

Pennsylvania
Special Education Hearing Officer

DECISION

Child's Name: CS

Date of Birth: xx/xx/xx

Date of Hearing: June 23, 2009

CLOSED HEARING

ODR No. 9899/08-09 KE

Parties to the Hearing:

Representative:

Parents:

Pro Se

School District:
Richard McDonald, Superintendent
Dunmore School District
300 W. Warren Street
Dunmore, PA 18512

School District Attorney:
Harold McGrath, Esq.
McGrath Law Office
321 Spruce Street, Suite 600
Scranton, PA 18503

Date Record Closed:

July 1, 2009

Date of Decision:

July 3, 2009

Hearing Officer:

Daniel J. Myers

INTRODUCTION AND PROCEDURAL HISTORY

Student (Student)¹ is an early teen aged student in the Dunmore School District's (District) elementary center who was not identified as a child with a disability when last evaluated in January 2007. The dispute between the parties concerns who will perform an independent educational evaluation (IEE) at public expense. Student requests a particular evaluator from a different part of the state whose fees may be higher than evaluators typically used by the District. The District wants the Parent to choose from a District list of evaluators. I conclude that the District has failed to comply with regulations that otherwise permit school districts to restrict parental choice of a publicly funded IEE evaluator. Accordingly, in this case I find for Student's parent.

ISSUE

Whether an IEE at public expense shall be conducted by one of the evaluators on a District list, or by Dr. R, an evaluator preferred by Student's parent who is not on the District's list?

FINDINGS OF FACT

1. Student, whose date of birth is xx/xx/xx, is a resident of the District. (SD19) ²
2. In January 2007, Student was evaluated by the District and found not entitled to special education services. (NT 49, 51)

¹ All further references to Student will be impersonal and gender-neutral. This is intended not to be disrespectful, but rather to ensure Student's confidentiality.

² References to "P," "SD," and "HO" are to the Parent, District, and Hearing Officer exhibits, respectively. References to "NT" are to the transcript of the due process hearing session.

3. On April 16, 2008, Parent informed the District that they disagreed with the District's January 2007 evaluation, and Parent asked the District to pay for an independent evaluation by Dr. H. (P3; SD-1; NT 52) On April 29, 2008, the District refused Parent' request and filed a due process hearing request. (P5; SD-3; NT 55) I was assigned to resolve the dispute and, on June 27, 2008, I dismissed the case after Parent withdrew his request for IEE at public expense. (SD-4; NT 57)
4. Apparently, Parent continued to express a desire for IEE at public expense and, on October 16, 2008, the District agreed to fund an IEE from one of three well-known psychologists in the area– none of which was parent's choice, Dr. H. (P8; SD-6; NT 40, 89, 105)
5. On October 21, 2008, Parent requested that the District pay for an IEE by Dr. R, a school psychologist whose office is in [redacted]. (P9; SD-7; NT 59) I take judicial notice that [redacted] is approximately 100 miles from the District.
6. On October 27, 2008, the District offered to pay for an IEE by Dr. H. This offer ostensibly was made by the District in an attempt to resolve the dispute between parent and SD. (P10; SD8; NT 54; NT 61)
7. On October 30, Parent reiterated his request to have Dr. R perform the IEE. (P11; SD9; NT 61)
8. On November 14, 2008, the District obtained a proposal from Dr. H to perform the evaluation for an estimated 11 hours at \$165 per hour, which equates to an estimated total of \$1,815. (SD10; NT 63-64) Dr. H has been around for many

years and has conducted hundreds of evaluations for many local school districts.

(NT 71)

9. On November 19, 2008, Parent attended a school board meeting and asked for answers to seven questions regarding the District's list of IEE evaluator qualifications. (NT 38, 43, 62, 123, 125) Substantial discussion occurred at the meeting among Parent, the Superintendent, and the District's solicitor. Parent believes that the solicitor stated that Parent would never receive answers to those questions unless and until Parent hired an attorney. (NT 125)
10. On December 3, 2008, the District reiterated its offer to publicly fund an IEE by Dr. H. (P15; SD11)
11. On February 4, 2009, the District's Elementary School Principal and Counselor sent a letter to Parent expressing the District's ongoing concerns regarding Student's behaviors in school that appeared to be social and emotional. (P16; SD12)
12. In early February 2009, the District informed Parent that it would consider funding an IEE by Dr R, if Dr. R's fees were comparable to either Dr. H's fees or to the fees that the District typically pays for IEEs. (NT 66-67; SD13)
13. On February 11, 2009 the District sent to Parent a list of evaluators and psychological services organizations whose IEEs the District would fund. (SD13) The District obtained this list from the North East Intermediate Unit (NEIU). (P17; SD13; NT 106) The District also added four names to the NEIU's list – Drs. L1, H, S and D. (NT 108-109) The District contends this is an exhaustive, 4-6 year old list of evaluators from Northeastern Pennsylvania, including

Lackawanna, Luzerne and Pike counties. (NT 39, 41, 45) The District believed that all individuals and agencies on the list satisfied the District's criteria for independent evaluators, and the District was unaware, until it learned at the due process hearing, that there were any deficiencies with its list. (NT 68, 111)

14. On April 11, 2009, Parent called each individual or group on the list and discovered the following. (NT 113, 128)

- a. Dr. L1 is a professor at [redacted] University and actually certifies school psychologists, which Parent believes is a conflict of interest. (NT 130-131)
- b. Drs. G and S are qualified but for the fact that they, like Dr. L1, have been used in the past by NEIU, which depends upon the District for some of its business. (NT 115, 121)
- c. [Agency redacted] does not do independent educational evaluations. (NT 116)
- d. Dr. L2 hasn't worked for six years at the telephone number listed on the District's list. (NT 119)
- e. The telephone numbers for Dr. N, as well as Psychology of NE Pennsylvania, were disconnected and parent did not follow-up by looking in a phone book for better numbers. (NT 119, 128)
- f. Dr. D hasn't done any evaluations since April 2008. (NT 119)
- g. Drs. H, Y and R are not a certified school psychologists. (NT 115, 121, 122)
- h. Psychological Services uses [redacted] University students, not certified school psychologists, to perform its evaluations. (NT 121-122)

15. On March 16, 2009, the District reiterated its refusal to fund an IEE by Dr. R, but offered an evaluation by its recently-hired school psychologist, who is a certified school psychologist. (P 19; SD15; P21; NT 76, 99)
16. On March 20, 2009, Parent reiterated that he wanted Dr. R to perform the publicly funded IEE. Parent informed the District that Dr. R's fee would be \$4,200. (P20; SD14; NT 73-74)
17. Student does not have any unique or exceptional needs that would require the expertise of Dr. R over any other certified school psychologist. (NT 132-133)
18. The District seldom receives requests for publicly funded IEEs, and the District has never sent a list of qualified IEE evaluators to any other parent. (NT 58, 89)
The District does not have a policy limiting the amount it will spend on publicly funded IEEs. (NT 86, 98) The District considers an IEE cost of around \$2,000 to be reasonable. (NT 98) Other factors considered by the District in agreeing to fund a particular evaluator's IEE are certification, experience, and expertise. (NT 82)
19. The District objects to funding an IEE by Dr. R because: a) the District does not know anything about Dr. R, although the Superintendent is willing to assume Dr. R is qualified (NT 86, 93); b) Dr. R's \$4,200 cost seems to be excessive (NT 86, 93, 98); and c) there are local evaluators who can perform the same evaluation. (NT 86) Also considered in the District's decision to reject Dr. R were the facts that Student has never been identified with disability, had a 92% grade point average, was proficient or basic in major subject areas on the PSSA, was

performing well in school, and the District saw no need to bring in someone from out of town. (NT 102)

20. On March 30, 2009, the District filed a due process hearing request. (SD16; SD19; P22; NT 79)

21. I conducted a due process hearing on June 23, 2009. District exhibits SD1-SD19 were admitted into the record. (NT 147) Parent exhibits P1-P5, P8-P12, and P15-P25 were admitted into the record. (NT 145, 146) Parent exhibit P-13 was not admitted. (NT 136-141, 146) Parent exhibits P6, P7 and P14 were not offered into evidence. (NT 144, 145) P25 was admitted over the District's objection. (118, 146)

22. I refused Parent's request to enter into evidence a cassette tape recording the November 19, 2008 School Board meeting at which Parent asked for District policies regarding IEE criteria. I also refused Parent's request to enter the testimony of the District's solicitor who attended that School Board meeting. I concluded that the tape and solicitor's testimony were irrelevant. I also concluded that the tape and solicitor's testimony would be cumulative of the Parent's and Superintendent's testimony regarding that School Board meeting. (P13; NT 136-141)

DISCUSSION AND CONCLUSIONS OF LAW

The United States Supreme Court has held that, in a special education administrative hearing, the burden of persuasion (which is only one element of the larger burden of proof) is upon the party seeking relief, whether that party is the disabled child or the school district. Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387

(2005); L.E. v. Ramsey Bd. Of Education, 435 F.3d 384 (3d Cir. 2006) If the evidence is not in equipoise, but rather one party has produced more persuasive evidence than the other party (regardless of who seeks relief), then the Supreme Court's ruling is not at issue – in that case I simply find in favor of the party with the more persuasive evidence.

In reviewing the District's compliance with the Individuals with Disabilities Education Act (IDEA), procedural compliance is as essential to FAPE as substantive compliance. Bd. Of Educ. Of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982)

Under the IDEA, parents of a child with disabilities are entitled to an opportunity to obtain an IEE, 20 U.S.C. 1415(b)(1) and (d)(2)(A),³ which is defined as an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. 34 CFR §300.502(a)(3)(i) A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency, unless the District files a due process hearing request to show that its evaluation is appropriate. 34 CFR §300.502(b)(1), (b)(2) A parent is entitled to only one IEE at public expense each time the public agency conducts an evaluation with which the parent disagrees. 34 CFR §300.502(b)(5)

The only conditions or timelines that a school district may impose upon an IEE at public expense are those criteria that the District itself uses when it initiates an evaluation. 34 CFR §300.502(e)(1), (e)(2) Each public agency must provide to parents, upon request for an IEE, information about where an IEE may be obtained, and the agency criteria applicable for IEEs. 34 CFR §300.502(a)(2)

³ Federal regulations implementing this IDEA provision are found at 34 CFR §300.502 and are incorporated into state regulations at 22 Pa. Code §14.102(a)(2)(xxix).

The United States Department of Education has provided guidance in interpreting IEE procedures. For example, the District may require an IEE examiner to hold the same licensure as District staff conducting the same types of evaluations. March 20, 2003 letter from Office of Special Education Programs to Young (http://www.ed.gov/policy/speced/guid/idea/letters/2003-1/Young_32003iee1q2003.doc) Nothing prohibits the District from publishing, and requiring parents to choose from, a list of IEE examiners that meet the District's criteria – if the child's needs can be appropriately evaluated by the persons on the list and the list exhausts the availability of qualified people within the geographic area specified. Letter to Young The list can also be based upon reasonable cost criteria. February 20, 2004 letter from Office of Special Education Programs to Parker (<http://www.ed.gov/policy/speced/guid/idea/letters/2004-1/parker022004iee1q2004.doc>) After the list is provided, it is the parent, not the district, who has the right to choose which evaluator on the list will conduct the IEE. Letter to Parker In addition, the district must allow parents the opportunity to select an evaluator who is not on the list but who meets the criteria set by the public agency. Letter to Parker

In this case, I conclude that the District has not complied with IDEA and its implementing regulations with respect to the imposition of criteria for publicly funded IEEs. While the District has the right to limit IEEs to evaluators meeting specific criteria, and while the District may limit parental choices to an exhaustive list of evaluators meeting those specific criteria, the District has neither established specific criteria to be applied to IEE evaluators, nor has it provided an exhaustive list from which it may require parents to choose.

The District's "criteria" are: a) reasonable cost (NT 98); b) the certification, experience and expertise of the IEE evaluator (NT 82); c) proximity of the IEE evaluator (NT 86); and d) the particular student's identified exceptionality, grade point average, PSSA scores, and overall school performance. (NT 102) I placed quotation marks around the word "criteria" because these actually are categories, not criteria. Within each category the District should be able to articulate specific criteria.

For example, while reasonableness of cost is a category, the criteria would be a specific dollar amount or a dollar range. Similarly, while certification, experience and expertise are categories, the criteria would be particular certifications, minimum years of employment, and specific credentials. While proximity is a category, the criteria would be a specific number of miles, and while student achievement is a category, specific GPAs and PSSA scores would be the criteria.

In this case, the closest that the District gets to listing actual IEE criteria are with respect to cost and location of the evaluator. Thus, within the category of reasonable cost, the District's criteria appear to fall somewhere between the \$2,000 it is willing to pay (NT 98) and the \$4,200 it refuses to pay. (NT 86, 93, 98) Similarly with respect to proximity, since the District's own list of acceptable IEE evaluators includes evaluators from Lackawanna, Luzerne and Pike counties (NT 39, 41, 45), and since Dr. R's office is 100 miles away, the District's actual proximity criteria apparently fall somewhere between Lackawanna/ Luzerne /Pike counties, and all points 100 miles away from the District. It is impossible to know, however, what are the District's specific criteria regarding either reasonable cost or proximity.

With regard to the other categories listed by the District as considerations in deciding whether to fund an IEE, the District has articulated no specific criteria concerning evaluator certifications, experience or expertise, nor has it articulated specific GPAs and PSSA scores that would trigger approval or disapproval of any particular IEE evaluator.

With regard to the District's list of IEE evaluators from which it may require parents to choose, I find that the District has not complied with IDEA requirements because I am not convinced that the District's list is an exhaustive list of qualified people within the geographic area. The District obtained its list from the NEIU and added four more names. (P17; SD13; NT 106-109) The District was unaware of any deficiencies in the list and was unable to refute Parent's claims that: Agency does not do independent educational evaluations (NT 116); Dr. L2 hasn't worked for six years at the telephone number listed on the District's list (NT 119); the telephone numbers for Dr. N, as well as Psychology of NE Pennsylvania, were disconnected (NT 119, 128); Dr. D hasn't done any evaluations since April 2008 (NT 119); and Drs. H, Y, R and the evaluators from University are not certified school psychologists. (NT 115, 121-122) With this unrefuted evidence in the record, I cannot conclude that the District's list is an exhaustive list of evaluators who meet the District's (unclear) criteria.

Thus, because the District has not complied with IDEA requirements regarding the limitations that it may impose upon publicly funded IEEs, I will order that that the District fund an IEE by Dr. R, with the total cost (including expenses) not to exceed \$4,200.

CONCLUSION

While the District is entitled to impose limits upon publicly funded IEEs, the District has not, in this case, either established specific criteria to be applied to IEE evaluators, nor provided an exhaustive list from which it may require parents to choose. Having failed to comply with IDEA's requirements regarding the imposition of limits for publicly funded IEEs, I will order the District to fund an IEE by Dr. R, with the total cost (including expenses) not to exceed \$4,200.

ORDER

AND NOW, the Dunmore School District shall fund an IEE by Dr. R, with the total cost (including expenses) not to exceed \$4,200.

Daniel J. Myers

HEARING OFFICER

July 3, 2009