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

Child's Name: B. L.

Date of Birth: [redacted]

Dates of Hearing: 3/22/2017

Closed HEARING

ODR File No. 18734-16-17

Parties to the Hearing:	Representative:
Parents Parent[s]	Parent Attorney Pro Se
Local Education Agency Owen J. Roberts School District Warwick Administration Building Elverson, PA 19465	LEA Attorney Sharon Montanye Esq. Sweet, Stevens, Katz & Williams PO Box 5069, 331 Butler Avenue New Britain, PA 18901 215-345-9111
Date of Decision:	April 20, 2017
Hearing Officer:	Charles W. Jelley Esq. LL.M.

INTRODUCTION AND PROCEDURAL HISTORY

The Student[1] is an eligible child with a disability under the Individuals with Disabilities Education Act, 20 U.S.C. §1401 et seq. (IDEA). The Student is identified as a child with an Intellectual Disability, 34 C.F.R. §§300.8(c)(6), and Autism, 34 C.F.R. §§300.8(c)(1) (SD#7). The Student lives within the Respondent District and is of school age. (SD#7) The current dispute arose in December 2016, when the District emailed the Parents about the state-mandated two-year reevaluation.[2] 22 Pa Code Chapter 14.12(c)

The Parents requested this due process hearing, citing several concerns. First, the Parents contend the District must obtain informed consent before initiating a review of the existing data and the subsequent preparation of the the Reevaluation Report (RR) when no new tests are administered (P#1). Second, the Parents contend the District must hold a formal face-face-meeting, including the Parents, to determine if additional data is needed to determine if the Student is IDEA eligible or in need of specially-designed instruction (P#1). Third, the Parents contend the District erred when it failed to administer new testing or assessments to determine the Student's IDEA eligibility and need for specially-designed instruction (P#1). [3] The Parents contend the above errors now require the RR to be stricken. The Parents now seek another review of the data and a new RR (P#1).

The Parents' contentions arise out of their understanding of the Comments to the 1999 IDEA regulations, more specifically the then 34 CFR §300.533 regulations, which are now 34 CFR §300.305 regulations (P#13 p.2; HO#1).

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[1] Student, Parents, and the respondent District are named in the title page of this decision; personal references to the parties are omitted in order to safeguard the Student's confidentiality. Because the Student's father engaged in most of the transactions with the District, he is referred to below as "Parent" in the singular.

[2] In Pennsylvania 22 Pa Code Chapter 14.123-124 requires a District to reevaluate a student with Intellectual Disabilities every two (2) years. The dispute developed while the Parties were awaiting a decision in yet another due process hearing. The Parties openly acknowledge they have participated in 13 other due process hearings. To say the relationship between the Parties is strained is an understatement.

[3] Although the Parent agreed to the statement of the issues on the record, during the hearing and in post hearing emails after the record closed the Parent demanded that the hearing officer answer five questions set forth in Parent Exhibit #14. To the extent necessary to resolve the instant dispute the answers to the questions are included in the Decision below, otherwise, the questions are either redundant or not relevant to resolving the dispute.

Several hours after the hearing record closed, the Parents acknowledged, in an email, that the 2006 IDEA regulations, not the 1999 regulations, control the outcome here (HO #1).[4]

The 2006 IDEA regulations dramatically changed the informed consent, the evaluation, the reevaluation, and the review of existing data requirements at issue here.[5]

The District asserts that it complied with all applicable laws and regulations.

The hearing was completed in one session.[6]

I have determined the credibility and reliability of all witnesses, and I have thoughtfully and carefully considered and weighed all of the evidence of record and considered the unsolicited post-hearing email arguments. After reviewing the applicable 2006 IDEA regulations, the answer, today, to each of the Parents' contentions is 'no'. *See*, *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007).[7]

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[4] The email reads as follows: "Hearing officer (sic) Jelley: I apology for not updating my knowledge. It seems some of my arguments are incorrect. It is very confused. Similar regulations were interpreted differently since 2007 that I was not aware (I have some old regulations). See attachment. [Name Redacted] Wed 3/22/2017 11:45 PM." The Parents are vigilant, skillful, and dedicated advocates. In this instance, the reliance on 1999 outdated regulations hampered their understanding of the reevaluation requirements.

[5] *See*, (1) Initial evaluations, 34 CFR §300.301, (2) Evaluation procedures, 34 CFR §300.304, (3) Determination of needed evaluation data, 34 CFR 300.305, (4) Determination of eligibility, 34 CFR §300.306 (a)-(b), (5) Procedures for determining eligibility and placement, 34 CFR §300.306 (c), and (6) Reevaluations 34 CFR §300.303 and 34 CFR §300.305 all apply. These regulations also require an analysis and application of the informed consent requirements at 34 CFR §300.300 (a)(1)(i) and the notice of procedural safeguards provisions at 34 CFR §300.500 *et seq. See also*, *Questions and Answers on Individualized Educ. Programs (IEPs), Evaluations, and Reevaluations*, 111 LRP 63322 (OSERS 09/01/11), 22 Pa Code Chapter §14.123-124.

[6] Rather than submit written closing statements the Parties agreed to make oral closing statements. After the closing statements were concluded, the hearing officer reviewed and the Parties agreed, to the Exhibits of record (NT p.143-168). Although the record was closed the Parent made additional closing arguments; the Parent and District emails are now part of the administrative record as Hearing Officer Exhibits #1-6.

[7] Although *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007) is not binding precedent, I find the logic persuasive. I also find *Letter to Anonymous*, 48 IDELR 136 (OSEP 2007) is entitled to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984) deference. The *Letter* was issued as an interpretation of a statute made by the government agency charged with enforcing the IDEA.

ISSUES

Do the applicable regulations require the District to obtain the Parents' informed consent before reviewing the Student's existing data?

Did the District fail to include the Parents or fail to seek Parental input when the District reviewed the existing data and/or prepared the 2017 Reevaluation Report?

Can the District prepare a Reevaluation Report without conducting additional assessments or testing, if the Individualized Education Program team decides additional data is not needed?

Findings of Fact

1. The Student is mid-teen aged. The Student is diagnosed with Autism and an Intellectual Disability and is classified as a Student in need of specially-designed instruction (NT 10.).

2. The Student attends an approved private school (APS) as a day student, placed there by the District pursuant to an agreed upon Individualized Education Program (IEP) (S#7). The Parties do not dispute the Student's eligibility for specially-designed instruction, related services or special education (S#7).

3. There is a long history of litigation between the parties, which includes 13 due process requests, and 11 due process hearings (NT p.148).

4. On December 1, 2016, the Supervisor of Special Education for the District received an email from the Student's APS about sending out a Permission to Reevaluate (PTRE) (S#1).

5. On December 9, 2016, the Supervisor of Special Education for the District sent an email to the Parents with a parent input form, to gather information for the required reevaluation. The email noted the Reevaluation Report should be completed by February 21, 2017 (P#3 p.2). On the same day the Parent replied asking "*What is your base for pre-evaluation?"* In the same email, the Parent complained about the reference to "*review existing evaluation data*." The Parent also disagreed with the District's contention that it did not need parental consent to review the existing data. (P#3 pp.1-2).

6. In response to the email request for a statement of legal authority to conduct the reevaluation, the Supervisor of Special Education referred the Parent to 34 CFR §300.305 and 34 CFR §300.300(C)(2)(d)(1)(i). The email went on to state that "parental consent is not required to review existing data." (P#3 p.1). In response to the email the Parent directed the District to stop the review of data and halt preparation of the RR. (P#3 p.1).

7. In a December 9, 2016, email to the APS the District inquired: *"Could you please have your team complete their appropriate portions for sections 1-7 of the reevaluation. Please send that to us by December 19. We will then have our school psychologist review and complete the report. The plan would be to have a pre rr* (sic) *meeting on January 11 to determine if additional data is needed"* (P#5 p.1).

8. On December 13, 2016, the District emailed the Parents a second, "*Parent Input Form for Reevaluation.*" The Input Form included the following message: "*Attached is a parent input form for you to fill out for the coming re-evaluation. Please complete and return*" (P#4).

9. On December 13, 2016, in response to the District's email, the Parent replied, "*No consent for re-evaluation was requested and given. What do you talk about?*" (P#4).

10. On December 16, 2016, the APS Director of Educational Programs replied stating, "*Please find attached RR in the form of a review of records with no additional formal testing and copies of the review forms as requested.*" (P#5 p.1; S#5 pp1-7).[8]

11. On or about December 19, 2016, the Parent, the District and the APS staff exchanged emails about dates to meet to review the preexisting data (P#7 p.1). On December 21, 2016, the Parent emailed the District's Director of Special Education that the Parent would be unavailable from January 9, 2017 to January 20, 2017. The Parents could not attend the meeting as they were awaiting instructions from federal court about a trial date in a pending appeal of a previous due process decision (P#7).

[8] Originally, S#5 was a 37-page document. At the close of the hearing when the exhibits were being catalogued on the record, the District asked and the Parent agreed that pages 1-30 would be removed, as pages 30-to 37 were the APS staff members' written input. The District's request was granted. The Hearing Officer directed the District to resubmit the Exhibit with proper pagination. The District complied with the request; therefore, consistent with the Office for Dispute Resolution Standard Practices, the Exhibit was reviewed and made part of the record. (NT p.146).

12. On December 30, 2016, the Supervisor of Special Education sent out an invitation to the Parents to attend a Pre-evaluation meeting on January 11, 2017, to review the existing data (S#6; P#6). On January 2, 2017, the Parent responded informing the District, the Parent(s) could not attend (S#6 p.2). On the same day, the Parent asked the APS to remove the Draft RR from the Student's educational records. The APS informed the Parent that they could not remove documents from the Student's file and stated that the report was assembled by the APS (P#9 pp.1-2).

13. On January 12, 2017, the Supervisor of Special Education emailed the Parents informing them "*As you are aware [redacted] bi-annual re-evaluation is due by February 21, 2017. The team met yesterday to review the existing data to determine if additional data are needed. The team determined that additional data are not needed. As a member of the team, your input will be included under the parent input portion of the report. I am attaching a parent input form which was sent on December 13, 2016. Please complete this form and return it to [redacted for privacy purposes] by January 30, 2017, so he can finalize the report." (S#10).*

14. On January 24, 2017, the Director of Special Education again emailed the Parents asking for Parental input into the RR (P#11).

15. In the midst of this emerging dispute, on January 9, 2017, Pennsylvania Hearing Officer William Culleton, Esquire, issued an Order concluding that the District acted appropriately and within its authority under the law when it issued a Notice of Recommended Educational Placement (NOREP) on November 4, 2016. Hearing Officer Culleton concluded the District was obligated to comply with the September 30, 2016 Order of another Pennsylvania hearing officer, which required the District to provide the NOREP to the Parents by November 30, 2016. (ODR File No. 18443-16-17-AS (January 9, 2017).

16. On January 31, 2017, in anticipation of a February 2017 IEP meeting, the District sent the Parents a working copy of the RR (P#12).

17. At no time did the District propose to conduct any assessment or testing not previously completed (S#7).

18. On February 6, 2017, the Parents filed the current Due Process Complaint.

21. Sometime in February 2017, the IEP team, including the Parent, met and reviewed the RR, decided that additional data was not required, and agreed upon the IEP goals, specially-designed instruction and the APS placement. The District gave the Parents a NOREP and Procedural Safeguards. The Procedural safeguards included notice of the right to request additional assessment data (NT pp.85-87).

General Legal Principles

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. 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 the evidence that the moving party is entitled to the relief requested. *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 the present matter, based upon the above rules, the burden of persuasion rests upon the Parents, who initiated the due process proceeding. If the Parents fail to produce a preponderance of the evidence in support of Parents' claims of fact, or if the evidence is in "equipoise", the Parents cannot prevail under the IDEA.

This analysis pertains to fact-finding, but not to the application of law to the facts found. The appropriate interpretation of law is the obligation of the hearing officer in the first instance. My resolution of the matter at hand, while based upon some fact-finding, depends heavily upon my interpretation of the law, as to which neither party bears a burden of persuasion.

Credibility

It is the responsibility of the hearing officer to determine the credibility of witnesses. 22 PA. Code §14.162 (requiring findings of fact); *A.S. v. Office for Dispute Resolution*, 88 A.3d 256, 266 (Pa. Commw. 2014)(it is within the province of the hearing officer to make credibility determinations and weigh the evidence in order to make the required findings of fact). Accordingly, I have weighed the evidence and made findings regarding credibility as applied to the specific issues of fact before me. In the present matter, I find that all of the witnesses were credible and reliable as to all material issues.

Discussion and Conclusions of Law[9]

Districts can review existing data without informed consent

Pursuant to 34 CFR §300.303(a), a public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with 34 CFR §300.301 through 34 CFR §300.311. A reevaluation may occur not more than once a year unless the parent and the public agency agree otherwise. Next, unless the parent and the public agency agree that a reevaluation is unnecessary, a reevaluation must occur at least once every three (3) years. 34 CFR §300.303 (a); 20 USC §1414(a)(2). In this instance, state law requires an earlier review of the existing data and a reevaluation as the Student is a person with an Intellectual Disability. 22 Pa Code Chapter §14.124(c).

A reevaluation must meet the same requirements as an initial evaluation (i.e. 34 CFR §300.301) when the district administers new assessments. A reevaluation need not be identical to the initial assessment in every respect. Like the initial evaluation, the reevaluation must be individualized; it must take into account the student's then-current needs, which at time of the reevaluation may require the district to use different or additional tests, assessments and/or observational procedures not previously employed in the initial evaluation. *Letter to Shaver*, 17 IDELR 356 (OSERS 1990); 34 CFR §300.303 through 34 CFR §300.311.

[9] On the record and in multiple emails after the record closed, the Parent admonished the hearing officer for not accepting the Parent's *ipse dixit* legal and factual contentions. The Parent's argument fundamentally misunderstands and misapplies the applicable 2006 state and federal regulations. Contrary to the Parent's repeated protests, the review, analysis, and application of these interlocking state and federal regulations takes more than his suggested five (5) to ten (10) minutes (HO#4). *See also, Questions and Answers on Individualized Educ. Programs (IEPs), Evaluations, and Reevaluations*, 111 LRP 63322 (OSERS 09/01/11).

When the IEP team decides that new assessments or evaluations are required, the parents must provide informed consent prior to the new testing or assessments. 34 CFR §300.300(a) through 34 CFR §300300(c); 34 CFR §300.304; *See also, City of Chicago Sch. Dist. #299*, 60 IDELR 173 (SEA IL 2013). In this instance, no new testing was suggested or requested by either Party.

In *Letter to Anonymous,* 48 IDELR 136 (OSEP 2007) the Office of Special Education Programs (OSEP) described the requirements of a legally sufficient review of existing data. First, OSEP explained that the review of existing data is not an evaluation. *Id.* Therefore, contrary to the Parents' informed consent argument, *Letter to Anonymous*, 48 IDELR 132 (OSEP February 6, 2007) provides that "the public agency **is not** required to obtain parental consent before reviewing existing data as part of a reevaluation." *Id* at p.1; *See also*, 34 CFR §300.300(d)(1)(i).

When the IEP team, including the parents, reviews the existing data and concludes that additional data are not necessary, OSEP informed the districts they must first notify the parents of the determination that additional data are not necessary. Second, the District must inform the parents of their right to request additional assessments. *Id.* Once the parent requests the additional data, the district must collect additional test data in a timely fashion. In this instance, the Parents did not request additional testing, assessments or data, therefore, the informed consent requirement was not triggered to review the existing data or prepare a draft RR. After the IEP team reviewed the RR and concluded that additional data was unnecessary, the District provided the Parents with a NOREP and Procedural Safeguards. Therefore, I do not find a violation of the procedural or substantive requirements of the IDEA or Chapter 14.

The IDEA Regulations do not require a face-to-face meeting to review data

As for the Parents' next contention that a formal face-to-face meeting is required to discuss whether additional data is or is not needed, OSEP also rejected the Parents' position. OSEP explained, "There is no requirement in the statute or the regulations that the IEP Team must be convened twice." Section §300.305(b) specifies that the group described in paragraph (a) of 34 CFR § §300.305, the IEP team, including the parent and other qualified professionals, may conduct a data review **without** a meeting. Therefore, it is not necessary to convene the IEP Team twice every third year, or in this case every two (2) years for a person with an Intellectual Disability, to review existing data, to develop an RR and to write a new IEP. *Letter to Anonymous*, 48 IDELR 132 (OSEP February 6, 2007).

In fact, 34 CFR §300.324(a)(5) states that to the extent possible, the public agency must encourage the consolidation of reevaluation meetings for the child and other IEP meetings for the child. *Letter to Anonymous*, 48 IDELR 132 (OSEP February 6, 2007). Accordingly, I find the District did not violate the Parents' or the Student's IDEA procedural or substantive due process rights.

The District requested and the Parents refused to provide input

In this particular instance, the District complied with the applicable reevaluation requirements when they requested Parental input about the review of the existing data and the RR. On multiple occasions, the District emailed the Parents, seeking written input and invited the Parents to attend several face-to-face meetings. Granted, when the Parents were unable to attend the January 11, 2017 meeting to discuss the RR the District pressed forward. Understanding the nature of the parties' fractured relationship, I do not find the decision to prepare a draft RR, in this instance, is a procedural violation that impaired the Parents' input or participation rights. The District did not impede the Parents' right to participate in the development of the RR. The applicable regulations require that the final decision about the need for the additional data should take place at an IEP conference; the Parent's attendance and participation at the IEP conference negates a finding of a substantive or procedural violation. It is abundantly clear, given the litigation history between the parties, that the District was not going to miss the 60-day RR deadline. Given the fact that the IEP team would make the decision about the data, I do not find a procedural or substantive violation occurred when the District and the APS reviewed the existing data or when the District prepared a Draft of the RR. Accordingly, I am denying the Parents' request that the RR be stricken.

The Student's Reevaluation Report without additional data is appropriate

In 2007, OSEP rejected the argument that reevaluations must include formal testing or additional assessments every three years. Id. OSEP advised districts "a review of existing data alone, with the finding that no additional data are needed, could constitute a reevaluation in toto." *Letter to Anonymous*, 48 IDELR 132 (OSEP February 6, 2007).

Consistent with state requirements, ten (10) days before the February 2017 IEP conference, the District provided the Parents with a draft of the RR. 22 Pa Code Chapter 14 §§14.123-124. The Student's teachers at the APS all opined that additional testing data was not necessary to complete the RR eligibility and specially-designed instruction questions. Although the Parents were asked to provide written and oral input, they flat out refused to discuss the RR at the IEP conference.

The District collected input from the teachers and other team members about the Student's educational needs and unique circumstances.

The IEP team reviewed the Student's present levels, goals, and progress reports, and considered whether the Student continues to need specially-designed instruction and related services. Consistent with the applicable regulations, the IEP team, including the Parent, made a determination whether any additions or modifications to the specially-designed instruction and related services were needed to meet the IEP goals 34 CFR §300.305(a)(1)-(a)(2)(i)(A)-(B). The Parent consented to the IEP goals, the specially-designed instruction, the related services and the APS placement.

Absent a request for additional data or testing the IEP team, based upon the existing data in the RR, was required to move forward and develop the 2017-2018 IEP. Curiously, although the Parent contends the RR was not appropriate, the District and the Parents reached an agreement about the specially-designed instruction, the goals, the related services and the placement at the APS described in the 2017-2018 IEP. After the team discussed and completed the IEP, the District provided the Parents with Procedural Safeguards describing the Parents' right to request additional data or further assessments.

The applicable regulations provide that had the Parents disagreed with the decision not to collect additional data, they had an unfettered right to request further testing data. 34 CFR §300.305(a)(1)(a)-(2)(i)(A)-(B). In this instance, the Parents did not ask for additional data or testing (NT pp.140-141). When asked why he did not request any data or testing, the Parent stated his understanding that, "There is no law to allow Parent to do that." (NT p.143 line 7).

The Parents' application of the 1999 regulations fostered a misunderstanding of the RR and review of data process, which in turn fueled the instant dispute.[10]

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[10] On the same day of the hearing, the Parents in an email wrote, "I apologize for not updating my knowledge. I was told a little while ago. It seems that since 2007 Review of Existing Evaluation Data ("REED"), with the finding that no additional data is required, can constitute a reevaluation. Honestly speaking, that is new to me. That is also weird, which a decision could be made without a meeting. The old regulations I have said something differently. It is surprised why it was interpreted so much different! I apologize for not update my knowledge. Some of my arguments are incorrect. I apology for it." HO Exhibit # 4 Parent email, Wed 3/22/2017 11:45 PM; *See also,* 34 CFR 300.305(d) Requirements if additional data are not needed.

Furthermore, even assuming the District needed informed consent to conduct a review of existing data and prepare the RR, the Parents did not provide a plausible justification why they refused to provide any input or even engage in any team discussions of the RR. The Parents, as the moving party, failed to produce evidence of procedural or substantive violations that impaired their participation. Accordingly, under these facts, the Parents' informed consent, review of existing data, and RR claims are denied.

In summary, I conclude the District's review of the existing data, was not an evaluation within the meaning of 34 CFR § 300.301, §300.303, §300.304, §300.505, 22 Pa Code Chapter §§14.123-124. Therefore, the District was not required to obtain informed consent before reviewing the existing data. I find the District complied with applicable procedural and substantive state and federal regulations in preparing the RR when the team concluded that additional data was not necessary. On multiple occasions, the District requested parental input and invited the Parents to attend meetings to review the existing data and to prepare the draft RR.

The IEP team, in a meeting with the Parent, reviewed the RR; upon reviewing the RR, the IEP team concluded that they did not require additional data to determine the Student's IDEA eligibility or need for specially-designed instruction. The District provided the Parents with their procedural safeguards and a Notice of Recommended Educational Placement (NOREP) about the proposed action. The Parent did not request additional data and willingly proceeded to develop and agree to an Individualized Education Program (IEP). The instant dispute places form over substance. Although the regulations permit the Parent to request additional testing if they disagree with the IEP team's recommendation, in this instance, rather than disagreeing with the IEP team's decision not to collect additional data, the Parents requested a hearing on the data review process rather than requesting additional data.

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(1) If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of -

(i) That determination and the reasons for the determination; and

(ii) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.

(2) The public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section unless requested to do so by the child's parents. (emphasis added)

Accordingly, I find the District did not violate the applicable state or federal regulations. Therefore, the Parents' request for appropriate relief is denied. An Order is attached along with the Appeal timelines.

ORDER

Now, this 20th day of April 2017, in accordance with the preceding findings of fact and conclusions of law, the Parents' claim is dismissed. I find that the District complied with the IDEA and Chapter 14 when the District conducted the mandatory two-year reevaluation of the Student's unique needs.

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

Charles W. Jelley. Esq. LL.M.
Charles W. Jelley, Esq. LL. M.
Hearing Officer
ODR FILE # 18734-1617 KE