

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania

Special Education Hearing Officer

DECISION

Student's Name: C.L.

Date of Birth: [redacted]

ODR No. 13201-12-13-AS

CLOSED HEARING

Parties to the Hearing:

Representative:

Parents

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Avon Grove School District
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Date of Hearing:

December 20, 2012

Record Closed:

January 9, 2013

Date of Decision:

January 16, 2013

Hearing Officer:

William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

The student named in the title page of this decision (Student) is an eligible resident of the school district named in the title page of this decision (District), and attends a District elementary school. (NT 127.) Student is identified as a child with Specific Learning Disability, pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). (NT 9.)

In response to a request for an independent educational evaluation at public expense (IEE) by Student's Parents (identified in the title page of this decision), the District filed a request for due process, seeking an order establishing that its re-evaluation dated May 6, 2011 is appropriate. (S-1, 4.) The District also requested an order concluding that the Parents are not entitled to an IEE specifically for a speech and language evaluation where the District had already funded an independent psychoeducational evaluation that did not include a speech and language evaluation.¹

The hearing was completed in one session. I conclude that the District failed to comply with the procedural requirements of the IDEA, by failing either to fund the requested IEE or file for due process without unnecessary delay. Consequently, I order the District to provide the requested independent speech and language evaluation at public expense.

ISSUES

1. Did the IDEA limitation to one IEE per District evaluation preclude Parents from requesting an independent speech and language evaluation?
2. Was the District's re-evaluation dated May 31, 2011, appropriate under the IDEA?

¹ In their opening remarks, Parents requested that this hearing officer issue an order requiring the District to provide an independent occupational therapy evaluation at public expense. I declined to hear this request due to lack of jurisdiction, because parents had not filed a request for due process as required by the IDEA, requesting such relief. 20 U.S.C. §1415(b)(4), (7)(B). (NT 18-20.)

3. Is the Parent entitled to an IEE at public expense?

FINDINGS OF FACT

1. Parents asked the District to evaluate Student's speech and language needs sometime before March 4, 2011, when Student was [a pre-teenager] and in fourth grade. (NT 126-127; S-1.)
2. Parents' concerns included Student's expressive language and what seemed to be a propensity to mumble at times, making Student difficult to understand and interfering with both reading and social functioning. (NT 126-131; P-3 p. 2.)
3. Although the District consulted with parents concerning the areas to be assessed, the March 4, 2011 Permission to Evaluate did not list articulation specifically as an area of functioning to be tested. (NT 57-58, 65, 108, 124-125; S-1.)
4. The District evaluated Student by having its speech and language pathologist conduct standardized testing with regard to language fundamentals, auditory processing, language processing and pragmatic language. The results of this testing were reported in a re-evaluation report dated May 6, 2011. (NT 53-55, 141-142; S-1.)
5. The District speech and language pathologist relied upon four standardized tests that did not measure whether or not there was an articulation difficulty; the pathologist relied upon personal observation to detect articulation problems. (NT 66-67; S-1.)
6. The pathologist conducted the four tests over three sessions in March and April 2011; each session lasted no more than one hour. In addition, the pathologist observed Student in the classroom on one occasion. (NT 55-58; S-1.)

7. The pathologist did not observe or detect any articulation difficulties. The pathologist's report did not explicitly address the Parents' concern that Student sometimes seemed to mumble. (NT 55-58; S-1.)
8. In June 2011, Parents disagreed with the District's evaluation and requested an IEE, specifically requesting an independent speech and language evaluation. (NT 30-33, 153-154; P-2 p. 1.)
9. About one month later, the District declined the IEE and filed for due process. (NT 33; P-2 p. 7.)
10. Parents subsequently withdrew their request for an IEE and Student completed most of the subsequent school year. (NT 34; S-2.)
11. Parents have communicated to the District that they are concerned with Student's articulation and perceived mumbling. (NT 49-50.)
12. In May 2012, Parents renewed their request for an IEE. The District agreed to provide an IEE, but did not specify that the IEE would include a speech and language evaluation. (NT 35-36, 44-45, 153-154; S-3 p. 1-2.)
13. The District intended in May 2012 to fund an IEE that would include a speech and language evaluation by a single evaluator who would also conduct all other independent evaluation of Student. (NT 35-36, 43-47; S-3.)
14. The Parents selected a neuropsychologist as an evaluator consistent with District policies (NT 37-38, 71; S-3 p. 5-35.)
15. Pursuant to District policies, the District engaged a neuropsychologist to complete the report; the District did not ask the neuropsychologist to conduct a Speech and language evaluation or to subcontract for that purpose. (S-3 p. 3.)

16. The neuropsychologist conducted cognitive and achievement testing and assessed Student's emotional, behavioral and social functioning, visual and spatial skills, and attention and executive functions. (NT 83-84; S-3 p. 5-35.)
17. The neuropsychologist considered the report of a private neurological examination that noted immature articulation and recommended a speech and language evaluation, as well as the report of a pediatric audiologist who recommended a speech and language evaluation. (NT 80-82; P-3 p. 47-49.)
18. In September 2012, the neuropsychologist presented a report to the District, which conveyed it to Parents. (S-3 p. 4-35.)
19. The neuropsychologist reported, among other things, that Student's functioning in all academic areas was impacted by difficulties with oral working memory and fluency, auditory processing and verbal retrieval. Student also displayed struggles with oromotor control and articulation, seeming to mumble at times. The neuropsychologist also reported symptoms of possible developmental dyspraxia, a condition that can affect speech articulation. (NT 74-77, 79-80, 86-87, 93-94; S-3 p. 5-35.)
20. The neuropsychologist recommended speech and language intervention or consultation to address Student's weaknesses in retrieval, auditory working memory and comprehension, and problems with articulation or mumbling. (NT 84-86, 88-90; S-3 p. 25.)
21. Parents renewed their request for an independent speech and language evaluation in October 2012. (NT 38-40; S-4.)
22. A speech and language evaluation would be appropriate to address the neuropsychologist's findings. (NT 67, 74-77, 79-80, 85-86, 110-111, 121; S-5.)

23. In November 2012, the Individualized Education Program (IEP) was revised to include a speech and language evaluation. The District listed this offer to evaluate in the IEP section entitled Modifications and Specially Designed Instruction. (NT 40-41, 46-47; S-5 p. 31.)
24. Parents participated in the IEP meeting that revised the IEP to include a speech and language evaluation; however, Parents later withheld consent for the evaluation. (NT 42-43.)

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 (which in this matter is the hearing officer).² In Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005), the United States Supreme Court held that the burden of persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence³ that the other party failed to fulfill its legal obligations as alleged in the due process complaint. L.E. v. Ramsey Board of Education, 435 F.3d 384, 392 (3d Cir. 2006)

This rule can decide the issue when neither side produces a preponderance of evidence – when the evidence on each side has equal weight, which the Supreme Court in Schaffer called

² 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.

³ 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.

“equipoise”. On the other hand, whenever the evidence is preponderant (i.e., there is weightier evidence) in favor of one party, that party will prevail, regardless of who has the burden of persuasion. See Schaffer, above.

In this matter, the District requested due process and the burden of proof is allocated to the District. The District bears the burden of persuasion that it has complied with the IDEA’s procedural requirements, that its re-evaluation was appropriate and that Parent is not entitled to an IEE. If the District fails to produce a preponderance of evidence in support of its claim, or if the evidence is in “equipoise”, then the District cannot prevail under the IDEA.

IDEA LIMITATION TO ONE IEE FOR EVERY CONTESTED LEA EVALUATION

The IDEA provides simply that the state must establish and maintain procedures to ensure that parents have the opportunity “to obtain an independent educational evaluation of the child.” 20 U.S.C. §1415(a), (b)(1). The regulations define “independent educational evaluation” as “an evaluation conducted by a qualified examiner who is not employed by the [LEA].” 34 C.F.R. §300.502(a)(3)(i). The regulations define the term “evaluation” as “procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.” 34 C.F.R. §300.15. While the IDEA entitles the parent to such an evaluation at public expense, however, the parent is “entitled to only one [IEE] each time the public agency conducts an evaluation with which the parent disagrees.” 34 C.F.R. § 300.502(b)(5).

In the present matter, Parents asked the District to evaluate Student’s speech and language needs sometime before March 4, 2011, when Student was [pre-teenaged] and in fourth grade. The District evaluated Student by having its speech and language pathologist conduct

standardized testing with regard to language fundamentals, auditory processing, language processing and pragmatic language. Parents disagreed with the District's May 2011 re-evaluation and requested an IEE in June, 2011. Parents specifically requested an independent speech and language evaluation. The District declined the IEE and filed for due process. Parents subsequently withdrew their request for an IEE and Student completed most of the subsequent school year.

In April 2012, Parents renewed their request for an IEE. They explicitly requested an independent speech and language evaluation. The District agreed promptly to provide an IEE, but did not specify that the IEE would include a speech and language evaluation. The District provided a list of potential evaluators, and Parents chose one⁴. The District contracted with the evaluator, a neuropsychologist, and the District did not ask that evaluator to provide a speech and language evaluation. There was no reason for the District to assume that the neuropsychologist was qualified to perform a speech and language evaluation, yet the District did nothing to provide for - or indeed respond to - Parents' request for an independent speech and language evaluation.

Parents did not raise any issue about the District's failure to respond to their request regarding speech and language. The issue did not re-emerge until late September, when the Parents received the report, which recommended, at least inferentially, a speech and language evaluation.

The neuropsychologist recommended speech and language services; since such services ordinarily would not be provided without a speech and language evaluation, the neuropsychologist's recommendation implied a recommendation for a speech and language

⁴ The evaluator chosen by Parents did meet agency criteria, 34 C.F.R. §300.502(b)(2)(ii), but was not qualified to conduct a speech and language evaluation.

evaluation, and the neuropsychologist has testified that she intended to recommend such an evaluation in her report. This recommendation was based upon the evaluator's observations of Student's problematic articulation, test scores indicating difficulties that called for speech and language services, and multiple recommendations for speech and language evaluation⁵ and services by other private evaluators, including a neurologist who had diagnosed Student with developmental dyspraxia.

Addressing the first issue in this matter, I conclude that the IDEA does not preclude Parents from requesting an independent speech and language evaluation in the present circumstances. The IDEA requires each agency evaluation or re-evaluation⁶ to address all of the child's suspected disabilities, and it also requires them to produce an evaluation sufficient to enable the IEP team to address all of the child's educational needs that arise from the child's disabilities. 34 C.F.R. §300.301(c)(2)(i), (ii); 34 C.F.R. §300.304(c)(4), (7). The IDEA regulation that defines an IEE explicitly incorporates these requirements into the definition of an IEE, as noted above. Therefore, I conclude that the IDEA and its regulations require that an IEE be just as comprehensive as the evaluation with which the parents disagree⁷. See, *Shaffer v. Weast*, 546 U.S. 49, 60-61 (2005)(recognizing statutory policy to provide parents with expertise necessary to meet agency arguments). The District's May 2011 re-evaluation included a speech

⁵ The District points out correctly that the neurological examination that recommended a speech and language evaluation appeared to be based in part upon the neurologist's apparent misimpression that Student had not received a speech and language evaluation by the District. However, the report indicates clinical observation of oral hypotonia and some articulation problems, (NT 146; P-3 p. 47, 49); thus, the neurologist's misimpression apparently was not the sole basis for the recommendation of a speech language evaluation. Moreover, I give this recommendation little weight; the primary basis for my findings in this regard is the recommendation of the neuropsychologist, who testified in this matter.

⁶ Since the requirements for re-evaluations are the same as those for evaluations, 34 C.F.R. §300.303(a), I use the terms interchangeably when referring to the IDEA requirements.

⁷ This is implied in Letter to Fields, 213 IDELR 259 (OSERS 1989), upon which the District seeks to rely for its general statement that only one IEE is allowed for each agency evaluation with which the parent disagrees. As part of an answer to another question in the same letter, OSERS stated that a parent was not required to specify what part of the evaluation the parent disagreed with, and if the parent would not reveal the part of concern, the agency would be required to fund an "entire" IEE. In context, this answer supports the view that the IEE must cover the same ground as the agency evaluation with which the parent disagrees.

and language evaluation by a qualified speech and language pathologist. Once the Parents disagreed with the May 2011 re-evaluation – explicitly requesting an independent speech and language evaluation – the District was obligated to respond to that request as prescribed by the IDEA and its regulations⁸.

The District’s position is inconsistent. The District argues that its May 2011 re-evaluation complied with the IDEA in part because it included a speech and language evaluation – that this was needed to address all of Student’s disabilities and needs. Yet it argues that the Parent requested independent speech and language evaluation is not necessary to provide a comprehensive educational evaluation. As noted above, the IDEA equates the rules and definitions applicable to agency evaluations and independent evaluations. The District cannot have it both ways.

A variant of the District’s argument is that a speech and language evaluation is not an “evaluation” as defined in the IDEA regulations – rather, it is a mere “assessment”. The District argues that the IDEA “evaluation” is the synthesis of many “assessments”, and the speech and language evaluation is one of these components. If that is the case, then the Parents are not requesting a second independent “evaluation” within the meaning of the IDEA – rather, they are merely requesting an additional assessment that is needed to form a complete and single independent “evaluation.”

⁸ The district relies upon Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1989) for the proposition that the Parents’ requested speech and language evaluation is precluded as it would constitute more than one evaluation. This case is inapposite. In Hudson, the parents had sought – and the court denied - reimbursement for “corroborative” evaluations (performed in addition to the independent evaluation that the court agreed was their right). These included forensic evaluations for purposes of litigation. In the present matter, Parents seek an evaluation that is a not duplicative, but rather is a necessary component of the overall evaluation, needed to address all of Student’s disabilities and educational needs.

THE DISTRICT'S NON-COMPLIANCE WITH IDEA PROCEDURAL REQUIREMENTS

When a parent requests an IEE, the IDEA requires the district to do one of two things “without unnecessary delay” 34 C.F.R. §300.502(b)(2). It must either request due process “to show that its evaluation is appropriate” or “Ensure that an independent educational evaluation is provided at public expense” 34 C.F.R. §300.502(b)(2)(i), (ii).

The District did not take either of these prescribed actions in May 2012, when Parents renewed their previously abandoned request for an independent speech and language evaluation. Instead, it agreed to an IEE in a generic sense and facilitated Parents in obtaining the evaluation by the neuropsychologist. It did not offer to fund the requested speech and language evaluation. It did not ask the neuropsychologist to do a speech and language evaluation (nor could it have done so since the neurologist was not qualified to do such an evaluation). It did not even acknowledge that Parents had made the request; it simply ignored the request.

By ignoring the Parents' request for an independent speech and language evaluation, the District failed to “ensure” its provision. 34 C.F.R. §300.502(b)(2)(ii). Instead, the District's supervisor explained that the supervisor intended that the independent evaluator would provide some tests that would have a bearing on the need for speech and language services. This silent intention on the part of the District's supervisor cannot be squared with the language of the regulation. I conclude that the District failed to comply with the regulations implementing the IDEA when it failed to respond to the Parents' May 2012 request to fund an independent speech and language evaluation.

UNNECESSARY DELAY

The District suggests that the Parents essentially acquiesced in the District's failure to provide the requested speech and language evaluation, by not objecting to its silence in the face of their request, and by waiting until October 2012 to reiterate the request for a third time. It points out that, when the Parents did reiterate their request, it promptly filed a request for due process to defend its May 2011 re-evaluation report. Having done so, the District asks that I declare its May 2011 re-evaluation to have been appropriate, and thus exonerate it of its responsibility under the IDEA to provide an IEE at public expense.

This argument is to no avail. The District's November request for due process failed to comply with the IDEA regulations, which require that the request be filed "without unnecessary delay" 34 C.F.R. §300.502(b)(2). As noted above, the District ignored parents' May 2012 request for an independent speech and language evaluation. Since it did not provide the requested IEE, its obligation to file for due process arose in May, yet it did not file for due process until November 2012.

The District, which bears the burden of proof in all respects on this issue, failed to introduce any evidence that this delay was not "unnecessary" within the meaning of the regulation. In light of the circumstances and my findings in this matter, and based upon the preponderance of the evidence, I conclude that the delay was unnecessary, and that the District failed to file for due process without unnecessary delay, as required by the IDEA regulations.

In effect, the District suggests that this delay was somehow the product of the Parents' failure to request an independent speech and language evaluation for yet a fourth time. The record is to the contrary. The delay was due to the District's deliberate decision to ignore the Parents' May 2012 request.

In view of the District's failure to comply with its procedural responsibilities with regard to the IEE, I conclude that the District is not entitled to a hearing officer declaration regarding the appropriateness of its May 2011 re-evaluation. Thus, I do not reach the question of the appropriateness of the May 2011 re-evaluation. The IDEA requires compliance with specific procedures, discussed above, as a condition of obtaining the relief that the District seeks. As the District did not comply with those procedures, it is not entitled under the IDEA to the relief it seeks.

The logical consequence of this decision is that the Parents are entitled under the IDEA to an independent speech and language evaluation by a qualified speech and language pathologist. However, Parents have not filed to request due process to seek an affirmative administrative order to that effect. I must consider therefore whether to go no further and leave Parents to their remedies, or to affirmatively order the District to provide the requested IEE. I conclude that I should issue an affirmative order.

If I issue no order, and the District fails to provide the requested IEE, it would appear that the Parents would be compelled to file for due process and ask for an affirmative order, relying upon this decision. I see no reason in justice or equity to put them to that further procedural hurdle, and inflict upon them the need to request the speech and language evaluation yet a fourth time. It seems inequitable to impose upon them the further expense and delay that a new round of administrative proceedings would require. Therefore, in the exercise of my equitable and remedial jurisdiction under the IDEA, I will order the District to provide the requested IEE.

CREDIBILITY

Although the District raises a number of arguments attacking the credibility of the Parents' neuropsychologist, I find her testimony to be credible and reliable with regard to her recommendation for and the need for a speech and language evaluation. The District suggests that the neuropsychologist's failure to explicitly recommend a speech and language evaluation (although she recommended speech and language services) somehow leads to the conclusion that she was recommending the evaluation only belatedly and for litigation purposes. On the whole record, I do not accept that characterization. As noted above, recommending services inferentially means recommending an evaluation; it is implausible that the expert would have carefully avoided recommending a speech and language evaluation while explicitly recommending an occupational therapy evaluation – rather it is more likely that the neuropsychologist simply chose words poorly in her report. Other flaws in the report raise no inference about the credibility of this recommendation. The District's own witnesses agreed that a speech and language evaluation should have been done and the District, without a Request to Evaluate, offered to do one. The record leaves little doubt that the neuropsychologist's findings militated in favor of a new speech and language evaluation.

In contrast, while I do not doubt the veracity of the District's supervisor, I find implausible the supervisor's explanations surrounding the District's response to the Parents' May 2012 request. I give little weight to the suggestion that the supervisor expected the neuropsychologist to do an appropriate speech and language evaluation.

CONCLUSION

For the reasons stated above, I conclude that the IDEA does not preclude Parents from receiving an independent speech and language evaluation by a qualified speech and language pathologist. I also conclude that the District failed to comply with the procedures set forth in the IDEA regulations governing parental requests for independent educational evaluations. I therefore conclude that the District is not entitled to the relief which it seeks, and I decline to reach the issue of the appropriateness of the May 2011 re-evaluation. As a further remedy for the District's non-compliance, I will order the District to provide the evaluation requested by the Parents, at public expense.

Any claims regarding issues that are encompassed in this captioned matter and not specifically addressed by this decision and order are denied and dismissed.

ORDER

1. The IDEA limitation to one IEE per District evaluation does not preclude Parents from requesting an independent speech and language evaluation in the circumstances of this matter.
2. As the District failed to comply with the IDEA regulations that are a condition of administrative relief, I decline to reach the question of the appropriateness of the District's May 2011 re-evaluation.
3. I hereby order the District to provide an independent speech and language evaluation through an qualified speech and language pathologist, at public expense, consistent with District criteria within the meaning of 34 C.F.R. §300.502(b)(2)(ii).

William F. Culleton, Jr. Esq.

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

January 16, 2013