

DOCKET NO. 145-SE-0207

EL PASO ISD § **BEFORE A SPECIAL EDUCATION**
§
§
VS. § **HEARING OFFICER**
§
Student BNF Parent § **FOR THE STATE OF TEXAS**

DECISION OF THE HEARING OFFICER

El Paso ISD (Petitioner) requested a due process hearing pursuant to the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 *et. seq.*, as amended. The Respondent is Student bnf Parent.

In its Request for Hearing, Petitioner alleged as follows:

1. The parent requested an Independent Educational Evaluation to determine whether the student had a learning disability. The last evaluation was completed in May 2004. The District claimed the parent's request for an IEE was untimely. The District proposed that it complete a Full Individual Evaluation and sought an order overriding the lack of parental consent.
2. The parent also requested an IEE in the area of speech. The District sought a declaratory judgment that its speech evaluation is appropriate.
3. The parent requested a medical evaluation to determine if the student met the criteria for Other Health Impairment due to suspected ADD/ADHD and refused to consent to a full evaluation, including an emotional and behavioral component to determine educational need. The District sought an order overriding the lack of parental consent to said evaluation.

Prior to hearing, the District non-suited its claims with regard to the declaratory judgment as to its speech evaluation and the consent override regarding a learning disability assessment. Therefore, those issues are DISMISSED. The only remaining issue at the time of hearing was whether the district was entitled to an order overriding lack of parental consent to a full evaluation to determine if the student met the criteria for a student with Other Health Impairment.

The parent filed a counterclaim, alleging as follows:

1. The District failed to authorize a physician's evaluation to determine if the student met the eligibility criteria for a student with ADHD/OHI as requested by the ARD Committee.

2. The District failed to provide notice to the parent of an ARD Committee meeting at which it determined further evaluation was needed.

As relief, the parent sought an order that the District not conduct an ARD Committee meeting without notice to the parent, an order that the District not review existing evaluation data to determine if further evaluation is warranted without input from the parent, and an order that the District have the student tested by a physician to determine a diagnosis for ADD/ADHD.

Held: For Petitioner.

PROCEDURAL HISTORY

Petitioner's request for hearing was received by the Texas Education Agency on February 7, 2007, and assigned to Special Education Hearing Officer Sharon M. Ramage. Petitioner was represented by Carol Helms, of Walsh, Anderson, Brown, Schulze & Aldridge. Mark Berry represented the Respondent. Following a continuance for good cause, the hearing was held on April 2 and 3, 2007. The parties requested an extension of the decision due date in order to submit proposed findings of fact and written arguments. I found good cause to extend the decision due date based on the parties' request and other reasons stated in a post-hearing Order dated April 18, 2007. This final decision was timely rendered and forwarded to the parties.

Based upon the testimony of the witnesses, and an assessment of their credibility, a review of the exhibits and a review of the tape recording of the relevant ARD Committee meeting, I make the following findings of fact and conclusions of law and find that Petitioner is entitled to the relief requested in its Request for Due Process Hearing. I further find that Respondent wholly failed to meet his burden of proof with regard to his counterclaim.

FINDINGS OF FACT

1. The student resides within the geographical boundaries of the El Paso ISD and currently receives special education services as a student with a speech impairment.
2. On December 12, 2006, the undersigned hearing officer issued a decision in Docket No. 010-SE-0906, requiring El Paso ISD to provide compensatory speech services to the student.
3. On January 8, 2007, the ARD Committee convened to implement the Hearing Officer's decision. The notice of ARD Committee meeting stated that the purpose of the meeting was to implement the Hearing Officer's decision.
4. During the January 8, 2007 ARD Committee meeting, all members of the committee, including the parent, deviated from the agenda and discussed existing evaluation data and educational needs of the student and the district personnel responded to concerns of the parent. All parties, including the parent, were responsible for deviating from the stated agenda

for the meeting. The parent was represented by counsel at the ARD Meeting and was provided an opportunity for input with regard to the review of existing evaluation data to determine whether further evaluation was warranted.

5. During the January 8, 2007 ARD Committee meeting, the parent and his attorney requested that the District provide an evaluation to determine if the student had ADD/ADHD and to determine if he met the eligibility criteria as a student with Other Health Impairment. The parent and his attorney also requested Independent Educational Evaluations in the areas of speech and learning disability.

6. On August 18, 2006, the ARD Committee met, with the father present, and conducted a Review of Existing Evaluation Data. It was at this meeting that the parent first mentioned concerns that the student should be tested for ADD/ADHD by his physician. At that meeting, the ARD Committee members discussed the parent's concerns regarding the student's need for redirection and difficulty in remaining focused. The discussion regarding the parent's concerns at the January 8 ARD meeting was a follow-up to ongoing discussions between district personnel and the parent regarding the student's behavior. The District appropriately responded to the parent's concerns and request for further evaluation at the January 8, 2007 ARD meeting.

7. The January 8 ARD Committee proposed that the District conduct a Full Individual Evaluation (FIE) as the student's three-year re-evaluation was due in May of 2007.

8. The ARD Committee specified that as a part of the FIE, it would conduct its own academic testing.

9. The ARD Committee also specified that it would pay for the medical evaluation of the student to determine if he had a diagnosis of ADD/ADHD. This agreement was in response to the parent's request for the evaluation.

10. The ARD Committee discussed the need for an emotional/behavioral assessment in relation to the student's suggested ADD/ADHD. The parent refused such testing and requested that the testing be limited to a medical evaluation.

11. The ARD Committee minutes specify that a Consent for FIE would be presented to the parent following the meeting.

12. On January 22, 2007, the District sent Prior Written Notice of its intent to implement the January 8, 2007 ARD Committee decision. Included with the Prior Written Notice was a Notice of Full and Individual Evaluation with regard to the student's three-year re-evaluation.

13. The Notice to the parent specified the areas in which the child would be tested. More specifically, it specified that testing for ADD/ADHD would be conducted by a physician and that certain emotional/behavioral assessments would be administered by the District, including a Behavior Evaluation Scale and ADD/ADHD Behavior Rating Scale. The notice also

specified that the evaluator would obtain information from the parent and teacher with regard to the student's behavior.

14. The parent refused to sign the consent to the evaluation and continued to withhold consent as of the date of hearing.

15. No further ARD Committee meetings were held following the January 8, 2007 ARD.

16. Although the notice for the January 8, 2007 ARD did not specify that there would be a discussion with regard to testing for ADD/ADHD or an evaluation for OHI eligibility, the parent initiated the request for further evaluation. The District appropriately responded to the parent's request for such testing by discussing the matter and agreeing to conduct the reevaluation. The parent provided input into the decision to conduct further evaluation and participated meaningfully in the decision making process.

17. The student's three-year re-evaluation was due May 13, 2007 and has not been completed due to the parent's refusal to provide consent.

18. The District has not failed to authorize a physician's evaluation with regard to the student's OHI eligibility. Rather, the parent has refused to consent to the evaluation.

DISCUSSION

The IDEIA's implementing regulations require that school districts conduct reevaluations of children with disabilities at least once every three years and that the reevaluations be conducted in accordance with the evaluation procedures found at 34 C.F.R. §300.304-300.311. *See* 34 C.F.R. §300.303. The evaluation procedures include provisions requiring school districts to assess such children in all areas related to their suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities. *See* 34 C.F.R. §300.304. In performing the reevaluation, the ARD Committee members and other qualified professionals, must review existing evaluation data on the child including evaluations and information provided by the parents of the child; current classroom-based assessments and observations; and observations by teachers and related services providers; and then determine, based on their review and input from the parent, what additional data, if any, is needed to determine:

1. Whether the child continues to have a particular category of disability;
2. The present levels of performance and the developmental and educational needs of the child; and
3. Whether the child continues to need special education and related services, or whether 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 curriculum.

34 C.F.R. §300.305(a).

The regulations contemplate that persons other than the ARD Committee members will participate in the review, with input from the parent, and further specifically provide that the review need not occur within the context of an ARD Committee meeting. 34 C.F.R. 300.305(b); *see also San Diego Unified School Dist.*, 102 LRP 10169 (Cal. SEA, February 14, 2002) (reevaluation prerequisites met absent a formal meeting where evaluation team obtained input from parent over a period of time, reviewed existing evaluation data and sent proper description of evaluation procedures to parent). Parental consent is not required prior to reviewing existing evaluation data as a part of the reevaluation process. 34 C.F.R. § 300.300(c) Once the review of existing evaluation data is completed, the school district must then administer such assessments and other evaluation measures as it determines necessary. 34 C.F.R. §300.305(c). Prior to administering the assessments, the District must provide the parent with prior written notice of the scope of the evaluation and seek informed consent. 34 C.F.R. §300.300(c). The prior written notice must include a description of the evaluation procedures the agency proposes to conduct. 20 U.S.C. 1415(b)(3) and (c); 34 C.F.R. 300.304; 34 C.F.R. 300.503.

In the instant case, the parent and the district reviewed existing data during August of 2006 and again at the January 8, 2007 ARD Committee meeting. Although the stated purpose of the January 8 ARD Committee meeting was to implement a hearing officer's decision, the parent not only requested the evaluation, but persisted in discussing the child's behavior and other issues (including the revision of IEP goals and objectives) when attempts were made to stay focused on the stated agenda for the meeting. The parent's attorney asked that an evaluation be conducted to determine whether the student met the criteria for Other Health Impairment (OHI) due to suspected ADD/ADHD. District personnel discussed with the parent that additional information would be needed in addition to a medical diagnosis to determine educational need. The parent and his attorney then stated that the parent would not agree to any evaluation other than a medical evaluation. In other words, the parent requested the evaluation and then attempted to limit its scope. The parent does not complain that the District is seeking an evaluation to determine eligibility under the category of OHI. Rather, the parent seeks to limit the scope of the data available to the District by insisting that only a medical evaluation be conducted.

The applicable state and federal regulations clearly require that a medical diagnosis standing alone is not sufficient to determine OHI eligibility. An inquiry must be made into the impact such a disorder would have on the child's educational performance. 34 C.F.R. §300.8(a)(1); 300.8(c)(9). The ARD Committee makes the eligibility determination with input from a multidisciplinary team that includes a licensed physician. 19 T.A.C. §89.1040(8). In other words, the applicable regulations contemplate that while a licensed physician makes the diagnosis of ADD/ADHD, it is a multi-disciplinary team that collects or reviews evaluation data to determine the student's educational need based on that diagnosis. This multi-disciplinary

team *includes but is not limited to* a physician. Additionally, in conducting an evaluation, the school district must use a variety of assessment tools and strategies to gather relevant data and must not use any single measure or assessment as the sole criterion for determining whether the child has a disability or his educational program. 34 C.F.R. § 300.304(b).

The District has an obligation to seek complete information to determine educational need based on current data. To limit the evaluation to a medical evaluation in this case would undermine the ARD Committee's ability to base its future decisions on complete information and potentially impede the provision of a Free Appropriate Public Education to the student. The parent and the District have determined that further inquiry is needed to determine whether the student has ADD/ADHD and should receive further services as a student with OHI. The District is obligated to augment the medical information to determine the student's eligibility and to develop an appropriate IEP which would meet his unique educational needs. *Conroe ISD v. Shelby S.*, 454 F.3d 450 (5th Cir. 2006). The District has the absolute right to conduct its own assessment to determine special education eligibility and educational need. This right includes the right to choose appropriate assessment procedures and instruments. *Andress v. Cleveland ISD*, 64 F.3d 175 (5th Cir. 1995); *Houston ISD v. C.P.*, Dkt. No. 104-SE-1100 (Tex. Hearing Officer James Hollis, December 30, 2000); *Northside ISD v. J.T.*, Dkt. No. 286-SE-0404 (Tex. Hearing Officer Ann Lockwood, July 6, 2004). The parent may not prospectively limit the scope of the District's chosen assessment strategies as a predicate to granting consent to the evaluation it requested.

The Petitioner bears the burden of proof in its request for an Order overriding parental consent for the evaluation. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Petitioner has established by a preponderance of the evidence that its request for additional data in the nature of emotional/behavioral measures are needed for its evaluation team to make a determination with regard to educational need and whether the student meets the criteria for Other Health Impairment. The Petitioner's request for an Order overriding the parent's lack of consent to the evaluation is GRANTED.

With regard to Respondent's counter-claim, Respondent has wholly failed to meet his burden of proof. The parent bears the burden of proof with regard to the issues raised in his counterclaim. *Schaffer v. Weast*, 126 S.Ct. 528 (2005). Respondent failed to present any evidence that the District failed to authorize a medical evaluation of the student. In fact, the evidence presented clearly establishes that the impediment to the completion of the evaluation is the parent's lack of consent. Additionally, Respondent failed to prove by a preponderance of the evidence that it failed to provide notice to the parent of an ARD Committee meeting at which the need for further evaluation would be discussed. The evidence presented demonstrated that the parent received notice of the ARD Committee meeting on January 8, 2007, participated meaningfully in the ARD meeting, and initiated the request for the evaluation in question. It is impossible for a school district to provide notice to a parent of issues which might be raised by the parent at an ARD meeting. However, assuming, *arguendo*, the notice of the January 8 ARD meeting was procedurally deficient, this type of procedural deficiency does not warrant a finding of a denial FAPE because there has been no loss of educational opportunity and no infringement of the parent's opportunity to meaningfully participate in the ARD process. 34 C.F.R. §

300.513(2); *Adam J. v. Keller ISD*, 328 F.3d 804 (5th Cir. 2003). Additionally, a review of existing evaluation data need not occur within the context of an ARD meeting, so notice of its intent to review that data was not needed prior to the January 8 meeting. The regulations require that the relevant committee members, as well as other qualified professionals, review the data and obtain input from the parent in determining if further evaluation is needed. If further evaluation is warranted, the District must provide prior written notice to the parent describing the proposed evaluation procedures. The District did so in this case. The relief requested in Respondent's counterclaim is DENIED.

CONCLUSIONS OF LAW

1. The student meets the eligibility criteria and presents a current educational need for special education services as a student with a disability classification of Speech Impaired under IDEIA, 20 U.S.C. §1400 *et. seq.* and its implementing regulations.

2. The student's parents reside within the geographical boundaries of the El Paso ISD, a legally constituted independent school district within the state of Texas that is responsible for providing him with a Free Appropriate Public Education.

3. El Paso ISD is responsible for ensuring that a reevaluation of the student is conducted in accordance with 34 C.F.R. §§300.304-300.311 at least once every three years absent the agreement of the parent.

4. With few exceptions, parental consent for initial evaluations and reevaluations of their child must be obtained by a School District prior to conducting the initial evaluation or the reevaluation. 34 C.F.R. §300.505(a)(1)(i).

5. During the January 8, 2007, ARD Committee meeting, El Paso ISD's evaluation team, with input from the parent, determined that additional data is needed as part of the student's triennial reevaluation. Such information is needed to determine if the student meets the eligibility criteria for Other Health Impairment and to determine his present level of educational performance and educational need. 34 C.F.R. §300.305.

6. El Paso ISD may seek and obtain through the due process hearing procedures an order overriding the refusal of the student's parents to consent to the reevaluation. 34 C.F.R. §300.300(c).

7. El Paso ISD established the need to conduct a medical evaluation and an emotional/behavioral assessment, including a behavior evaluation scale and ADD/ADHD Rating Scale, to determine whether the student meets the criteria for Other Health Impaired due to ADD/ADHD and to determine his current educational need.

ORDER

After due consideration of the record, the foregoing findings of fact and conclusions of

law, I hereby **ORDER** that the following relief is **GRANTED**:

1. The District shall complete a Full Individual Evaluation of the student as noticed to the parent in its January 22, 2007 prior written notice. This evaluation shall comply with 34 C.F.R. §300.304-300.311 and shall be completed no later than 45 days from the date of this Order.

2. The parent is ordered to cooperate with the District in the conduct of the FIE and to present the student for such an evaluation.

3. This Order shall override the parent's lack of consent to the evaluation.

4. The ARD Committee shall meet within ten (10) school days of the date of this decision to begin implementation of the relief ordered herein.

All other relief not specifically granted herein is hereby **DENIED**.

NOTICE TO THE PARTIES

This Decision is final and is appealable to state or federal district court.

The district shall timely implement this Decision within 10 school days in accordance with 19 T.A.C. §89.1185(q) and 34 C.F.R. §300.514. The following must be provided to the Division of Complaints Management at the Texas Education Agency, and copied to the Petitioner within 15 school days from the date of this Decision: 1.) Documentation demonstrating that the Decision has been implemented; or 2.) If the timeline set by the Hearing Officer for implementing certain aspects of the Decision is longer than 10 school days, the district's plan for implementing the Decision within the prescribed timeline, and a signed assurance from the superintendent that the Decision will be implemented.

SIGNED this 14th day of May, 2007.

/s/Sharon M. Ramage

Sharon M. Ramage

Special Education Hearing Officer

SYNOPSIS

Issue No. 1: Whether the District has the legal right to override lack of parental consent to conduct a full, individual reevaluation to determine eligibility and educational need under IDEIA when the parent requests the evaluation but withholds consent because he disagrees with the scope of the evaluation.

Held: For the District. The district has the right to conduct its own assessment under IDEIA and the scope of the evaluation is left to the determination of the evaluation team. The District has the right to invoke the due process hearing procedures to override lack of parental consent if the additional data sought is needed to determine (1) whether the child continues to have a particular disability; (2) the child's present levels of performance and educational needs; and (3) whether the child continues to require special education and related services, or whether any additions or modifications to the special education and related services are needed to enable to child to receive a FAPE.

Citation: 34 C.F.R. 300.305(a); 300.300(c); 300.505(b)

Issue No. 2: Whether the scope of an evaluation for Other Health Impaired due to suspected ADD/ADHD is limited to a medical evaluation.

Held: For the District. An evaluation for OHI due to ADD/ADHD must include, but is not limited to, a physician's diagnosis and input. A diagnosis standing alone is insufficient as there must be a determination as to the impact on the child's education.

Citation: 34 C.F.R. 300.8(a)(1); 300.8(c)(9); 300.304(b); 19 T.A.C. § 89.1040(8).