

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.

AP 8681/07-08 LS

Name

Xx/xx/xx

Date of Birth

04/01/08, 05/28/08, 06/02/08

Dates of Hearing

Closed

Type of Hearing

Parties to the Hearing:

Mr. & Mrs.

Parents' Names

06/09/08

Date Transcript Received

06/20/08

Date Record Closed

Address

07/08/08

Date of Decision

Council Rock

School District

The Chancellor Center
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Newtown, PA 18940

School District Address

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Hearing Officer

Name

Mr. Mark Klein

School District Superintendent

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Officer

I. BACKGROUND

The Student involved in this matter is a teenage resident of the Council Rock School District (District) who will enter high school at the beginning of the 2008/2009 school year. The District agrees that the Student is IDEA eligible by reason of autism, and has provided Student with special education services on that basis, but has never conducted an evaluation of the Student by a District school psychologist. In 2002, the District funded an independent educational evaluation conducted by a private psychologist chosen by Parents. The Student's program and placement based upon the 2002 independent evaluation remained in effect during Student's middle school years (2006/2007 and 2007/2008).

In February 2006, while the Student was in 6th grade, Student's final year in elementary school, the District concluded that a three year reevaluation was unnecessary because the District members of the Student's IEP team believed they had sufficient information to continue to provide Student with appropriate special education services. Parents, however, suggested an updated IEE by the same evaluator who had conducted the 2002 evaluation, to which the District agreed in principle. That evaluation did not occur.

Early in 2008, the District determined that additional information was necessary to plan successfully for the Student's transition to high school, and for the required IDEA post high

school transition planning. When Parents refused permission for the reevaluation, the District filed a due process complaint, seeking an order for the reevaluation. The appropriateness of the District's proposed reevaluation is the subject of a simultaneously issued decision and order on the District's due process complaint.

On the date of the first hearing session on the District's complaint, Parents filed a due process complaint alleging that the District failed to conduct a timely reevaluation and failed to honor its agreement to fund the independent reevaluation. In addition to seeking an order requiring the District to provide the IEE, Parents also requested compensatory education for denial of FAPE arising from the District's failure to provide a timely reevaluation of the Student. By agreement of the parties, the District's and Parents' complaints were consolidated for hearing, with the record of the first session on the District's complaint incorporated into the record on the Parents' complaint. The consolidated record concerned only the evaluation issues.

II. FINDINGS OF FACT

1. The Student is a teenage student, born xx/xx/xx. Student is a resident of District and is eligible for special education services. (Stipulation, N.T. p. 21).
2. Student has a current diagnosis of Autism in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 21).
3. In the 2007/2008 school year, Student was an eighth grade student, completing Student's final year in a District middle school. (N.T. p. 22)
4. Student entered middle school as a 7th grade student in the 2006/2007 school year. Student was identified as a student with some developmental delays, and social, sensory information, speech/language and OT needs. Those were addressed in a fairly extensive IEP from Student's elementary school, which remained in effect through most of Student's first year in middle school. (N.T. pp. 36, 37)
5. Student's transition from elementary to middle school was quite successful. (N.T. pp. 38; S-5)

6. Upon entering middle school, Student was placed in an itinerant autistic support class, and Student's program/placement continued in 8th grade. Progress reports/report cards and observation indicate that Student was academically successful during Student's two years in middle school. In 7th grade, Student made good progress in language and social skills. Student's ability to focus improved to the point that an incentive system designed to promote improvement in that area was successfully phased out during the fall of 7th grade. (N.T. pp. 38, 39, 41, 74—76; 376--378; S-5, S-6)
7. In 2002, when Student was in third grade, the District agreed to fund an independent educational evaluation which resulted in a report that discussed Student's cognitive strengths and weaknesses in detail and made program recommendations. (N.T. pp. 45, 46, 77, 79; P-3)
8. In February 2006, Student's sixth grade year, the District members of Student's IEP team noted that Student was due for a reevaluation, but determined that a reevaluation was unnecessary at that time because there was sufficient information about Student to provide Student with an appropriate program and placement. (N.T. p. 449, 454, 456; P-5)
9. When Student's special education supervisor contacted Student's Parent to discuss the need for a reevaluation, Parent agreed that Student did not need an evaluation, but then suggested that the District hire the same independent evaluator who had conducted the 2002 evaluation of Student to conduct a reevaluation. (N.T. p. 384)
10. The District agreed to pay for an updated evaluation by the private psychologist. (N.T. pp. 57, 384, 461; P-4, P-5)
11. Upon contacting the evaluator, the District learned that she would be unavailable to conduct the evaluation until late April or May 2006 due to upcoming surgery. The District was unsuccessful in its attempts to reestablish contact with the evaluator after the time she indicated she would be available for an evaluation, notified Student's Parents of its inability to reach the evaluator and inquired whether Parents had any other means to contact Parent. (N.T. pp. 426, 427, 462-464; P-4, P-5).
12. No psycho-educational reevaluation of Student was conducted in 2006, or at any time since the 2002 evaluation, and no permission to reevaluate was issued until February 2008. (N.T. pp. 58, 427)

III. ISSUE

Is the School District required to fund an IEE for Student based upon its agreement with the Parents' suggestion in 2006 that it should pay for an updated evaluation by the same private psychologist who conducted the 2002 independent educational evaluation?

IV. DISCUSSION AND CONCLUSIONS OF LAW

The IDEA regulations provide that reevaluations of an eligible child must occur when conditions warrant or if the child's parents or teacher requests it. 34 C.F.R. §300.303(a). The regulations further provide that a reevaluation shall occur at least once every three years unless parents and the district agree that it is unnecessary. §300.303(b)(2). *In re: The Educational Assignment of J.W.*, Spec. Ed. Op. #1299 (Nov. 2002).

There is no doubt that in February 2006, a three year reevaluation of Student was due, and, therefore that the issues in this case are governed by §300.303(b)(2). (FF 8) The record establishes that the District recognized that a reevaluation was due in accordance with regulatory requirements, considered the need for additional information, decided that it was unnecessary and communicated that conclusion to Student's Parent, who initially agreed as well. (FF 8, 9) Nevertheless, when Student's Parent then suggested that the District fund a reevaluation by the same private psychologist who had evaluated Student in 2002, the District agreed. (FF 10)

It is obvious from the testimony of both parties, however, that neither the Parents nor the District considered a reevaluation of Student necessary in 2006. Parent's testimony about the District's communication to Parent regarding a reevaluation and response conveys no urgency:

I remember a conversation with [redacted]...where she...called me and said that they thought Student needed an evaluation. And my knee jerk reaction was to say, oh, [Student] doesn't need an evaluation And but then after I realized that it had been more than three years since Student had an evaluation, I suggested that she hire [redacted] to do it and she agreed to do that.

N.T. p. 384 l. 13—25.

The District began the process of arranging for the reevaluation immediately, but had no control over the availability and willingness of the independent evaluator to conduct an evaluation. When the District contacted the psychologist after several attempts, (*See* handwritten notes on P-4), it learned that she would not be available to conduct an evaluation for several

months. The District was unsuccessful in reestablishing communication with her after the date she stated that she would again be available. (FF 11)

Parents argue that they should not be required to “nag” the District to fulfill its agreement, (Parent’s Closing Argument at p. 5), but that position raises the question of why the District should be required to, in essence “nag” the evaluator to determine when/whether she would agree to conduct the evaluation. Ordinarily, when a school district agrees to provide an IEE, the parent selects and confirms the availability of the evaluator before the district makes the final funding arrangements. Here, the District was accommodating the Parent with a publicly funded evaluation that the parties had agreed was unnecessary at that time, and, therefore, not required under §300.303(b)(1). Although Student’s Parent testified that Parent contacted the independent evaluator at some time in 2006 to determine her availability to conduct the evaluation in Pennsylvania, (N.T. p. 436), nothing in the record suggests that Parents took any further steps to assist in securing the evaluator’s involvement after the District was unsuccessful in contacting her and so informed the Parents. (FF 11) When asked directly whether Parent had ever raised an issue concerning the District’s failure to secure the independent reevaluation prior to the District’s due process complaint seeking an order for its own evaluation, Student’s Parent could not recall. (N.T. p. 428) No documents were produced suggesting that Parents contacted the District to inquire as to the status of the reevaluation, or were at all concerned about the non-occurrence of that reevaluation, until the spring of 2008.

Although the timing of the Parents’ due process complaint concerning the IEE agreement is not an issue in terms of barring their complaint, Parents’ belated recall of the agreement only after the District asserted a due process complaint seeking an evaluation, and after Parents were unsuccessful in forestalling or delaying the hearing on that complaint, leaves

the strong impression that their complaint based upon the 2006 agreement was part of a series of attempted procedural “end-runs” designed primarily to derail the District’s plans to secure an order to conduct its own evaluation. *See, e.g.*, HO-3, addressing Parents’ request for summary judgment; HO-4, addressing Parents’ request to postpone the hearing on the District’s complaint.

There is no doubt that the reason Parents attempted to use all possible means to thwart a District evaluation of Student is their sincere concern about how the District might use the results of its proposed evaluation. *See, e.g.*, N.T. pp. 391—395. If a reevaluation of Student must occur, Parents would clearly prefer that it be conducted by the private psychologist of their choice, with whose testing philosophy they agree. N.T. pp. 388—391. The record, however, does not support turning the Parents’ two year old suggestion that the District hire their preferred evaluator into an enforceable agreement requiring the District to fund an IEE at this time rather than conduct its own evaluation. Permitting such course would constitute an “end run” around the IDEA regulations which provide that an IEE at public expense is available only after a school district conducts an evaluation and parents disagree with the results. 34 C.F.R. §300.502(b); *Lauren W. v. DeFlaminis*, 480 F.3d 259, 274-75 (3d Cir. 2007).

Finally, ordering the District to arrange for an IEE from a practitioner that it would first be required to locate and persuade to undertake the evaluation would place an unreasonable and unwarranted burden on the District.

For the foregoing reasons, I conclude that the District did agree to pay for a private reevaluation of Student in 2006, based upon a suggestion by Parents, and notwithstanding both parties’ acknowledgement that a reevaluation was not necessary at that time. I further conclude that the District discharged any obligations arising from its agreement to Parents’ suggestion by taking reasonable, albeit unsuccessful, steps to arrange for the evaluation. FF 8—11. The

District will not be required to renew its attempts to contact the private psychologist now, after initiating a due process complaint to seek an order to conduct its own evaluation. Parents are not, however, precluded from seeking an IEE if they disagree with the District's evaluation. The decision and order in this case extends only to the Parents' 2006 suggestion and the events which followed.

Parents' due process complaint in this case also included a claim for compensatory education based upon their contention that Student was denied FAPE by the District's failure to conduct a reevaluation within three years of the 2002 evaluation, as provided in 34 C.F.R. §300.303(b)(2). At the beginning of the second hearing session, when the parties' agreement to consolidate the records of their respective evaluation cases was placed on the record, Parents also agreed to defer the compensatory education issue until a reevaluation of Student is completed. *See*, N.T. pp. 206—212. At that time, Parents were told that they would be permitted to pursue their claim for compensatory education if the results of the evaluation produced evidence that Student suffered a substantive deprivation of educational opportunity arising from the lack of a timely reevaluation, relating back to April 1, 2008, the date this complaint was filed. N.T. pp. 210—212. Those statements, however, were made before the evidence disclosed that the parties had agreed in 2006 that a reevaluation was not necessary at that time. *See* FF 8, 9.

The relevant regulatory provision clearly permits the parties to agree that a reevaluation is unnecessary, and such agreement relieves the District of an obligation to conduct the three year reevaluation. 34 C.F.R. §300.303(b)(2). Parents also indicated by their conduct that they did not consider a reevaluation necessary in 2006. Parents, *e.g.*, took no steps to contact their chosen evaluator or even inquire into the status of the private reevaluation, tacitly continuing to

agree that an evaluation was not needed at that time. Parents cannot now claim that Student was denied FAPE due to the lack of a reevaluation between 2006 and the completion of the School District's evaluation.

V. ORDER

In accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that School District is not required to take any action to fund an IEE as suggested by Parents and agreed to by the District in 2006.

It is **FURTHER ORDERED** that Parents' claim for denial of FAPE based upon the absence of an evaluation within three years of the 2002 IEE is **DISMISSED**, inasmuch as the evidence in this case establishes that in accordance with 34 C.F.R. §300.303(b)(2), Parents and the District agreed in 2006 that a reevaluation of Student was not necessary at that time.

Dated: 07/07/07

Anne L. Carroll
Anne L. Carroll, Esq., Hearing Officer