rather, it disputes that it had an obligation to even initiate a due process application under the circumstances of this matter, as it contends it did not deny the request for an IEE. It was simply seeking



further clarification regarding the requested evaluation(s) and asserting its right to place a fee cap on the evaluation.

A school district can ask for a parent's reason why they object to the public evaluation, "[h]owever the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation." 34 C.F.R. § 300.502(b)(4). Thus, even well meaning, good faith actions by a District in attempting to ascertain answers to its inquiries such as the specific type of evaluation; why that type is necessary; and confirm that a reasonable cost will be paid in accordance with an approved fee schedule; does not remove the burden upon the District to meet the twenty day deadline to file its petition if it objects to the request by the parent for an IEE. If the District was dissatisfied with the parents' generic objection to the public evaluation because they "disagreed" with it, the District cannot further require the parents to explain their disagreement. The District "must" act promptly and provide the IEE at public expense, or file a due process petition. 34 CFR §300.502 (2020).

A situation nearly identical to the matter at hand was recently decided in an unpublished New Jersey District Court opinion. Hopewell Twp. Board of Education v C. B., 2020 U.S. Dist. LEXIS 136604 (DNJ July 31, 2020). District Judge Shipp affirmed ALJ Kennedy's decision that the BOE had to provide publicly funded IEEs as requested by the parents. In that matter, the BOE asserted it understood the parents were dissatisfied with the evaluations and were seeking independent evaluations. The BOE wanted to work cooperatively with the parents, yet asserted that the evaluators the parents requested were more expensive than the evaluators the District typically used and proposed utilizing different evaluators, which was rejected by the parents. The parents initiated a due process petition. The school did not file a petition within twenty days contesting the request. The District Judge noted that the state and federal regulations both "state that the right to a publicly funded IEE is triggered upon a disagreement by the parents." Hopewell 2020 U.S. Dist. LEXIS 136604 (DNJ July 31, 2020), citing 34 CFR § 300.502(b); N.J.A.C. 6A:14-2.5(c); and Haddon Township School District v. New Jersey Department of Education, No. A-1626-14T4 (App. Div. February 4,

2016). The District Judge emphasized that the federal regulation mandates that when a parent requests an IEE, the school “must” act without unnecessary delay and either grant the IEE request or file its petition within the twenty day time frame. 34 CFR § 300.502(b)2. The New Jersey regulation sets forth that the requested IEE must be provided, “unless” the school has filed its due process petition within twenty days. N.J.A.C. 6A:14-2.5(c)(1)(ii). “The use of ‘must’ and ‘unless’ indicates that, absent a school district’s due process complaint, a parent is entitled to an IEE at public expense.” Hopewell.

The District insists it is not disputing or denying the requested IEE. The District contends it does not need to file a due process petition when it is declining to reimburse the excessive cost for the requested IEE, which exceeds the District’s established cost criteria, without justification from the parents as to why the cost is excessive. Respondent relies upon the Fifth Circuit decision of Seth B. v Orleans Parish School Board, 810 F.3d 961 (5<sup>th</sup> Cir. 2016). The Circuit court determined that the plain meaning of the federal regulation indicates an agency is excused from paying for an IEE if the agency demonstrates at a hearing that the evaluation obtained by the parent did not meet agency criteria. Seth B., 810 F.3d at 961. The Fifth Circuit held that the federal regulation does not require the agency to initiate or request the hearing. Id. Respondents urge this tribunal to follow the fifth circuit decision, as an ALJ has done so in the decision issued in CP obo FP v Clifton Board of Education, OAL Docket No EDS 15781-17 (December 13, 2018).

The District here contends that it only must initiate a due process petition to demonstrate that its own evaluation is appropriate and it is seeking a final determination to that effect following the hearing. N.J.A.C. 6A:14-2.5(c). Since it is seeking here to align petitioner’s requested IEE cost with its reasonable cost analysis fee schedule, it did not need to file a due process petition. Although the Fifth Circuit has found the school district was not required to initiate a due process petition where it contends that the IEE did not meet agency criteria, I do not find that persuasive, given the positions of previously cited case law continually referring to the federal and state regulations language that a District “must” initiate a due process petition “unless” it is approving of the requested IEE. Moreover, the trend in decisions regarding requests for independent evaluations, continually strictly construes the burden on the District to act promptly.

To construe Seth B. decision in favor of respondent's position here, is contrary to the position asserted by the New Jersey Department of Education (NJ DOE). The Parental Rights in Special Education (PRISE) booklet is promulgated by the NJ DOE, Office of Special Education Policy and Dispute Resolution. The booklet is distributed to parents of special education students to provide them with a description of state and federal laws pertaining to the special education process and to provide the most comprehensive and up to date information regarding parents' rights, so they are prepared to take an active role in their child's education. PRISE, revised August 2019. School districts are required to provide a copy of PRISE to parents at least one time per year, and at other times as specified within the regulations, such as when a parent specifically requests same. N.J.A.C. 6A:14-2.3(g)7.

PRISE sets forth procedural safeguard information for parents in a straightforward, question and answer format. Specific to the issue in this matter regarding independent educational evaluations, PRISE provides:

***Can the school district impose limitations or restrictions on the choice of evaluators?***

If the school district agrees to your request for an independent evaluation, the school district must provide information on where an independent evaluation may be obtained. To assist school districts and parents, the Department of Education maintains a list of approved clinics and agencies. School districts may suggest a number of clinics or agencies within the geographic area from that list. Parents must be able to obtain the requested evaluation from the suggested list within a reasonable time frame and at the rate determined by the district.

If you do not agree to select a provider from those suggested by the school district the district must consider your request for a different provider. **Also, the school district must consider your request for an evaluator that costs more than the school district usually pays for the same evaluation. If the school district disagrees with your request, it must request a due process hearing to deny your request.**

Such consideration and the district's decision to grant or request a due process hearing to deny the request must occur within 20 days of receipt of the request for an independent evaluation.

PRISE, revised August 2019, page 9, *italics emphasis original*; **bold emphasis added.**

The information outlined within PRISE is in line with the “must” and “unless” requirements of the federal regulation and New Jersey code, both having been interpreted that the burden is on the District to file a due process petition where it has any dispute with a parent’s requested IEE. The literature promulgated by DOE supports the position that a District must file for due process if the District disagrees with the cost of the proposed evaluator. The school district “must” consider a request for an evaluator who costs more than the district usually pays, and if the district disagrees with the request, it “must” request a due process hearing to deny the request. PRISE, revised August 2019, page 9.

The New Jersey Appellate Division, in an unpublished decision, relied upon guidance given to a school district from the NJ DOE, regarding the requirement to provide independent evaluations when requested by parents. Haddon Township School District v. New Jersey Department of Education, No. A-1626-14T4 (App. Div. February 4, 2016), <http://njlaw.rutgers.edu/collections/courts/>. In the Haddon Township matter, the school district advised parents they were not entitled to an independent evaluation as requested, because the school district had not yet done any formal assessments. The parents initiated a complaint with New Jersey Office of Special Education Programs (OSEP) and OSEP determined that the school’s position did not comport with the requirements of federal regulation 34 CFR § 300.502. The Appellate Division panel noted that the NJ DOE had sent a guidance letter to the school district, advising the district that the United States Department of Education indicated that the pertinent New Jersey regulation as of 2013 violated the IEE provisions of 34 CFR § 300.502 and to “be aware that districts may no longer limit the parents’ rights to an IEE by first conducting an assessment in an area not already assessed by the initial evaluation or reevaluation before the parents’ request is granted. Rather, when a parental request for an independent evaluation is received, a district **must provide the evaluation at no cost to the parent, unless the school district initiates a due process hearing . . . [.]**” Haddon Township, No. A-1626-14T4, **emphasis added.** Hence, the Appellate Division has construed information promulgated

from the NJ DOE as guidance for confirming the district must provide a requested IEE, unless the school district initiates a due process hearing.

In this situation, it is undisputed that the parents requested an IEE to be completed by a reading specialist. The District indicated they agreed the parents could obtain the IEE, yet only at the cost cap it provided, and that the parent would be responsible to pay the difference. Otherwise, the parents should select a different evaluator within the fee schedule. I **CONCLUDE** the District did disagree with the parents' requested IEE, specifically advising the parents it would only pay up to the cap on its cost analysis sheet and the parents would be required to pay the difference. The parents insisted that the District had to pay the full cost of the IEE. Therein lies the "dispute" triggering the District's obligation to file a due process petition.

The District did not file a due process petition seeking to be found exempt from providing the IEE at the public expense at either a reduced rate or otherwise in line with its cost criteria. Thus, I **CONCLUDE** petitioners are entitled to their requested IEE, at the public expense, as the District waived its right to seek relief from same by not filing a due process complaint within twenty days of the parents' request for the IEE.

After oral argument was conducted on this motion, respondent's submitted correspondence to alert this tribunal to the recently decided matter of D.S. v Trumbull BOE, Unites States Court of Appeals, Second Circuit, decided September 1, 2020. The court found that the parents' dissatisfaction with a Functional Behavior Assessment (FBA) does not entitle the parents/student to an IEE. D.S. v Trumbull BOE, United States Court of Appeals, Second Circuit, decided September 1, 2020, docket 19-644. I have reviewed the case and it does not persuade me to alter my determination that the District did dispute the requested IEE here, which triggered its obligation to initiate a due process petition.

**ORDER**

It is **ORDERED** that petitioners' request for partial summary decision is **GRANTED**. Respondent shall reimburse petitioners for the requested Reading IEE.



November 24, 2020  
\_\_\_\_\_  
DATE

\_\_\_\_\_  
**ELAINE B. FRICK, ALJ**

Date Mailed to Parties:

November 24, 2020 (Sent Via E-Mail)

/dm

cc: Deputy Clerk – OAL Trenton

**APPENDIX OF SUBMISSIONS ON MOTION**

July 31, 2020: Motion to Compel the District to provide Reading IEE at the public expense within ten days

August 21, 2020: Respondent's opposition to motion

September 1, 2020: Petitioners' Letter Brief reply to opposition; September 3, 2020, footnote information

September 18, 2020: Sur reply brief by respondent in opposition to petitioners' reply

October 15, 2020: Letter submission by respondent with additional case law

October 15, 2020: Petitioners' objection letter to October 15, 2020, letter by respondent

October 19, 2020: Petitioner's sur reply response to October 15, 2020, letter by District

October 27, 2020: Respondent's letter response to petitioner's October 19, 2020, letter