

STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Regional School District No. 14 v. Student

Appearing on behalf of the District: Attorney Rebecca Santiago
Attorney Leander Dolphin
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Hartford, CT 06103-1919

Appearing on behalf of the Student: *Parent (Mother), pro se*
and
Attorney John Cvejanovich
O'Connell, Flaherty & Attmore, L.L.C.
1350 Main Street
Springfield, MA 01103-1628¹

Appearing before: Attorney Mary Elizabeth Oppenheim, Hearing Officer

FINAL DECISION AND ORDER

ISSUE:

Whether the hearing officer shall override the Parents' lack of consent to the neuropsychological evaluation of the Student.

SUMMARY:

The 11 year old Student is eligible for special education under the category of autism. The District sought to have the Student evaluated by a neuropsychologist or a school psychologist who had the background and experience to conduct a school based neuropsychological assessment. The Parent refused to provide consent for this evaluation. The

¹ The Parent was initially represented by Attorney Cvejanovich. During the lengthy prehearing conference, the Parent's attorney was active in a discussion of scheduling the first hearing date, selecting August 23, 2011 for the hearing date. At the prehearing conference, the Parent's attorney then said that he may need to schedule the hearing for later in September. The hearing date was changed twice to accommodate the Parent's attorney request for a later hearing date, but an indefinite postponement was denied. The date of September 20, 2011 was held for hearing but was not scheduled. The hearing was scheduled for September 28, 2011, the latest date it could be held to allow for sufficient time to convene the hearing and issue a decision on or before the mailing date of October 13, 2011. The Parent's attorney was sent all notices, and although he was an attorney in a law firm, no other attorney submitted a notification of appearance to substitute as attorney. Such inaction by the Parent's attorney was not appropriate, and the Parent's attorney did not take appropriate steps to obtain substitute counsel for the Parent. Moreover, the Parent's attorney reported to the District's attorney that he was not representing the Parent in this matter, although the Parent continued to claim that the attorney did represent her. The Parent's attorney had notice of the hearing and failed to appear or obtain a substitute attorney for this matter.

District brought this action to seek a hearing officer order overriding the lack of parental consent for this evaluation.

PROCEDURAL HISTORY:

The District received this request for hearing on July 11, 2011 [Exhibit H.O.-1] and a prehearing conference convened on July 20, 2011. At the prehearing conference, the parties agreed to a hearing date of August 23, 2011 and a request for extension of the mailing date was submitted and granted to allow for scheduling this hearing date.

Subsequently, the Parent's attorney brought a second case regarding the Student who is the subject in this case, Student v. Regional School District No. 14 (Case No. 12-0003). The request to consolidate the two cases was granted, and the request for a 30 day extension of the mailing date of the decision was granted, which extended the mailing date to Thursday, October 13, 2011.

The Parent's attorney also filed a request for an indefinite postponement of this hearing. This request was denied, as such indefinite postponements are not permitted in IDEA cases. The Parent's attorney was informed that the Parent may elect to withdraw the Parent's hearing request without prejudice and re-file at another time when the Parent's attorney is ready to proceed with the hearing.

The August 23, 2011 hearing date was cancelled at the request of the Parent's attorney, and the additional hearing date of September 20, 2011, which was being held for this matter, was not scheduled at the request of the Parent's attorney. The hearing date of September 28, 2011 was scheduled as it was the latest possible date that would provide sufficient time for the parties to submit closing arguments or briefs and for the decision to be issued on or before the current mailing date of October 13, 2011.

Subsequently, the Parent submitted a request for dismissal of her action (Case No. 12-0003) without prejudice. The parties were notified that the hearing for the case of RSD 14 v. [Student], Case No. 11-0561, would convene on September 28, 2011 as previously scheduled. The other part of the consolidated action (Case No. 12-0003) was severed from this case and dismissed without prejudice, as requested by the Parent.

The hearing convened on one hearing date on September 28, 2011. The Parent was present with her father. State Senator Joseph Crisco also appeared at the hearing, and stated upon his entrance that he was at the hearing in his "official capacity." Senator Crisco was told there is no such standing in the hearings, and that he could only be present, silently, as a person lending assistance to the Parent and that they would be provided time to consult with each other if necessary.²

² In addition, Senator Crisco attempted to have a telephone conversation with the hearing officer prior to the hearing date. Senator Crisco was directed to contact the Due Process Unit of the State Department of Education with any questions, and that it was improper for a party to have another person contacting the hearing officer directly regarding the pending matter, as it was an ex parte communication.

At the close of the hearing on September 28, 2011 the parties were provided with additional time for submission of written closing arguments by October 3, 2011. The District's attorney submitted written closing argument on Monday, October 3, 2011. The Parent submitted no closing argument.

At the hearing, the District's witnesses were Kimberly Culkin, District director of special services; Danielle Hay, District school psychologist and Kristi Sacco, licensed neuropsychologist. The Parent did not present any witnesses, although she actively cross examined the District's witnesses.

The District submitted exhibits numbered B-1 to B-13, which were entered as full exhibits. The Parent submitted no exhibits.

All exhibits and the testimony of the witnesses were thoroughly reviewed and given their due consideration in this decision.

To the extent that the procedural history, summary and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. Bonnie Ann F. v. Callallen Independent School Board, 835 F. Supp. 340 (S.D. Tex. 1993)

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to *Connecticut General Statutes* ("CGS") §10-76h and related regulations, 20 United States Code §1415(f) and related regulations, and in accordance with the Uniform Administration Procedures Act ("UAPA"), CGS §§ 4-176e to 4-178, inclusive, §§4-181a and 4-186.

FINDINGS OF FACT:

1. The Student is 11 years old and currently placed at Easton Country Day School. [Exhibit B-3]
2. It is undisputed that the Student is eligible for special education and related services under the category of autism.
3. On May 17, 2011, the Planning and Placement Team (PPT) convened for the purpose of conducting an annual review and to plan the re-evaluation of the Student. [Exhibits B-2a, Page 8, B-3]
4. At the May 2011 PPT meeting, the District recommended that the Student undergo a neuropsychological evaluation of cognitive, executive and social/emotional functioning, as well as an occupational therapy evaluation of fine and gross motor and sensory

processing and an academic evaluation of reading, math and writing skills. [Testimony Director, Exhibit B-3]

5. At this PPT meeting, the team reviewed the Student's current needs through the information provided by the Student's current teachers and service providers. The Easton Country Day School reported that the Student was motivated and had made a lot of progress in terms of her functioning in the school environment and in her stamina. [Testimony Director; Exhibit B-4a] The Student's records and reports received showed tremendous progress. Reportedly the Student was evolving and changing over time at a rate that was impressive and positive. This led the District to conclude that it was important to look further into her current functioning to design her program. [Testimony Director]
6. The Student has not had a comprehensive evaluation for several years. In March 2010 there was a record review, but no additional testing was completed at that time. The last standardized assessment of the Student was in 2008 when a Woodcock Johnson battery was completed, which did not provide interpretation of the results. In 2007 a psychological evaluation was completed. [Testimony Director]
7. Since the Student had not had a comprehensive evaluation for more than three years, it was imperative for the District to obtain current and comprehensive information about this Student. [Testimony Director]
8. While the District had received anecdotal and verbal reports regarding the Student, the District does not have current standardized information about the Student. The Student receives extensive services on her IEP, and the District needs more information to determine what services need to be added or altered to provide an appropriate program for the Student. [Testimony Director]
9. The District determined that a neuropsychological evaluation would provide the information necessary about the Student. The Student has complex needs and receives neuropsychological services, so an opinion by a neuropsychologist would be of great assistance. [Testimony Director]
10. As part of the neuropsychological evaluation, the District wanted to obtain information about the Student's executive functioning. Students' executive functioning allows them to be able to proceed with the demands of a typical school day. Executive functioning is the higher level functioning necessary to organize, plan and process information simultaneously and shift and maintain attention. These areas of organization and processing skills have been reported areas of difficulty for the Student. [Testimony Director]
11. Obtaining this information would be helpful in building a program for the Student to work on the Student's weaknesses and utilize her strengths. Information gleaned about the Student's executive functioning would be of assistance in developing strategies that will work well in the school environment, and determining what will not work well for

- the Student. This will assist the District in developing goals and objectives for the Student. [Testimony Director, School Psychologist]
12. A neuropsychological evaluation would provide information on the Student's ability to perform tasks. Standardized test scores can be obtained to compare the Student with students of the same age, gender and grade. In addition, information can be obtained through observation during the evaluation. All of this information can be used to differentiate the instruction and build a program that meets the Student's complex needs. [Testimony School Psychologist]
 13. A neuropsychological evaluation can provide information about the Student's reading and writing. Along with completion of an academic assessment, the neuropsychological evaluation includes a cognitive assessment and assessment of processing skills. Adaptive skills can also be assessed in a neuropsychological evaluation, as well as learning and memory, emotional functioning, intellectual functioning and processing skills. A neuropsychological evaluation would help determine what methods are most effective for this particular Student. The neuropsychological evaluation looks at academic skills and the way students obtain these skills. [Testimony School Psychologist, Dr. Sacco]
 14. The District requested that the Student receive a neuropsychological evaluation, and provided the Parent with a choice of an evaluation by the school psychologist who was qualified to complete a neuropsychological evaluation or a neuropsychologist. [Exhibit B-13] The level of interpretation of the data would be more in depth in a neuropsychological evaluation, which is one of the reasons the District felt it was the best assessment for the Student. [Testimony Director]
 15. The District had initially requested that the District staff complete the evaluation, but the Parent had indicated that she was very opposed to District staff conducting the evaluation. Although the Director felt the District staff could complete a comprehensive evaluation, in response to these concerns expressed by the Parent the District proposed that a neuropsychologist not employed by the District could complete the evaluation. [Testimony Director]
 16. The Parent was provided the Notice and Consent to Conduct a Reevaluation. This document provides the Parent information about the evaluation, including the test/evaluation procedures, the areas of assessment and the evaluation. The notices provided clearly identified the test/evaluation procedure for the assessment by the neuropsychologist (standardized measures, interview, record review, rating scales, observation) or in the alternative, the school psychologist and special education teacher (standardized measures, curriculum based standardized measures, observation, rating scales, interview and record review). The notices also clearly set forth the areas of assessment (reading, math, writing, adaptive, social-emotional, cognitive and executive functioning). The evaluators – either a neuropsychologist or school psychologist/special education teacher – were also clearly set forth in the notices. Both notices also noted that the the assessment would include consultation with the Parent and related services

providers prior to evaluation. The Parent did not consent to the evaluation. [Testimony Director, Exhibit B-13]³

17. A member of the District staff, the school psychologist, has experience and training to conduct this comprehensive evaluation. She has the training to conduct a comprehensive evaluation and the ability to interpret the data. The special education teacher could also perform the academic portion of the evaluation. Alternatively, a Connecticut licensed clinical psychologist with expertise in neuropsychology could complete the entire evaluation, including the academic portions thereof. [Testimony Director]
18. The Parent insisted that the evaluation be completed solely by Dr. Lovecky. Dr. Lovecky is a clinical psychologist in Rhode Island. Dr. Lovecky is not a neuropsychologist and is not a school based neuropsychologist. Dr. Lovecky is also not licensed to practice in Connecticut. To practice in Connecticut, a psychologist needs to be licensed in this state. Practicing in Connecticut would include providing an evaluation, a diagnosis and other services. The District could not agree to the evaluation by Dr. Lovecky, a provider who is not licensed in this state. The District has had discussions with the Parent about the evaluators they proposed and the steps that would be taken to ensure that the Student would be comfortable with the testing environment and evaluators. The Parent remained dissatisfied with the District's proposal, although she agreed that the Student should be evaluated. [Testimony Director]⁴
19. The Director believes this evaluation is necessary because the District does not have a comprehensive evaluation more recent than three to four years ago. The Student has changed as a student and a learner since that time. The District needs to be able to move forward to conduct evaluations about the Student's current functioning and designing an IEP based on the findings of the evaluation. [Testimony Director]
20. Danielle Hay, District school psychologist, has the experience and expertise to conduct an evaluation of the Student. She is a diplomate of the American Board of School Neuropsychology which endorses that she is qualified to perform school based neuropsychological assessments. [Testimony School Psychologist, Exhibit B-8]
21. The District's School Psychologist could conduct a school based neuropsychological evaluation which could provide information on the Student's cognitive functioning, executive functioning, and sensory motor, attention and social-emotional needs to help develop an educational program to help the Student to learn. The evaluation would include a meeting with the Parents and teachers to get background information on the Student, observation of the Student in a natural setting as well as during the assessment,

³ The Notice also requested consent for an occupational therapist evaluation. The District is not seeking to override the lack of consent to the OT evaluation in this case.

⁴ In 2010, the PPT convened and there was discussion referenced in the minutes that in the future, Dr. Lovecky would be the evaluator to complete the evaluation. Dr. Lovecky is not appropriately credentialed to complete the evaluation that the District is seeking, and the District has the right to select the evaluator of their choice. [Testimony Director, Exhibit B-1]

and a direct assessment in a one to one testing environment. [Testimony School Psychologist]

22. The District's School Psychologist has the experience to conduct an appropriate evaluation. She has experience evaluating students with more than one disability as well as with obsessive compulsive behaviors and autism. [Testimony School Psychologist]
23. Kristi Sacco, a neuropsychologist, is licensed to practice clinical psychology in Connecticut, has experience in evaluating students similar to the Student, and is experienced in completing evaluations including comprehensive neuropsychological assessments. Dr. Sacco also has the background and experience to conduct an appropriate evaluation. [Testimony Dr. Sacco; Exhibits B-9, B-10]
24. There are several evaluators in Connecticut who have experience and background to evaluate the Student, in addition to the School Psychologist and Dr. Sacco. [Testimony Director]

DISCUSSION/CONCLUSIONS OF LAW:

The District brought this action in accordance with the Individuals with Disabilities Education Act [IDEA] which provides for special education and related services to children with disabilities, from birth through age 21. Students who are identified as eligible for special education are entitled to receive a free and appropriate public education ("FAPE") pursuant to state and federal laws. See Conn. Gen. Stat. §§ 10-76 *et. seq.*; the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401, *et seq.*

The District is seeking to complete a neuropsychological evaluation of the Student, and override the lack of parental consent to the reevaluation in accordance with 34 CFR §300.300(c)(1)(ii).

As part of any reevaluation, the IEP Team and other qualified professionals, as appropriate, must review existing data on the child and determine "[w]hether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child, and to participate, as appropriate, in

the general education curriculum.” 34 CFR §300.305(a)(2)(B) The District must ensure that the Student is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. 34 CFR §300.304(c)(4)

The District has the affirmative obligation to conduct a reevaluation of the Student, which must occur at least once every three years. The Federal Regulations provide:

“§ 300.303 Reevaluations.

(a) *General.* A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311—

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(2) If the child’s parent or teacher requests a reevaluation.

(b) *Limitation.* A reevaluation conducted under paragraph (a) of this section—

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.”

The District also has the obligation to ensure that good standards and practices are maintained in the selection of the evaluator, and has the right to select its evaluator.

The District has reviewed the information that it has received regarding the Student from the current placement, and has also reviewed the most recent evaluative data. The District has

appropriately concluded that the neuropsychological evaluation will provide assessment information that is necessary to develop an appropriate program for the Student.

The District has provided substantial reasons for the Student, who has complex needs and has not undergone a comprehensive evaluation since 2007, to undergo a neuropsychological evaluation. The District must be able to move forward to conduct the neuropsychological evaluation about the Student's current functioning and designing an IEP based on the findings of the evaluation.

The Parent's lack of consent to the neuropsychological evaluation of the Student is hereby overridden. The District shall be permitted to proceed with the neuropsychological evaluation of the Student by an evaluator of their choosing.

FINAL DECISION AND ORDER

1. The Parent's lack of consent to the neuropsychological evaluation of the Student is hereby overridden.
2. The District shall be permitted to proceed with the neuropsychological evaluation of the Student by an evaluator of their choosing.