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: B.R.

Date of Birth: [redacted]

ODR No. 13610-12-13-KE

CLOSED HEARING[1]

Parties to the Hearing:	Representative:
Parents	Judith A. Gran, Esquire Reisman, Carolla, Gran, LLP 19 Chestnut Street Haddonfield, New Jersey 08033-1810
Southern York County School District 2900 Terwood Road Willow Grove, PA 19090-1431	Karl A. Romberger, Jr. , Esquire Sweet, Stevens, Katz & Williams LLP 331 Butler Avenue New Britain, PA 18901
Dates of Hearing:	None; Record Stipulated
Record Closed:	May 7, 2013
Date of Decision:	May 22, 2013

[1] Although no hearing was convened, I will treat this as a closed hearing (in order to protect Student's privacy) and I request that the Office for Dispute Resolution treat it as a closed hearing by redacting this decision.

Hearing Officer: William F. Culleton, Jr., Esquire

INTRODUCTION AND PROCEDURAL HISTORY

Southern York County School District filed a request for due process hearing on March 5, 2013. The complaint notice states that the District:

> is refusing request for an Independent Educational Evaluation at public expense. SYCSD first requested, and obtained, parental permission to conduct a re-evaluation, including psychiatric evaluation, psychological evaluation, behavior checklists, classroom observation, and educational, social, and physical records review. Parents subsequently requested an IEE at public expense and withdrew consent for the RR. Further, parents' IEE at public expense request is not reasonably contemporaneous with a school district completed (re)evaluation and thus not premised on disagreement with a school district evaluation per 34 CFR 300.50(b)(1). SYCSD must be allowed to complete its proposed evaluation and, until then, parents' requested IEE at public expense is premature.

I construe this language to assert that the Parents[2] are not entitled to an independent educational evaluation at public expense (IEE) because the Parents requested the IEE after the District conveyed its request to re-evaluate and before the completion of the re-evaluation. However, the District goes further in its request for relief, asking for an order "that [it] be allowed to proceed with and complete its proposed reevaluation … ." Thus, the District argues that it has the right to an administrative order authorizing re-evaluation despite parental withdrawal of consent.[3]

Parents filed a motion for summary judgment, asserting that the District had no right to re-evaluate without parental agreement, because the proposed re-evaluation would occur within one calendar year of the previous re-evaluation. Parents also asserted that their disagreement with a prior re-evaluation of the Student entitles them to an IEE.

[2] The Parents acted jointly, usually through the Student's Mother, in most transactions depicted herein. References herein to "Parent" in the singular refer, for ease of reference, to Student's Mother. In one transaction, Parents acted separately and I have indicated that by referring to them individually in the text.
[3] No sufficiency challenge was filed in this matter.

At my suggestion, and in lieu of pursuing a summary judgment procedure, the parties submitted this matter on a stipulated record. The record consists of a joint exhibit book to which the parties have stipulated. The parties did not submit any other stipulations of fact, and they each proposed competing findings of fact comprising their arguments as to the inferences that I should draw from the joint exhibits. I conclude that this record is sufficient to form a basis for findings of fact and conclusions of law. Moreover, I conclude that there are no genuine issues of material fact. Thus, I enter this final administrative decision, partially granting the relief requested by the District, and partially denying such relief.

ISSUES

1. Is the Parent entitled by law to an IEE and should the hearing officer order the District to provide an IEE at public expense?

2. Is the District entitled by law to re-evaluate the Student and should the hearing officer enter an order authorizing the District to proceed with a re-evaluation despite the Parents' withdrawal of consent for such re-evaluation?

FINDINGS OF FACT

1. On February 24, 2011, the District issued a re-evaluation report to the Parents, classifying Student as a child with a disability under the category of Other Health Impairment. The re-evaluation dismissed Student from the category of Speech or Language Impairment. The re-evaluation found no behavior needs requiring special education or related services. (J 6, 7.)

2. On March 3, 2011, the Student's IEP team completed an IEP placing Student in itinerant learning support. On the same date, Parent approved the Notice of Recommended Educational Placement (NOREP). (J 8, 9.)

3. On June 2, 2011, the IEP team revised the IEP to place Student in supplemental learning support. (J 10.)

4. In the following school year, beginning in September 2011, and continuing through the 2011-2012 and 2012-2013 school years, Student began to display inappropriate and

impulsive behavior that led to numerous incident reports and significant disciplinary actions. (J 11, 18, 22, 27.)

5. On February 28, 2012, the IEP team provided an IEP that continued Student in supplemental learning support. Parent approved the NOREP. (J 12, 13.)

6. On April 10, 2012, the District requested permission to re-evaluate by Permission to Re-evaluate form (PTR), in order to conduct a Functional Behavioral Assessment (FBA) and review records. Parent consented to the re-evaluation. (J 14, 15.)

7. The multidisciplinary team conducted the requested re-evaluation and produced a re-evaluation report on June 7, 2012. This was sent to Parents on the same day. The report concluded that Student needed specially designed instruction and/or accommodations regarding study skills, work habits, social skills and emotions and behavioral self-control. It recommended a positive behavior support plan and sensory diet in addition to continued supplemental learning support and occupational therapy. It recommended continued classification with Other Health Impairment. Parent approved the re-evaluation report at some time thereafter. (J 16, 17, 19.)

8. On September 24, 2012, the IEP team provided an IEP placing Student in Itinerant Learning Support, providing a special education environment for study skills. Parent approved the related NOREP. (J 20, 21.)

9. In February 2013, District administrators referred Student for re-evaluation due to disciplinary incidents of a sexual nature. (J 22.)

10. On February 7, 2013, District personnel made an appointment for a psychiatric evaluation of Student, and planned to conduct a comprehensive educational re-evaluation, including a psychological evaluation and FBA. (J 23.)

11. On February 7, 2013, a PTR was sent to Parent. The PTR did not indicate that a comprehensive re-evaluation would be conducted, but did indicate the plan to conduct a psychiatric evaluation and records review. It did not indicate an intention to conduct an FBA. Student's Father consented to this plan on the same day. (J 24.)

12. On February 12, 2013, Student's Mother wrote a letter to the District, requesting an IEE at public expense. The letter gave as a reason that Student's "education and emotional needs" were "not being met." The letter also suggested, inartfully, that a District evaluation would be a "conflict of interest." The letter addressed a future conflict of interest. The letter did not indicate disagreement with any previous evaluation or re-evaluation. (J 25.)

13. On February 14, 2013, the District issued a second PTR, indicating an intention to conduct a psycho-educational evaluation and FBA along with the requested psychiatric evaluation and review of records. (J 26.)

14. Parents met with District officials on February 14, 2013, to discuss the District's planned re-evaluation, and indicated their revocation of consent and continued desire for an IEE. Also discussed was a pending disciplinary matter. (J 27.)

15. On February 15, 2013, the Student's Father and Mother sent a letter to the District's Director of Special Education revoking their consent to the District's proposed re-evaluation. The letter indicated that the reason for revocation of consent was that Parents wanted an IEE "due to conflict of interest." The letter did not express any disagreement with any previous evaluation or re-evaluation. Parents also returned the PTR form marked "do not consent" and requested mediation. (J 27.)

16. Also on February 15, 2013, Parent notified the District that an independent evaluator, named in the message, was scheduled to perform a private evaluation of Student. This message did not indicate any disagreement with any previous evaluation or re-evaluation. (J 28.)

17. On February 28, 2013, the District's Director of Special Education sent Parents a letter denying their request for an IEE and indicating the intention to file for due process. (J 29.)

18. On February 28, 2013, an independent evaluator began conducting a private evaluation of Student. In an evaluation report provided later, the private evaluator diagnosed Student with Tourette's Syndrome and made pertinent recommendations. (J 32.)

19. On March 11, 2013, Parent sent an email message requesting cancellation of a pending IEP meeting and requesting instead a re-evaluation planning meeting. Parent requested a list of specific tests proposed and who would conduct those tests. This message did not indicate any disagreement with any previous evaluation or re-evaluation. (J 31.)

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).[4] 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

[4] 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.

persuasion is on the party that requests relief in an IDEA case. Thus, the moving party must produce a preponderance of evidence[5] 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 "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, which bears the burden of persuasion on all issues. On this stipulated record, I conclude that there are no genuine issues of material fact, and that my findings and conclusions are supported by evidence that cannot be controverted reasonably. Therefore, my conclusions are based upon an application of law to the facts disclosed in the record.

PARENTS' ENTITLEMENT TO AN IEE

I conclude that Parents are not entitled to an IEE at public expense at this time. Parents' request for an IEE came as a response to the District's proposal to conduct yet another re-evaluation, not as a result of disagreement with any prior evaluation or re-evaluation. Therefore, Parents fail to meet the threshold requirement for entitlement to an IEE: disagreement with a prior evaluation or re-evaluation. See generally, D.Z. v. Bethlehem Area Sch. Dist., 2 A.3d 712, 727 (Pa. Commw. 2010).

[5] 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.

The IDEA regulations implementing 20 U.S.C. §1415(a)(state agency must provide an opportunity to obtain an independent educational evaluation) plainly provide that a parent is entitled to an IEE at public expense "if the parent disagrees with an evaluation obtained by the public agency … ." 34 C.F.R. §300.502(b). I find by a preponderance of the uncontroverted evidence before me that Parents did not disagree with any prior evaluation or re-evaluation. Therefore, I conclude that Parents are not entitled to an IEE at public expense.

The record is preponderant that Parents did not comply with the regulation's pre-requisite of disagreeing with a public evaluation or re-evaluation. Here, there is not a hint in any of the documents constituting the record in this case that Parents ever disagreed with a completed evaluation or re-evaluation. Parents agreed with the most recent evaluation in June 2012. Parents' messages and correspondence refusing consent for the re-evaluation that was proposed (including a psychiatric evaluation) never stated or even suggested that they did not agree with the June 2012 re-evaluation or any previous evaluation or re-evaluation. On the other hand, both the timing and language of the Parents' request raise an inference that they were disagreeing with the proposed re-evaluation, not any public evaluation that had been done for Student.

Parents argue that the District failed to file for due process as required by the IDEA regulations, and therefore, that it must provide the IEE as requested. Parents note that the regulations require the District to either fund the IEE or request due process "to show that [the District's] evaluation is appropriate … ." 34 C.F.R. §300.502(b)(2)(i) requires this and nothing else. Since the District, in its complaint notice, did not seek to defend the appropriateness of its evaluation, Parents assert that it failed to comply with the regulation.

I do not accept this argument. Preliminarily, I note that the regulation speaks in broader terms about the District's procedural obligation in another sub-section. 34 C.F.R.

§300.502(b)(4) refers to the agency filing for due process "to defend the public evaluation." Thus, the plain language of the regulations admits of a broader construction, since it uses two different phrases to describe the purpose of the due process request that the District is required to file. More significantly, however, reading the subsection as Parents would have me read it would negate the plain requirement that parents disagree with an evaluation before being entitled to an IEE, because there would be no way to enforce that requirement without engaging in a pointless and logically unnecessary exercise of determining the appropriateness of an evaluation with which parents never disagreed. I conclude that such a wooden reading of the regulations is not necessary or appropriate; rather, the regulations in my view permit the District to request due process to defend its evaluation on any legal ground available to it.

DISTRICT ENTITLEMENT TO AN ORDER AUTHORIZING RE-EVALUATION DESPITE PARENTS' WITHDRAWAL OF CONSENT

The District argues that it is entitled to an order authorizing its evaluation of Student because Student's negative and impulsive behavior has steadily escalated for several years despite the institution of a positive behavior support plan. Thus, it contends, there is good cause for a re-evaluation even though the District re-evaluated student less than a year ago. Parents counter that the plain language of the IDEA and its regulations prohibits re-evaluation less than one year after a previous re-evaluation unless both parties agree. Here, Parents do not agree and they argue that the District cannot legally re-evaluate. I accept this argument and deny the District the order that it seeks overriding parental revocation of consent.

20 U.S.C. §1414(a)(2) requires the District to re-evaluate if it "determines that the educational and related service needs … of the child warrant a re-evaluation … ." The District

clearly on this record determined that Student's service needs required a re-evaluation; thus, the District argues, the re-evaluation should be ordered. However, this mandate of the IDEA is tempered by a subsequent sub-section of the same section. 20 U.S.C. §1414(a)(2)(B) limits the duty set forth in subsection A, requiring that: "A re-evaluation conducted under subparagraph (A) shall occur … (i) not more frequently than once a year, unless the parent and the local educational agency agree otherwise … ." 20 U.S.C. §1414(a)(2)(B)(i). Thus, the IDEA is clear that re-evaluations may not occur more than once a year unless both parents and districts agree to conduct them more frequently.

The District argues that this limitation to "once a year" means once in each calendar or school year, regardless of the actual elapsed time between evaluations or re-evaluations. I do not adopt this construction. I conclude that "once a year" is plain language, and that it means that evaluations are to be one year apart.

The District argues from case law and from the separate IDEA section on parental consent, 20 U.S.C. §1414(c)(3), that there is a general legal principle vesting in districts a fundamental statutory right to re-evaluate whenever they find that a child's needs should be re-evaluated. I conclude that the specific limitation set forth in 20 U.S.C. §1414(a)(2)(B)(i) must be given effect over any more general sections or subsections. Moreover, the cases that the District cites appeared to be based upon the rule that a parent cannot have an IEE without first receiving an agency re-evaluation with which the parent disagrees.[6] This has been discussed above. It does not override the one year limitation on re-evaluations without parental consent.

[6]I conclude that all of them are inapposite, and that, in any case, none of them are binding in this jurisdiction.

CONCLUSION

In sum, I conclude that, on this record, the Parents are not entitled to an IEE and the District is not entitled to an order overriding parental non-consent because of the one year statutory limitation discussed above. 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 Parent is not entitled by law to an IEE and the hearing officer does not order the District to provide an IEE at public expense.

2. The District is not entitled by law to re-evaluate the Student and the hearing officer does not authorize the District to proceed with a re-evaluation despite the Parent's withdrawal of consent for such re-evaluation.

William F. Culleton, Jr. Esq.

_____

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

May 22, 2013