Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of [Student]
v.
School District of River Falls

DHA Case No. DPI-18-0021
DPI Case No. LEA-18-0017

DECISION ON SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT

The PARTIES to this proceeding are:

[Student], by

[Parent]

Click here to enter text.

School District of River Falls, by

Attorney JoAnn M. Hart
Boardman & Clark, LLP
1 S. Pinckney Street
PO Box 927
Madison, WI 53701-0927
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PROCEDURAL HISTORY

On August 14, 2018, the Department of Public Instruction (DPI) received a request for a due process hearing, Case No. LEA-18-0017, under Wis. Stats. Chapter 115 and the federal Individuals with Disabilities Education Improvement Act (IDEA) from [Parent] (the Parent) on behalf of her child, [Student] (the Student), against the School District of River Falls (the District). DPI referred the matter to the Division of Hearings and Appeals for hearing and the matter was assigned Case No. DPI-18-0021.

A prehearing conference was held on August 30, 2018 and pursuant to a briefing schedule set at the prehearing conference, the District filed a summary judgment motion and supporting materials and affidavits on September 14, 2018. On October 15, 2018, the Student filed a response. The District filed a reply brief on October 22, 2018. On October 25, 2018, a telephone conference was held to hear additional oral arguments relating to the motion. Pursuant to the scheduling order, a written Decision on the District's motion is due November 5, 2018.

SUMMARY JUDGMENT METHODOLOGY

A party is entitled to summary judgment when the record establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2).

The Wisconsin Supreme Court has set forth the methodology for deciding motions for summary judgment, which will be followed here. First the court must examine pleadings to determine whether a claim for relief has been stated and a material issue of fact presented; if a claim for relief has been stated, inquiry shifts to the moving party's affidavits or other proof to determine whether the moving party has made a prima facie case for summary judgment. If the moving party has made a prima facie case for summary judgment, the court must examine affidavits and other proof of the opposing party to determine whether disputed material facts or undisputed material facts exist from which reasonable alternative inferences may be drawn sufficient to entitle the opposing party to a trial. See *Voss v. City of Middleton*, 162 Wis. 2d 737, 470 N.W.2d 625 (1991).

Further, "when a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial." Wis. Stat. §802.08(3). The court takes evidentiary facts in the record as true if not contradicted by opposing proof. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25 ,¶ 23, 241 Wis. 2d 804, 623 N.W.2d 751.

UNDISPUTED FACTS

1. The Student attends the River Falls School District (the District), qualifies for special education and has an individualized education program (IEP).

2. The Student's IEP team met on January 17, 2018 and January 30, 2018. The January 2018 IEP meetings were not part of an initial evaluation or re-evaluation of the Student's eligibility for special education. Rather, the IEP states the purpose of the meeting was an annual review IEP review; review/revise IEP; transition and determine continuing placement. (Ex. F)

3. As a result of the January 2018 IEP meetings, an IEP was developed with a proposed start date of February 3, 2018.

4. On February 2, 2018 the Student's Parent filed a request for a due process hearing, Case No. DPI-18-0004/LEA-18-0004. The three issues identified in the due process hearing included:

    a. From September 21, 2017 to October 16, 2017, did the District's placement of the Student violate the Student's right to receive a free, appropriate public education in the least restrictive environment?
    b. Does the District's placement of the Student set forth in the individualized education program dated February 3, 2018, violate the Student's right to receive a free, appropriate public education in the least restrictive environment?
    c. Prior to implementing the Student's placement and individualized education program in September 2017 and February 2018, did the District fail to provide the Parent (the Student's mother) with prior written notice, as required by 34 CFR § 300.503? (Ex. D)

5. No further IEP team meetings were held with regard to the Student and no further revisions were made to the Student's IEP after the completion of the February 2018 IEP during the remainder of the 2017-2018 school year.

6. In May 2018 the District retained the services of a consultant, [Consultant], to provide expert testimony in support of the District's case and listed her on the District's witness list in the due process hearing, Case No. DPI-18-0004/LEA-18-0004. (Exs. A and C)

7. [Consultant] did not conduct any testing of the Student.

8. [Consultant] was never a member of the Student's IEP team.

9. The District did not issue written notice of intent to conduct a re-evaluation of the Student and no evaluations or formal assessments were done of the Student during the 2017-2018 school year. (Ex. E)

10. The Student's father authorized the release of the Student's educational records to [Consultant]. (Hart Aff. ¶11)

11. On July 9-11, 2018 a due process hearing was held in Case Nos. DPI-18-0004/LEA-18-0004. At the due process hearing, [Consultant] testified that as part of her contracted consulting duties she reviewed documents, interviewed staff, observed the Student and provided an opinion regarding the appropriateness of the proposed and current IEP. (Ex. E, pp. 187 and 229)

12. On August 28, 2018 a Decision was issued in Case No. DPI-18-0004/LEA-18-0004 concluding, in pertinent part, that the District's placement as set forth in the February 3, 2018 IEP did not violate the Student's right to receive a free, appropriate public education in the least restrictive environment, that the District provided the Student's mother with written notice as required under 34 CFR §300.503 prior to implementing the Student's placement and IEP in February 2018 and therefore, dismissing the Parent's due process hearing request. (Ex. D)

DISCUSSION

The instant due process hearing request raises the following issue: whether the District improperly conducted a re-evaluation of the Student without parental consent. The underlying facts are largely undisputed. Under the IDEA, school districts are required to conduct evaluations of students before they provide special education services to a student with a disability. 20 U.S.C. §1414(a)(1)(A). In addition, a school district must conduct a re-evaluation of a student with a disability no more often than once per year but at least once every three years unless the parents and school agree that it is unnecessary. 20 U.S.C. §1414(a)(2). The IDEA requires a school district to obtain prior consent from a parent before conducting an evaluation or reevaluation. 20 U.S.C. §§1414(a)(1)(D) and (c)(3); 34 CFR 300.300(d); Wis. Stat. §115.782(1). Parental consent is also required before a school district may provide special education services to a student. *Id*. Consent

is not required when a teacher or specialist retained by the school district is merely screening a student "to determine appropriate instructional strategies for curriculum implementation", which the law explicitly states is not "an evaluation for eligibility for special education and related services." 20 U.S.C. §1414(1)(E). Upon conclusion of an evaluation or re-evaluation, an IEP team determines whether the student is a child with a disability and/or determines an appropriate educational program for the student. 20 U.S.C. §1414(b)(4); Wis. Stat. §115.782(2)(a), (3)(a) and (4).

The Student's Parent alleges in the current due process hearing request that the District utilized a consultant to improperly conduct a "re-evaluation" of the Student without parental consent. Although acknowledging that the consultant did not perform any testing of the Student, the Parent asserts that a re-evaluation can occur without the need for additional testing and that the consultant's review of the Student's educational records and existing data, observations of the Student at school and interviewing staff amounted to a re-evaluation. (Parent Response, ¶2).

The undisputed facts in this case establish that the District retained a consultant, [Consultant], in May 2018 to provide expert testimony on behalf of the District during a prior due process hearing. It is also undisputed that [Consultant] was not a member of the Student's IEP team, did not participate in any IEP meetings nor did she propose any changes to the Student's IEP. Rather, the consultant, with consent of the Student's father, reviewed the Student's educational records, observed the Student at school and interviewed staff. Based upon what she learned from her records review, observations and interviews, [Consultant] provided testimony at the due process hearing to support the District's position that the proposed February 2018 IEP and placement were appropriate. There is no dispute that the Student is a child with a disability eligible for special education. Moreover, there is no dispute that the Student's IEP team did not meet during the 2017-2018 school year to discuss a re-evaluation of the Student. Based upon a review of the transcript of the prior due process hearing and the affidavits and documents attached to the District's motion for summary judgment, the consultant in this case was merely opining as to whether the District's actions and resulting IEP were appropriate. She was not conducting a re-evaluation, as that process is defined under the law.

It is important to note the distinction between the purpose of the consultant in the present matter and the purpose of conducting evaluations/re-evaluations under the IDEA. The consultant in this matter was not brought in to provide an opinion as to whether the Student continued to be eligible for special education or to determine the educational program needs of the child, which are the function of the IEP team and the main purposes of an evaluation or re-evaluation. 20 U.S.C. §1414(b)(4); Wis. Stat. §115.782(2)(a), (3)(a) and (4). Nor was the consultant retained to provide recommendations to change the Student's IEP or placement. Rather, the consultant was retained as an expert in a contested due process hearing case to support the school district's position in that matter that the Student's IEP program and placement previously determined during the 2017-2018 school year were appropriate. Nothing under the law prevents a school district from retaining an expert consultant to offer testimony at a due process hearing. See Wis. Stat. §115.80(3); see also, 34 C.F.R. §300.512(a).

Because I do not find that the District improperly conducted a re-evaluation under these circumstances, I similarly do not find that the District failed to obtain parental consent for any

alleged re-evaluation. See, 34 C.F.R. §99.31(a)(1)(i). Simply, no re-evaluation occurred. Because there are no genuine issues as to any material facts, I find that District has established that they are entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). Finally, because my determination of whether an evaluation occurred is dispositive on summary judgment grounds, I do not find it necessary to address the District's res judicata claim. Therefore, the due process hearing request should be dismissed.

CONCLUSION OF LAW

The District did not improperly conduct a re-evaluation of the Student without parental consent.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the due process hearing be DISMISSED, as set forth above.

Dated at Madison, Wisconsin on November 5, 2018.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
Madison, WI 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____
Kristin P. Fredrick
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

APPEAL TO COURT: Within 45 days after the decision of the administrative law judge has been issued, either party may appeal the decision to the circuit court for the county in which the child resides under §115.80(7), Wis. Stats., or to federal district court pursuant to U.S.C. §1415 and 34 C.F.R. §300.512.

A copy of the appeal should also be sent to the Division of Hearings and Appeals, 4822 Madison Yards Way, 5th Floor, Madison, WI 53705-5400.

The Division will prepare and file the record with the court only upon receipt of a copy of the appeal. It is the responsibility of the appealing party to send a copy of the appeal to the Division of Hearings and Appeals. The record will be filed with the court within 30 days of the date the Division of Hearings and Appeals receives the appeal.