Pennsylvania

Special Education Hearing Officer

DECISION

Child's Name: A.B.

Date of Birth: [redacted]

ODR No. 01972-1011 AS

CLOSED HEARING

Parties to the Hearing:	Representative:
Parent[s]	Pro Se
Fleetwood Area School District 801 North Richmond Street Fleetwood, PA 19522-1031	David F. Conn, Esquire Sweet, Stevens, Katz & Williams LLP 331 Butler Avenue New Britain, PA 18901
Date of Hearing:	April 27, 2011
Record Closed:	April 29, 2011
Date of Decision:	May 14, 2011
Hearing Officer:	William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Student is an eligible elementary school student; Student at all relevant times resided within the Fleetwood Area School District (District). (NT 8-10.) Student is identified with Other Health Impairment and Speech and Language Impairment under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). Ibid. The Parents requested due process to require the District to either pay for an Independent Educational Evaluation (IEE) or to defend its evaluation pursuant to the IDEA regulation, 34 C.F.R. §300.502(b)(2)(i). The District asserts that it has agreed to fund an IEE at public expense, but that the evaluation proposed by the Parents through the examiner they selected does not meet agency criteria pursuant to 34 C.F.R. §300.502(b)(2)(i).

The hearing was conducted in one session and the record closed upon receipt of the transcript. I conclude that the District is entitled legally to place a cap on the total fee to be charged for an IEE and that the limit that it proposed in this matter was reasonable.

ISSUE

1. Does the IDEA permit the District to place a reasonable cap on the total cost of an IEE?
2. Was the cap set by the District in this matter reasonable?

FINDINGS OF FACT

1. The Student is diagnosed with ADHD and a speech and language impairment, for which the Student has been identified as a child with a disability. (NT 9-10.)
2. The District evaluated the Student for speech and language impairment as reported in the evaluation report (ER) dated June 4, 2010. The report relied in part upon findings of a speech and language evaluation in 2009. (NT 65-66; P-3 p. 9-11; P-9 p. 2-3, 17-18.)
3. The June 2010 evaluation found auditory processing difficulties with higher linguistic skills and recommended direct speech and language services. (P-9 p. 19.)

4. By letter dated November 22, 2010, Parents requested an independent speech and language evaluation at public expense. Parents stated that they disagreed with the ER dated June 4, 2010. Parents indicated that they disagreed because the speech and language evaluation reported in the ER did not evaluate all areas of Student's disability. (NT 56-57; P-8.)

5. By email message dated November 30, 2010, the District agreed to provide an independent speech and language evaluation at public expense. In the email message, the District's superintendant reserved the right to disapprove the proposed independent evaluator and requested proposed fees. The message also suggested two speech and language pathologists who could perform the independent evaluation. (P-7.)

6. The District's policy on IEEs, dated April 21, 2009, provides that independent evaluators shall include only that testing that is required in light of previous testing and other information available from the District evaluators and others. The policy also provides that evaluators not selected from a District maintained list must submit fees in advance for approval by the Superintendent. The policy does not include a set fee schedule for independent speech and language evaluations or any other kinds of evaluation. (P-2.)

7. The District's Superintendant inquired with the [local] County Intermediate Unit (IU) to determine the usual and customary cost of an evaluation of speech and language impairment if conducted by a qualified individual. (NT 35-49, 73-74; P-1.)

8. The examiner selected by the Parent proposed a fee of up to $3300.00. This was based upon six to eight hours for testing, two and one half hours to review records and interview Student and Parents, and a flat six hour charge for writing a report. (NT 26-27; P-1, P-3 p. 2-3, P-4.)

9. This figure represented over five times the amount that the IU had recommended as the usual and customary cost of a speech and language evaluation in the circumstances of the Student. (NT 73-74; P-1.)

10. By email message dated December 22, 2010, district personnel informed the Parents that the District would be willing to pay the examiner a maximum of $1500.00 for the independent speech and language evaluation that the Parents had requested. This limit was stated to be District policy and the policy of the IU, namely, that any "single discipline evaluation" was limited to this expenditure cap. (P-1, P-4 p. 9.)

11. Parents filed a request for due process on January 18, 2011, requesting an order that the District provide the evaluation at public expense without any expense limit. (P-6.)

12. Based upon the previous testing and identification, the IU contractor estimated that it would require six to eight hours to produce an evaluation report, including interviews, testing and two hours for writing the report. (NT 69-86.)

13. The District expenditure cap takes into account variations in fees charged among different providers and variations in evaluation strategies for children in different circumstances. (NT 49-50.)

DISCUSSION AND CONCLUSIONS OF LAW

BURDEN OF PROOF

The burden of proof is composed of two considerations, the burden of going forward and the burden of persuasion. Of these, the more essential consideration is the burden of persuasion, which determines which of two contending parties must bear the risk of failing to convince the finder of fact.[1] The United States Supreme Court has addressed this issue in the case of an administrative hearing challenging a special education IEP. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). There, the Court held that the IDEA does not alter the traditional rule that allocates the burden of persuasion to the party that requests relief from the tribunal. Thus, the moving party must produce a preponderance of evidence[2] that the District failed to fulfill its legal obligations as alleged in the due process Complaint Notice. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

In Weast, the Court noted that the burden of persuasion determines the outcome only where the evidence is closely balanced, which the Court termed "equipoise" – that is, where neither party has introduced a preponderance of evidence to support its contentions. In such unusual circumstances, the burden of persuasion provides the rule for decision, and the party with the burden of persuasion will lose. On the other hand, whenever the evidence is preponderant (i.e., there is greater evidence) in favor of one party, that party will prevail. Schaffer, above.

Based upon the above rules, the burden of proof, and more specifically the burden of persuasion in this case, rests upon the Parents, who initiated the due process proceeding

[1] The other consideration, the burden of going forward, simply determines which party must present its evidence first, a matter that is within the discretion of the tribunal or finder of fact (which in this matter is the hearing officer).

[2] A "preponderance" of evidence is a quantity or weight of evidence that is greater than the quantity or weight of evidence produced by the opposing party. Dispute Resolution Manual §810.

challenging the fee cap established by the District. If the Parents fail to produce a preponderance of the evidence in support of their claim, or if the evidence is in "equipoise", the Parents cannot prevail.

THE DISTRICT IS LEGALLY AUTHORIZED TO PLACE A CAP ON THE TOTAL EXPENDITURE FOR AN IEE

The IDEA requires the local educational agency to provide any parent of a child with a disability with "an opportunity" to obtain an independent educational evaluation of the child. 20 U.S.C. §1415(b)(1). This opportunity is one of the procedural safeguards accorded to parents by the IDEA. It is delineated in the regulations of the Department of Education. 34 C.F.R. §300.502. The regulation makes it very clear that the Department did not view the right to an IEE under the IDEA as absolute or unlimited; the regulations themselves place limits upon that right. At 34 C.F.R. §300.502(a)(1), the regulation provides that parents has a right to an IEE "subject to paragraphs (b) through (e) of this section." Those subparagraphs provide that, unless the school district seeks due process to defend its evaluation, the district must "[e]nsure that an [IEE] is provided at public expense, unless the agency demonstrates … that the evaluation obtained by the parent did not meet agency criteria." 34 C.F.R. §300.502(b)(2)(ii). Subparagraph (e) of section 300.502 provides for agency criteria that the proposed IEE must meet before the parent is entitled to it. 34 C.F.R. §300.502(e). This subsection allows the school district to apply the same criteria that it uses when it initiates an evaluation. 34 C.F.R. §300.502(e)(1). These may "include[e]" the location of the evaluation and the qualifications of the examiner. Ibid. No other criteria may be imposed on the IEE. 34 C.F.R. §300.502(e)(2).

The legal issue here is whether or not the above language authorizes a school district to impose a cap on the total cost of an IEE requested by a parent. The parties have disclosed no

judicial authority that gives guidance as to the answer to this question. Thus I must base my conclusion on this issue solely upon the above language of the regulation, which has the force of law. I conclude that the above language encompasses the authority for a district to impose a reasonable cap on total cost.

Not only does the above regulatory language clearly contemplate some limits on the provision of an IEE, it authorizes an indefinite range of criteria that can be applied to limit the IEE. Indeed, a district may impose any criterion that a district would apply to its own evaluations. The regulation gives two examples, but indicates that they are not the sole examples, using the word, "including" to imply that other criteria may be applied. 34 C.F.R. §300.502(e)(1). The only limit on the types of criteria is that the District applies the same criteria to its own evaluations. Ibid.

The U.S. Department of Education clearly reads its regulation to permit districts to establish reasonable limits on the expenditures for IEEs. In its response to comments on the above regulation, the Department clarified its rule with regard to a public agency's right to limit the amount that it pays for an IEE. 71 Fed. Register 46540-01 at 46689-46690 (August 14, 2006). The Department confirmed that "it is appropriate for a public agency to establish reasonable cost containment criteria [for IEEs] … ." The Department cautioned that such criteria must be communicated to the parent when an IEE is requested and that the agency must provide the parent with an opportunity to show that there are unique circumstances that require reimbursement of the IEE at a rate higher than the local agency's cost criterion for the particular evaluation in question. Ibid. See also, Letter to Anonymous, 22 IDELR 637 (OSEP 1995)(a district may establish maximum allowable charges for specific tests).

The record shows by a preponderance that the District in this case applied a reasonable cap on the expense of an independent speech and language evaluation. The figure was informed by information obtained from the Intermediate Unit as to the usual cost of its speech and language evaluations, which are provided by a private contractor. (FF 7, 12.) The contractor's usual and customary charge for such an evaluation is $600.00. (FF 13.) The District superintendent set a much higher figure for the maximum payment, thus allowing for variation in the reasonable range of fees that could be expected among evaluators in the region and the variation in the types of test that might be selected in the exercise of professional judgment by different evaluators. (FF 7, 12, 13.)

The United States Office of Special Education Programs (OSEP), the agency charged with implementing DOE regulations regarding special education, has issued several guidance letters that indicate its opinion that local education agencies are allowed to set reasonable caps on services. The District has included one such letter in its response to Parents' due process complaint. (P-5.) I see nothing in that letter that prohibits what the District did here.

The letter cautions that fee caps must not be inflexible; that is, the parent must be allowed an opportunity to show that the unique circumstances justify an IEE that exceeds agency criteria. There is no evidence that the District failed to provide for unique circumstances in this case. The expense cap that it determined was deliberately set higher than the usual and customary cost of speech and language evaluations in the region. (FF 6, 7.) This in itself allows for some variation in provider hourly fees and in the selection of tests and evaluative strategies based on the individual evaluator's judgment. (FF 13.) Moreover, nothing in the record suggests that the District would not have responded favorably to a specified additional cost if needed. On the

contrary, the Parents did not even assert that there was a unique circumstance requiring an unusual test battery or evaluation strategy. (FF 12.)

Where a proposed IEE exceeds agency cost criteria, the letter also requires the local education agency to request due process to show that the evaluation does not meet agency cost criteria and that the child's unique circumstances do not merit a more expensive evaluation. This clearly was not done in the present matter; however, it was not done because the Parents filed quickly after it became clear that their selected evaluator would charge more than the District's $1500.00 cap. (FF 11.) Thus, Parents waived any right to rely upon the procedural benefit of having the District take the burden of justifying its adherence to the $1500.00 cap. In light of this waiver by Parents, I note, but do not need to reach, the question of whether or not the DOE regulation itself requires the District to file first in this situation. The regulation does not explicitly require this.

Regardless of whether or not the District is required to file first, the regulation does require the agency to "demonstrat[e] in a [due process] hearing that the evaluation obtained by the parent did not meet agency criteria." 34 C.F.R. §300.502(b)(2)(ii). Here, the District has done so by a clear preponderance of the evidence. The private evaluator's fee far exceeds the expense cap set by the District. (FF 8.) That cap is reasonable. Further, the evidence shows preponderantly that the private evaluator's fee is based upon excessive time allocated to writing a report. (FF 8.)

The IU's contract evaluator, who performs evaluations for public educational agencies throughout southeastern Pennsylvania, testified credibly and reasonably that the fee for writing the report should not exceed two hours. (FF 12.) In this case, the private evaluator proposed to spend six hours to write the report at $200.00 per hour. (FF 8.) In addition, the IU evaluator

testified credibly that the entire evaluation for the Student should not exceed eight hours, taking into account the areas of concern that the Parents' private evaluator had identified for further exploration. (FF 12.) The Parents' evaluator proposed to spend six to eight hours just for testing. (FF 8.) The private evaluator did not testify, so the private evaluator's opinion on the reasonableness of the proposed hours for evaluation is in the record solely based upon a letter sent in February to the Superintendent, seeking to justify the evaluator's original quotation. Weighing this letter against the credible testimony of the IU's contract evaluator, I find that the District's evidence is preponderant as to what is a reasonable amount of time that should be anticipated for an evaluation in the circumstances of the Student. In short, I find that the District has shown preponderantly that its proposed expense cap is reasonable and can be applied reasonably to the Student at the present time.

The Student's Parent, whom I also find credible and sincere, made it clear that she wanted a broad inquiry into the Student's speech and language difficulties, to make sure that the full dynamics of the Student's functioning, and all of the Student's needs, would be brought to light. There is no question that this is an appropriate desire and that it should be accommodated reasonably.

Yet, even while I agree with the parent's desire for a comprehensive evaluation, I find, in accordance with the testimony of the IU's evaluator, that the previous testing of the Student had been broad enough to bring to light any weaknesses that would impact Student's educational performance or achievement. There is no evidence to contradict the testimony of the IU's evaluator that the District's evaluations have screened the Student broadly and in a way reasonably calculated to find all of Student's speech and language weaknesses. Thus, the only thing that may remain to be done is to delve more deeply into those areas of weakness to make

sure that the District knows as precisely as possible how the Student's weaknesses affect learning and what would be the best approaches to teaching the Student in light of these weaknesses.

Even if independent testing reveals new weaknesses that were not detected by the District's testing, Parent would not be precluded from requesting further testing if professionally appropriate. Parent could request further evaluation because the law does preclude the District from enforcing its expenditure limit if the Student's unique circumstances require an evaluation that exceeds the expenditure cap. Thus, my decision today is not meant to prevent Parent from attaining the goal of a thorough independent evaluation; it merely recognizes that, on this record, the District's application of a $1500.00 limit on the cost of evaluation is reasonable and within the law, based on what is known at present.

Parent, in cross examination of the Superintendent, made much of the argument that the District's policy requiring superintendent approval of private evaluators' fees was not sent at the time that the IEE was approved, and that the District's policy did not state the precise expense cap applied to the Parents' requested IEE. However, the IDEA and its regulations do not specify the form in which a permitted expense cap must be promulgated, or precisely when it must be promulgated. I find nothing in the sequence of events or its character as a newly promulgated rule to call into question the credibility of the Superintendent or the good faith of the District in trying to control its costs in a reasonable way.

CONCLUSION

I conclude that the District's expenditure cap on the Parents' request for an IEE was appropriate under the IDEA. Any claims regarding expedited issues that are not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The IDEA authorizes the District to place a reasonable cap on the total cost of an IEE.
2. The cap set by the District in this matter was reasonable.

William F. Culleton, Jr. Esq.

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WILLIAM F. CULLETON, JR., ESQ.
HEARING OFFICER

May 14, 2011