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

ODR No. 13338-1213 AS

Child's Name: A.Z.

Date of Birth: [redacted]

Dates of Hearing: 1/8/13, 1/16/13, 1/17/13

OPEN HEARING

Parties to the Hearing:	Representative:
Parents Parents	Parent Attorney None
School District Gateway 9000 Gateway Campus Boulevard Monroeville, PA 15146	School District Attorney Jocelyn Kramer, Esq. Law Offices of Ira Weiss 445 Fort Pitt Boulevard, Suite 503 Pittsburgh, PA 15219
Date Record Closed:	February 4, 2013
Date of Decision:	February 25, 2013
Hearing Officer:	Anne L. Carroll, Esq.

INTRODUCTION AND PROCEDURAL HISTORY

Student in this case has a medical diagnosis of autism spectrum disorder, as well as mental health disorders and ADHD. Student received educational services at home during the 2011/2012 school year, when the family resided in [another state] but was not evaluated by the school district in which the family resided.

The family relocated to Pennsylvania late in the spring of 2012 and found temporary housing within the District. Parents enrolled Student at the beginning of the 2012/2013 school year, when they signed an agreement to purchase a house within the District after two unsuccessful efforts to buy a house in a neighboring district.

Initially, Parent provided the District with medical and educational records, and the District later received additional records from school districts Student had attended in [two other states]. The District began providing home-based academic instruction and occupational therapy, but sought an initial evaluation in late September 2012, after an IEP meeting and review of the records available at that time. Parents refused the District's initial request and two later requests that expanded the scope of the evaluation based upon further information and discussions with Parents.

After Parents refused consent to the District's November 2012 request to evaluate, the District filed the complaint in this case to seek an order permitting the evaluation. Parents had previously filed their own due process complaint, alleging that the District failed to implement Student's pending IEP and provide adequate and appropriate special education services. Three hearing sessions created a full evidentiary record for decisions on all issues raised by both complaints. This decision and order, however, relates only to the District's complaint.

Although the applicable law alone would justify a decision in favor of the District on the evaluation issues, the facts of this case also amply support the District's position. Consequently, the District will be permitted to proceed with an initial evaluation of Student.

ISSUES

1. Did the School District violate IDEA procedures in seeking to conduct an educational evaluation of Student based upon three Permission to Evaluate (PTE) forms sent to Parents between September and November 2012?

2. Is the District entitled to conduct an initial evaluation of Student as requested in its November 27, 2012 PTE despite the existence of medical and other information concerning Student's diagnosis and educational needs contained in records provided to the District?

3. Is the District entitled to an order that it had no obligation to continue providing a special education placement and services to Student once Parents refused consent for an initial evaluation requested in a September 2012 PTE?

FINDINGS OF FACT

1. Student, born [redacted] is currently [a preteenaged] resident of the School District with a medical diagnosis of autism who received special education services in other states before relocating to Pennsylvania. (N.T. pp. 10, 11(Stipulation); S-2, S-2A)

2. The parties stipulated that at the time the due process complaint in this case was submitted and the hearing began, Student was receiving instruction in the home and occupational therapy from the District. The District provided the special education placement and related service based upon an IEP from [an out of state] school district where the family resided during the 2011/2012 school year. (N.T. p. 12; S-2)

3. Parent enrolled Student in the District on August 31, 2012 the Friday before Labor Day, noting on the enrollment form that Student had received special education and speech services, and attaching an IEP from the [out of state] school district. Parent also requested home-based services. The registration packet was provided to the director of special education on September 4, 2012. (N.T. pp. 60, 95, 98; S-1 pp. 1, 2, 8)

4. Also attached to the enrollment documents was a letter from [an out of state] neuropsychologist dated April 25, 2012 requesting homebound educational services in Pennsylvania due to Student's diagnoses of an autistic spectrum disorder, a major depressive disorder, an anxiety disorder, ADHD and a history of mental health symptoms and behaviors related to attending school. Student had been receiving home-based instruction from the [out of state] school district. (N.T. pp. 95, 96, 100, 101, 302; S-2, S-2A)

5. After reviewing the enrollment documents, the District's director of special education made several telephone requests for Student's educational records to the [out ofstate] school district, and subsequently sent a letter, but did not receive any records until October 15, 2012. (N.T. pp. 95, 114, 119, 120, 129—131; S-1 p. 5, 10A—C)

6. The special education director had telephone conversations with Parent on September 4 and 5. In those conversations, the special education director tried to arrange an IEP meeting, discussed the need for an evaluation of Student and requested that Parent provide records in addition to the [out of state] IEP. Parent initially declined an IEP meeting, and requested that homebound services begin, but ultimately agreed to an IEP meeting on September 19. (N.T. pp. 104—114; P-70 p. 1, P-107 pp. 6, 7, S-2)

7. On September 6, Parent provided the District with a number of documents via e-mail attachments. The most recent information about Student available to the District at the beginning of the current school year was provided by a July 2011 neuropsychological evaluation, in addition to the [out of state] IEP. Achievement testing and other assessment results described in the IEP, and included among the documents sent to the District by Parent, were conducted between 2007 and 2010. (N.T. pp. 96, 97, 100, 114—117, 297, 298; P-70 p. 1, P-107 pp. 4, 5, S-2 pp. 16, 17, S-3A, S-3I pp. 6, 7)

8. The neuropsychological evaluation was undertaken between May and July 2011 after referral from Student's treating psychiatrist. The evaluation report listed medical diagnoses of autistic spectrum disorder, major depressive disorder, single episode, severe without psychosis, generalized anxiety disorder and ADHD combined type, all made by a psychiatrist in 2010, prior to the family's relocation to [another state]. An evaluation at Children's Hospital of Philadelphia (CHOP) in 2009 had also resulted in diagnoses of Autism Spectrum Disorder and ADHD. (N.T. p. 299; S-3A pp. 1, 2)

9. In his report, the neuropsychologist noted Student's refusal to attend school beginning in April 2011 and a psychiatric hospitalization around that time for suicidal ideation. (S-3A p. 1)

10. The evaluation report also described a compulsive, mildly self-injurious behavior, [redacted], "obvious social skills deficits," and the results of prior evaluations, including a December 2007 evaluation that yielded a WISC-IV FSIQ of 108 and unspecified "high average to superior" results of achievement testing. The neuropsychologist further noted that prior speech evaluations showed receptive/expressive language deficits, a mild articulation delay and suggested difficulties with auditory processing. (N.T. pp. 299, S-3A p. 2)

11. The neuropsychologist administered the WISC-IV, resulting in an FSIQ of 106, in the average range. Student also performed within the average range on the Beery Developmental Test of Visual-Motor Integration and the Trail-Making Test, a measure of sequencing ability requiring focused visual motor integration, attention and shifting of mental set to different stimuli. (N.T. pp. 299; S-3A pp. 3—5)

12. Student performed within the mildly impaired range on the Wepman Auditory Discrimination Test and showed mild cognitive deficits on the NEPSY-II, as well as the general developmental functioning of a five year old child on the Developmental Profile-3, with poorly developed social-emotional, communication and adaptive behavior skills in particular. (N.T. pp. 299; S-3A pp. 4, 5)

13. The neuropsychologist confirmed the diagnosis of autistic spectrum disorder, anxiety disorder and ADHD. Major depressive disorder without psychotic features, but now recurrent and severe, was also noted, but it was not clear from the report whether that diagnosis was made by the neuropsychologist based on the evaluation or by the referring psychiatrist. Although no achievement test results or curriculum-based assessments were reported, the evaluation report noted that Student was reading at a 6th grade level. (N.T. p. 299; S-3A p. 6)

14. The neuropsychologist recommended that speech/language and OT services be resumed, and recommended a physical therapy (PT) evaluation and further auditory processing tests. He also recommended Applied Behavior Analysis (ABA) to address behaviors such as tantrums and aggression, as well as to improve social skills and a detailed IEP, noting that academic instruction needed to begin in the home with short sessions and adjustment by teachers and other service providers to Student's sensory, motor, social and behavior needs. Individual counseling for Student was also recommended, along with neuropsychological follow-up in three months and repeat testing in 18—24 months. (N.T. pp. 299—301; S-3A pp. 6, 7)

15. The [out of state] IEP provided homebound instruction and OT during the 2011/2012 school year, through June 4, 2012. The IEP included one goal, for completing homebound instruction assignments, with three short-term objectives, and specified a number of accommodations to be implemented by the homebound teacher. (N.T. pp. 98, 99; S-2 pp. 2, 4, 7, 10, 12, 13, 19)

16. Student's level of academic performance/functioning was reported in a section of the IEP designated "Prior classroom teacher input," which stated that "[Student] appears to be at grade level in all academic areas, except for writing. He has scored at grade level on all placement assessments, and classroom assignments. His relative strength is math. He is very curious. He is mild-mannered and a pleasure to work with. He is inquisitive." The source(s) of that information, including the names and grade levels taught by the person or persons who provided the input, were not identified. (N.T. p. 102; S-2 p. 17)

17. The District director of special education had immediate concerns about the IEP and her concerns increased after reviewing the additional documents provided by Parent on September 6 and after reviewing a far more extensive IEP for the 2010/2011 school year from [another out of state] school district, received on September 7, 2012 in response to the District's record request. (N.T. pp. 112, 116, 117, 119—122; S-4)

18. Based upon the review of the documents the District had in September 2012, and after discussing at the September 19 IEP meeting the need for an evaluation and Parents' concerns about subjecting Student to a large number of assessments, the District wanted to conduct an initial evaluation limited to the fewest assessments necessary to determine Student's eligibility based on a disability category recognized in Pennsylvania, to determine the nature and extent of Student's need for special education and related services in accordance with Pennsylvania special education procedures, and to address

concerns noted by the teachers who were providing educational services to Student in the home setting. (N.T. pp. 117—119, 127—129, 203, 304)

19. The District expected to use the medical and other evaluation information provided by Parents, including the cognitive assessments in the 2011 neuropsychological report, as part of its evaluation in order to reduce the number of assessments it needed to administer. (N.T. pp. 303—305)

20. The District sent Parents a permission to evaluate (PTE) form dated 9/28/12 listing as evaluation components a records review, parent input, curriculum based assessments (CBAs), a functional behavioral assessment (FBA), OT evaluation, PT evaluation and a speech/language assessment. (N.T. pp. 123—125, 127, 128; P-58 p. 2, S-8 p. 2)

21. The PTE cover letter explained the reasons for the evaluation, as well as the District's belief, shared by the county behavioral health staff member who accompanied Parent to the IEP meeting, that Parent had agreed to the proposed evaluation at the September 19 IEP meeting. (N.T. pp. 307, 308, 706, 713, 714; P-58 p. 1, S-8 p. 1)

22. Parents refused permission to evaluate by letter dated October 10, 2012. In the letter, Parents stated their position that any evaluation would be a reevaluation, not an initial evaluation, and that the District's PTE did not comply with IDEA standards. (N.T. pp. 129; S-9 pp. 1, 2)

23. Parents did agree to permit the proposed OT and PT evaluations as part of a reevaluation but never returned a signed PTE. (N.T. p. 129; S-9 p. 2)

24. After reviewing additional records received from [an out of state] district on October 15, including e-mail correspondence relating to a three year evaluation due in May 2012, the scheduled end of homebound services on June 4 2012, notations that the [out of state] district had been attempting to reevaluate Student, and concerns about Student's educational program and related services, the District issued a second PTE for an initial evaluation on October 17, 2012. The October PTE, accompanied by a NOREP, added standardized achievement assessments to the proposed evaluation but otherwise included the same types of information and assessments as the District's first PTE. (N.T. pp. 129—131, 139, 140, 143—147, 307—311; S-10A pp. 9, 15, S-10B pp. 18, 38, 44, S-11 pp. 1, 3—5, 7)

25. Parents filed a due process complaint on November 3, 2012 alleging discrimination and retaliation under §504 0f the Rehabilitation Act of 1973, seeking implementation of the [out of state] IEP and compensatory education. Parents also alleged that the PTEs issued by the District did not comply with IDEA standards. (N.T. p. 149; S-A pp. 4, 6—8[1])

[1] S-A is Parents' Due Process Complaint in ODR File # 13216-1213 AS, which will be the subject of a separate hearing officer decision based upon the same three hearing sessions and documents that comprise the evidentiary record for this decision..

26. At the statutorily required resolution meeting, which included an ODR facilitator at Parents' request, the participants discussed the District's proposed evaluation, and based on Parent's comments concerning the limited scope of the assessments the District was proposing for an initial evaluation, the District issued a third PTE on November 27, 2012. The District participants, the IEP facilitator and the county behavioral health staff member who accompanied Parent to the resolution meeting believed that Parent was requesting a more comprehensive evaluation, as well as a more detailed description of the assessments the District proposed. (N.T. pp. 149—152, , 313, 314,703, 704, 714, 716; S-14 p.1)

27. The November 27 NOREP and PTE specified reading, writing and math CBAs and achievement assessments. In addition to the proposed assessments/information included in the first two PTEs (Records review, Parent input, FBA, OT, PT evaluations and speech/language assessment), the District added Autism Rating Scales, a neuropsychological evaluation (including intelligence testing) and a psychiatric evaluation. The PTE did not include specific information concerning the evaluators the District proposed to conduct the assessments to the extent Parents wanted and expected (N.T. pp. 153—155, 716; S-14 pp. 1, 3, 6)

DISCUSSION AND CONCLUSIONS OF LAW

Before considering the issues presented by this case in light of the factual record, it is helpful to describe the law that governs resolution of the matters in dispute.

Legal Standards Applicable to the Issues in this Case

1. Right to a Due Process Hearing/Burden of Proof

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3rd Cir. 2009).

In *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion, one of the two aspects of the burden of proof. Consequently, in this case, because the District filed the due process complaint to override

Parents' refusal to consent to its proposed evaluation, it was the District's burden to establish its right to proceed with the evaluation.

Since the Court limited its holding in S*chaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding, the burden of proof analysis affects the outcome of a due process hearing only in that rare situation where the evidence is in "equipoise," *i.e.,* completely in balance, with neither party having produced sufficient evidence to establish its position.

Here, the applicable law, as well as the facts established by the evidence, leave no doubt that the District's proposed evaluation must be permitted. The decision, therefore, does not depend upon allocating the burden of persuasion to the District.

2. IDEA Requirements Relating to Interstate Transfer Students

When a student with an IEP that is in effect transfers into a school district in another state during the same school year, the federal IDEA regulations require the transferee school to provide comparable services, "until the new public agency—(1) Conducts an evaluation pursuant to §§300.304 through 300.306 (if determined to be necessary by the new public agency);" 34 C.F.R. §300.323(f).[2]

Through the years, that provision has been interpreted by the federal Department of Education through sub-agencies responsible for implementing special education requirements, the Office of Special Education Programs (OSEP) and the Office of Special Education and Rehabilitative Services (OSERS). OSEP issued a general policy memorandum relating to

[2] This provision also applies under the applicable state regulations. The Pennsylvania special education regulations adopt the federal regulations found at 34 C.F.R. §§300.300—300.325 without change or elaboration. *See* 22 Pa. Code §14.102(a)(2), (xxiv), (xxv), (xxvi), and (xxvii).

interstate transfers in 1995 and OSERS has provided further guidance in the form of questions and answers concerning how that regulatory section is to be implemented. *See Memorandum 96-5*, 24 IDELR 320 (OSEP 1995); *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations*, 47 IDELR 166 (OSERS 2007); *Questions and Answers on Individualized Education Programs (IEPs), Evaluations, and Reevaluations* 54 IDELR 297 (OSERS 2010).

The OSEP policy memorandum notes that after enrolling a student with an IEP from another state, the transferee school district's first step is to determine whether it is willing to adopt the most recent evaluation and eligibility determination from the prior district, or if an evaluation of the student is needed. If the new school district determines that an evaluation is necessary, it is "treated as a pre-placement evaluation" and parent consent is necessary for the evaluation. There is no suggestion in the regulations, the 1995 OSEP memorandum or later OSERS guidance, however, that the need for an evaluation is to be determined with parent input through an IEP meeting or any other means.

Very recently, a Washington state federal district court also concluded that §323(f) grants the transferee school district complete discretion to determine whether an evaluation is necessary, and does not require the new district to establish the need for an evaluation. *J.B.v. Lake Washington School District*, 113 LRP 2899 (W.D. Wash. 2013).[3]

Although the decision in the *Lake Washington School District* case is not binding, the court was interpreting the IDEA regulations applicable to this issue in all states. The court's reasoning is both persuasive and in accordance with the reasoning of the Court of Appeals for the Third Circuit in *Michael C. v. Radnor Twp. School District*, 202 F.3d 642 (3rd Cir. 2002), a

[3] This case was cited in the School District's closing statement under the name *B.B .v. Lake Washington School District*, using student's initials rather than a parent's initials, but it is the same case and was sent to both parties by the hearing officer via an e-mail attachment on 1/29/13.

decision that does apply to Pennsylvania decisions. In the *Radnor Twp. School District* decision, the court discussed the right of school districts in each state to make an independent determination whether an IEP from another state meets state standards. 202 F.3d at 650. In addition, the court noted that deference is due to official policy statements issued by the Office for Special Education Programs (OSEP), and specifically in that case, *Memorandum 96-5*. 202 F.3d at 652.

The section of the IDEA regulations relating to interstate transfers does not directly and explicitly address the situation where a student who received special education services in another state does not transfer to a different state during a school year but enrolls in the new school district during the summer or at the beginning of a new school year, when there was no IEP in effect because school is not in session when the student entered the new district. The agency discussions do, however, address the situation of an IEP that is unavailable from either the prior school district or parents. In that event, the new school district "has no duty to provide comparable services. The district may choose to provide special education services while it pursues an initial evaluation." 54 IDELR 297 (OSERS 2010). That language implies that the new school district could also choose to provide only regular education services.

Moreover, in the event parents disagree with an evaluation proposed by the new district and file a due process complaint, and the parties cannot agree upon an interim placement and services, the transferee district may place the student in the regular education program pending the outcome of the due process proceedings. OSEP *Memorandum 96-5*. That conclusion was reiterated by OSERS in 2007:

> If there is a dispute between the parent and the new public agency regarding whether an evaluation is necessary, or regarding what special education and related services are needed to provide FAPE to the child, the dispute could be resolved through the mediation procedures or, as appropriate, the due process

> procedures. Once a due process complaint notice requesting a due process hearing is filed, the child would remain in the regular school program during the pendency of the due process proceedings.

47 IDELR 166.

3. Evaluation/Reevaluation Standards

The federal IDEA regulations include specific requirements for evaluations of students who may be disabled, as well as standards for the periodic reevaluation of eligible students, set forth at 34 C.F.R. 300.301, *et seq*. The general standards for an appropriate evaluation (or reevaluation) are found at 34 C.F.R. §§300.304—300.306, which require a school district to: 1) "use a variety of assessment tools; " 2) "gather relevant functional, developmental and academic information about the child, including information from the parent;" 3) "Use technically sound instruments" to determine factors such as cognitive, behavioral, physical and developmental factors which contribute to the disability determination; 4) refrain from using "any single measure or assessment as the sole criterion" for a determination of disability or an appropriate program. C.F.R. §300.304(b)(1—3).

In addition, the measures used for the evaluation must be valid, reliable and administered by trained personnel in accordance with the instructions provided for the assessments; must assess the child in all areas of suspected disability; must be "sufficiently comprehensive to identify all of the child's special education and related service needs" and provide "relevant information that directly assists" in determining the child's educational needs. 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7).

Every reevaluation (and initial evaluations if appropriate) must also include: 1) a review of existing evaluation data, including a) local, state and current classroom-based assessments; b) classroom–based observations by teachers and related service providers; 2) a determination of

additional data, if any, necessary to determine a) whether the child has an IDEA-defined disability (in the case of an initial evaluation); b) the child's educational needs, present levels of academic achievement and related developmental needs; c) whether the child needs/continues to need specially-designed instruction and related services. 20 U.S.C. §1414(c); 34 C.F.R. 300.305(a)(1), (2). It is a district's responsibility to administer all assessments and other measures needed to compile the required evaluation data. 34 C.F.R. 300.305(c).

Once the assessments are completed, a group of qualified school district professionals and the child's parents determine whether he/she is a "child with a disability" and his/her educational needs. 34 C.F.R.§300.306(a). In making such determinations, school districts are required to: 1) "Draw upon information from a variety of sources," including those required to be part of the assessments, assure that all such information is "documented and carefully considered." 34 C.F.R. §300.306 (c)(1). School districts must also provide a copy of the evaluation report and documentation of the eligibility determination to parents at no cost. 34 C.F.R. §300.306(a)(2). If it is determined that the child meets the criteria for IDEA eligibility *i.e.,* is a child with a disability and is in need of specially designed instruction, an IEP must be developed. 34 C.F.R. §§300.306(c)(2).

Procedural and Substantive Appropriateness of the District's Proposed Evaluation

The discussion of the legal standards relating to a new school district's absolute right to conduct an initial evaluation of a student transferring from another state leaves no doubt that as a matter of law, the District in this case is entitled to proceed with its evaluation of Student as proposed in the November 27, 2012 PTE. (FF 27) Nevertheless, it may be helpful to the parties to further explain the reasons the District will be permitted to conduct its proposed evaluation of Student in terms of both additional legal considerations and the specific facts of this case.

Parent's position throughout the hearing was that the IDEA regulatory requirement concerning the need to include a review of records in reevaluations and initial evaluations when appropriate means that in this case, the District was required to consider Student's medical records and educational records received from other school districts in [other states], in order to determine whether the District had sufficient information to determine Student's eligibility arising from the existence of a disability in one of the categories listed in 34 C.F.R §300.8(c) and Student's need for special education. Parent also contended that the District was then required to convene an IEP meeting to discuss the need for more information with Parents before issuing a PTE.

As noted above, there is no requirement that the District consult with the parents of a student transferring from another state with respect to whether an evaluation is necessary. School districts are free to make that determination unilaterally. There is, therefore, no requirement that the District convene an IEP meeting to discuss the need for an evaluation, Consequently, there is no procedural violation arising from the District's general policy of seeking an evaluation of students transferring from other states. (N.T. p. 232)

Moreover, even if the District's general policy and procedure were flawed due to a lack of consideration of individual circumstances, it also appears that scheduling an early meeting with the parents of an out of state transfer student is also part of the District's general procedures. In any event, in this case, the District tried to arrange an IEP meeting with Parent almost immediately and delayed it until mid-September only because Parent was not available earlier. (FF 6) In addition, the District discussed the need for an evaluation with Parent both in the initial telephone conversations and at the September 19 IEP meeting, as confirmed by the advocate from behavioral health services who accompanied Parent to the IEP meeting. (FF 18,

21) Finally, in this case it is quite clear that the District considered an evaluation of Student necessary based upon the nature and quality of the prior information available from Student's prior educational records, particularly the [out of state] IEP. (FF 17, 18) The District, therefore, did not request permission to evaluate Student based upon a general policy, unconnected to Student's specific situation and needs, or without prior discussion with Parent, although there is no requirement to do so.

In this case, the District also took into account Parent's concerns about over-evaluating Student by limiting the number of assessments it proposed for its initial evaluation, intending to use existing information to the greatest extent possible. (FF 18, 19, 20) After the September 19 IEP meeting the participants, except Parent, apparently, believed that the contours of an evaluation had been agreed by the parties, but Parent nevertheless refused to sign the PTE issued on September 28. (FF 21, 22) When Parent later took the position that the limited assessments the District proposed were insufficient as a proposal for an initial evaluation, the District expanded the scope of the evaluation, although it had initially limited the proposed in response to Parent's concerns that an extensive evaluation might adversely impact Student. (FF 18, 26, 27) In short, although the District attempted to work with Parent in order to move forward with the evaluation as quickly as possible, Parent's shifting positions made a collaborative process impossible. It is apparent that Parent was unwilling to agree to any evaluation proposed by the District, and that the only level of cooperation and input that Parent would have considered acceptable would have been the District's agreement to determine Student's eligibility for special education services without an evaluation that includes current assessments.

Parent also contends that there is sufficient existing information to determine Student's IDEA eligibility and needs for special education and related services. That is clearly inaccurate,

however, as a matter of both fact and law. The IDEA statute and regulations begin the definition of the term "child with a disability" with the words, "a child **who has been evaluated in accordance with §§300.304 through 300.311**…" 34 C.F.R §300.8(a)(Emphasis added). That language does not suggest that either a records review or a non-educational evaluation, medical or otherwise, is sufficient for an initial evaluation and eligibility determination. To the contrary, it suggests that an evaluation that meets IDEA regulatory standards must be completed before an initial determination of IDEA eligibility, although that can be altered with respect to an interstate transfer student if the new school district has sufficient recent information. Despite Parents' contention that the existence of educational evaluations from another state renders the District's proposed evaluation a reevaluation, the IDEA regulation relating to interstate transfers, as interpreted by OSEP and OSERS, make it clear that the evaluation of an interstate transfer student is an initial evaluation.

In this case, the most recent available information concerning Student's cognitive and adaptive functioning comes from a private neuropsychological evaluation, not a school district educational evaluation. There is no indication that 2011 neuropsychological evaluation was expected to serve as either an initial IDEA evaluation or a reevaluation. It does not include any curriculum-based or standardized achievement measures as necessary assessments, and further assessments of OT and PT were recommended. Most important, the report recommends additional testing in 18—24 months, so an evaluation at present by the District complies with the neuropsychologist's recommendation. (FF 14)

In summary, although the District's determination that an evaluation is needed is not subject to a reasonableness requirement, its decision to proceed with an evaluation was eminently reasonable in the absence of a recent school district evaluation and objective

information concerning Student's educational levels, as well as significant mental health concerns that prompted a request and a recommendation that Student remain in a very restrictive educational placement, receiving instruction at home. (FF 4, 5, 9, 13, 14)

Educational Services Before the Evaluation Is Completed

In addition to seeking permission to conduct an evaluation, the District also seeks a decision and order that it was not obligated to provide special education services to Student from the date of Parents' first refusal of consent for an evaluation in September 2012. The District's request for, essentially, a declaratory judgment, is based on its contention that the IDEA regulations provide that when a student moves from one state to another, the district in the transferee state has an absolute right to determine the transferring student's IDEA eligibility and needs via an evaluation that is considered an initial evaluation, and, therefore, if parents refuse permission for such an evaluation, the transferee district is justified in considering the transfer student a regular education student whose IDEA eligibility has not been established.

The agency guidance for applying §300.323(f) supports the District's position partially, but not entirely. Even if parties in a case relating to an interstate transfer disagree with respect to an evaluation, they can agree to an interim program and placement, as the parties did in this case when the District agreed to provide instruction in the home, a special education placement. (FF 2) The District is not, however, required to continue to agree to special education services if there is a disagreement over an evaluation that results in due process proceedings. In that event, the District may consider a transfer student a regular education student. *OSEP Memorandum 96-5* at p. 3; *Questions and Answers,* 47 IDELR 166 (OSERS 2007).

There is no explicit guidance for the situation presented by this case, however, where the disagreement over the evaluation first arose in September 2012 but due process proceedings

were not initiated until much later. Here it was Parents who first filed a due process complaint on November 3, 2012 that raised issues relating to the District's proposed evaluation. Although Parent had refused permission for the District to evaluate Student in September and October, the District did not initiate its own due process complaint until early December, after the resolution session on Parents' complaint and the rejection of the District's third PTE. (S-L) Until that point, the District was willing to continue its efforts to reach an agreement with Parents concerning the evaluation. The District now wants to rescind its agreement to provide special education services to Student as if the parties' disagreement over the evaluation had ripened into due process proceedings in October, when Parent rejected the first PTE, yet seeks an order permitting the evaluation described in the third PTE. Since Parents' refusal to permit the evaluation described in the November 27 PTE resulted in a due process complaint, the District was permitted to treat Student as a regular education Student during the pendency of the due process proceedings from the date the District's complaint was submitted on December 7, 2012.

CONCLUSION

For the reasons explained above, the District will be permitted to proceed with an initial evaluation of Student and determine IDEA eligibility as provided in 34 C.F.R. §323(f) and as described in the PTE issued on November 27, 2012. The parties are encouraged to work together to determine whether additional assessments might be warranted, such as a sensory evaluation, if not included in the OT evaluation, and an assistive technology evaluation.

The District may treat Student as a regular education student pending completion of the evaluation, determination of eligibility and development of an IEP, if Student is determined to be IDEA eligible. The District may, therefore, require Parents to provide medical justification to continue providing home-based instruction, which may now be considered the temporary regular

education placement, homebound instruction, rather than the special education placement designated instruction in the home.

The District is, of course, required to comply with IDEA requirements concerning the selection of evaluators and assessments, as well as the Pennsylvania timeline for completing an evaluation. Parents are encouraged to cooperate in scheduling assessments in order to assure timely completion of the evaluation.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the School District is permitted to proceed immediately with the evaluation of Student described in the Permission to Evaluate dated November 27, 2012 in compliance with all applicable statutory and regulatory requirements relating to an initial evaluation.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are denied and dismissed.

February 25, 2013

Anne L. Carroll

Anne L. Carroll, Esq.
HEARING OFFICER