



# The University of the State of New York

## The State Education Department State Review Officer

No. 08-121

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the XXXXXXXXXXXXXXXX School District**

### **Appearances:**

Keane & Beane, P.C., attorney for respondent, Stephanie M. Roebuck, Esq., of counsel

### **DECISION**

Petitioners (the parents) appeal from the decision of an impartial hearing officer which ordered that in the absence of parental consent respondent (the district) arrange for the performance of a psychological evaluation, an educational evaluation, a medical evaluation, a classroom observation, and a social history report of the student. The appeal must be dismissed.

At the time of the initiation of the impartial hearing, the student was in seventh grade in a district middle school (Tr. p. 12). The student's educational history is discussed in a prior appeal involving the student<sup>1</sup> and will not be repeated here in detail. The student's eligibility for special education services as a student with a learning disability is not in dispute in this proceeding (Dist. Ex. J at p. 2; see 34 C.F.R. § 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The district sent the parents a letter dated September 20, 2007 entitled "Committee on Special Education (CSE) Consent for Reevaluation" with a "consent for reevaluation" form attached thereto (Dist. Ex. 3 at p. 1). The letter advised that pursuant to State regulations the CSE must arrange for an appropriate reevaluation of each student recommended to receive special education services at least every three years for the purpose of determining the student's educational needs and continuing eligibility for special education (id.). The narrative portion of the consent letter advised the parents that the district was requesting their written consent for a reevaluation that would occur during the school year, but that consent was not necessary if the district had taken reasonable measures to obtain consent and received no response (id.). The

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<sup>1</sup> Application of a Child with a Disability, Appeal No. 07-126

letter further explained that the evaluation would consist of a variety of tests and assessments provided at no cost to the parents (id.). The reevaluation as proposed consisted of a social history, a psychological evaluation, an educational assessment of the student's academic achievement, a physical examination performed either by the school or submitted from the student's physician, and a classroom observation of the student or a review of current evaluative information, if appropriate (id.). In addition the letter noted that a speech-language evaluation, an assessment of the student's motor abilities, and a functional behavioral assessment would occur as needed (id.). The parents were notified that they had the right to request a test or assessments as part of the reevaluation (id.). In addition, the parents were invited to submit any evaluation information they may have that they wanted the CSE to consider (id.). The letter further explains that when the reevaluation was completed the parents would have the opportunity to discuss test results with members of the evaluation team (id. at p. 2). The CSE would then formally meet to review the evaluation results and discuss possible recommendations with the parents (id.). The letter indicated that if the parents had any questions regarding the notice of testing, the request for consent that the district would arrange a meeting to discuss any questions regarding the proposed evaluation, or would provide the parents with additional resources to contact to obtain assistance in understanding the information (id.). The parents were asked to "please sign and return the enclosed consent form as soon as possible so that we can address your child's learning needs in a timely manner"(id. at pp. 2-3). The consent form for the student to be reevaluated by the CSE advised that, upon signing the form a parent would be indicating that he or she understood that the district is required to reevaluate a student for the purpose of determining the student's educational needs and continuing eligibility for special education; that the district was requesting the parents' written consent to reevaluate the student, but consent was not necessary if the district had taken reasonable measures to obtain consent if the parents did not respond; that the parents received and understood the notice that the student would be reevaluated by the CSE; and that the parents also received a copy of the procedural safeguards notice that is required by the Individuals with Disabilities Education Act (IDEA) (id. at p. 3). Testimony by the district director of staff and pupil personnel services indicated that the district received no response from the parents regarding the district's first request for consent to reevaluate the student (Tr. pp. 92-93).

By letter dated October 15, 2007, the district sent the parents a "second request" for the parents' consent for reevaluation<sup>2</sup> with a return receipt requested as a follow-up to previously sent notice for which the parents did not respond (Dist. Ex. 4 at p. 2). On October 22, 2007, a third request for parental consent to reevaluate the student was made by the district by hand delivering a copy of the October 15, 2007 request for consent for reevaluation to the student's father with a note indicating that the district had not yet received the parents' signed consent, and again requesting that the parents return a signed consent form to the district so that the student's reevaluation could commence (Tr. pp. 93-94; Dist. Ex. 4 at p. 1). Testimony by the district director of staff and pupil personnel services ("director") indicated that the district received no response to its second or third requests for consent to reevaluate the student (Tr. p. 94).

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<sup>2</sup> This letter was entitled "Committee for Special Education Consent for Reevaluation Return Receipt" and, but for a minor variation, contained the same information as the initial request for consent letter dated September 20, 2008 (Dist. Ex. 3).

A CSE meeting was held on October 24, 2007, in which there was parental participation, to discuss several issues including the need for new evaluations (Tr. pp. 95-96, 292; Dist. Ex. 5). At the CSE meeting, the district offered to have the Board of Cooperative Educational Services ("BOCES") Child Guidance Center conduct the psychological and educational evaluations (Tr. pp. 95-96, 292; Parent Ex. J at p. 7-8). No consent was received at the meeting for the evaluations.

In a December 12, 2007 letter to the parents, the district sent a fourth written request for consent to reevaluate, and asked them to sign and return the consent form by December 19, 2007 (Dist. Ex. 5 at pp. 1-4). The letter summarized the district's obligation per regulation that a three-year reevaluation needed to be conducted for the student and contained essentially the same information as the prior three written requests for consent.

In an e-mail dated December 18, 2007 to the director of staff and pupil personnel services, the parents indicated that they were requesting a full and complete CSE meeting on behalf of their son (Dist. Ex. 6). Among other things, the parents indicated that they could "not even begin to discuss" the district's request for consent to evaluate until the student's individualized education program (IEP) was "actually completed and approved by the CSE TEAM" (id.). The parents indicated that it had been more than a year since the student had an IEP that was completed and approved by the CSE (Tr. p. 98; Dist. Ex. 6).

In response to the aforementioned e-mail, a December 19, 2007 letter to the parents from the director expressed the district's belief that it did have an approved IEP in place for the student that was appropriate for his needs (Dist. Ex. 7 at p. 1). The letter indicated that regardless of the parents' beliefs that there was not a finalized IEP in place, the district was obligated to conduct a reevaluation every three years for the student, and the fact that the parents believed that there was not an IEP in place did not preclude further testing (Tr. pp. 98-100; Dist. Ex. 7 at pp. 1-2). The director of staff and pupil personnel services indicated in the letter that she hoped the parents would consent to the evaluation especially since the evaluations would be conducted by outside evaluators (Dist. Ex. 7 at pp. 1-2). She also indicated that if the parents did not consent for reevaluation at that time the district had to take some action and that if the parents did not respond to the request the district had the right to evaluate the student without their consent (id.). The letter indicated that if the parents refused to have the student reevaluated, the district would consider commencing an impartial hearing to gain consent (id. at p. 2). The director noted that she did not wish to pursue an impartial hearing and she requested that the parents sign a consent form to reevaluate the student (id.). This represented the district's fifth written request for consent to evaluate.

In an e-mail attachment dated January 17, 2008 to the director of staff and pupil personnel services, the parents requested a CSE meeting "to finish developing" the student's IEP for 2007-08 (Dist. Ex. 8 at p. 2). The parents indicated that the district had already completed many of the requested evaluations within the last three years (id.). Evaluations administered within the last year would "not need to be repeated by the district personnel or those hired by the district" (Dist. Ex. 8 at p. 2). The parents indicated that if the district wanted other testing repeated the parents were willing to discuss at the CSE meeting the need for Independent Educational Evaluations (IEE) (id.). The e-mail attachment included a list of proposed triennial

evaluations that the parents indicated had already been completed, including a 2005 neuropsychological evaluation (Tr. p. 102; Dist. Ex. 1), 2006 and 2007 psychological evaluations (Parent Ex. A), a 2006 psychiatric evaluation (Parent Ex. C), a functional behavior assessment, a 2006 educational assessment (Dist. Ex. 2), multiple classroom observations (Parent Exs. B; D; E), a 2005 speech language evaluation,<sup>3</sup> and motor testing as a result of technology evaluations (Parent Ex. G)<sup>4</sup> conducted in 2006 and 2007 (see Dist. Ex. 8 at p. 2). The parents indicated that the social history needed to be completed since it had not been updated since December 2004 when the student was in second grade (Tr. p. 101; Dist. Ex. 8 at p. 2). They also noted that the student's physical examination would be conducted by their private doctor (Tr. pp. 100, 103; Dist. Ex. 8 at p. 2).

In a letter dated January 22, 2008 to the parents, the director of staff and pupil personnel services indicated that psychological, educational, social history, classroom observation, physical, and neurological<sup>5</sup> evaluations would need to be completed (Tr. p. 106; Dist. Ex. 9). The letter stated, "To the extent to which the consent to reevaluate is not forthcoming, the [d]istrict reserves the right to take whatever steps necessary to obtain the requisite evaluations" (Dist. Ex. 9).

An e-mail dated January 28, 2008 to the director from the student's father acknowledged an invitation by the district to attend a CSE meeting scheduled for February 6, 2008 (Parent Ex. H). The student's father requested a copy of an agenda that the district planned to cover at the CSE and indicated that there were several items from their own agenda that had not been covered at the October 24, 2007 CSE meeting (id.). In a same day response the director indicated that she did not have anything to cover at that time which had not already been reviewed in previous CSE meetings, and that the only pending item was the parents' consent needed by the district to conduct the necessary evaluations as part of the student's reevaluation process (id.).

On February 6, 2006 the CSE convened for approximately one and one-half hours to discuss the parents' submitted agenda and the CSE did not reach the issue of the need for new evaluation data (Parent Ex. J at pp. 6-7).

The district submitted a due process complaint notice on March 13, 2008 (IHO Ex. I at p. 1). The complaint indicated that the parents had not provided consent to the district for the student's mandatory reevaluation, seven correspondences had been sent to the parents regarding the consent since September 2007, and that the need for the consent had been discussed verbally

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<sup>3</sup> The speech-language evaluation is not included in the hearing record.

<sup>4</sup> An October 4, 2006 assistive technology assessment recommended among other things that the student use various assistive technology equipment and software for all formal writing assignments (Parent Ex. G at pp. 7-8). The assessment indicated that the student displayed moderate grapho-motor difficulties when writing; his hand fatigued after writing; he had poor endurance for writing; and his handwriting was not functional for school work on his grade level (id. at p. 3). The evaluator recommended that the student's equipment needs be reevaluated in two years to assess how he was progressing and to define new technology recommendations as he grows (id. at p. 8).

<sup>5</sup> A neurological evaluation of the student was previously recommended by the determination in Application of a Child with a Disability, Appeal No. 07-126 based upon the hearing record in that appeal (see Dist. Ex. 9).

with the parents on numerous occasions (Tr. p. 115; IHO Ex. I at p. 2). The district's proposed solution was for the parents to give consent to conduct the following evaluations: psychological, educational, social history, and a neurological (IHO Ex. I at p. 2). The parents were to provide the physical evaluation (id.).

In another e-mail dated April 1, 2008 the student's father indicated that although the parents had written several times regarding the social history portion of the triennial evaluation, they did not hear back from the district regarding this, and they requested that someone contact them to schedule the social history portion of the evaluation (Tr. p. 107; Dist. Ex. 10). In a same day response letter to the parents, the director indicated that their e-mail regarding the social history was the first correspondence received requesting and giving the district consent to complete the social history (Tr. p. 108; Dist. Ex. 11). A social history update form was attached to the letter with a request for the parents to complete the form and return it to the district (Dist. Ex. 11). The hearing record reflects that by the time of the hearing proceedings, the district had still not received the form back from the parents (Tr. p. 109).

On March 18, 2008 the hearing officer was assigned (IHO Ex. II at pp. 1, 3). The impartial hearing commenced on June 19, 2008 and concluded on July 29, 2008 after two days of testimony. The district called two witnesses and submitted 11 documents into evidence (Dist. Exs. 1-11). The parents called two witnesses and submitted 16 documents into evidence (Parent Exs. A-P). The impartial hearing officer rendered her decision on September 4, 2008. In the decision she stated that the sole issue at the impartial hearing was the appropriateness of the district's request for triennial evaluations in the absence of signed parental consent, specifically a psychological evaluation that included cognitive testing, an educational evaluation with a classroom evaluation, and a social history (IHO Decision at pp. 1, 7).

The impartial hearing officer made the following determinations: (1) that the hearing record supported the district's position that the need for evaluative data was determined by appropriate individuals after due consideration and with notice and parental input; (2) that earlier evaluations were either more than three years old or incomplete and that there was a need for a psychological evaluation that included cognitive testing; (3) that although educational testing had been conducted between September 25 and October 16, 2006, the district's request for educational testing was reasonable because in 2006 the area of writing was not tested because of the student's resistance at the time, and that there are advantages to having a battery of tests done close in time to provide a better measure of the student's educational needs; (4) parental concerns and speculation about the student possibly exhibiting oppositional and non-cooperative behaviors specific to testing were not valid reasons to restrict necessary evaluations; (5) the parents' behavior belied the district's attempts to more fully discuss the need for evaluation; (6) the hearing record offered no proof that BOCES personnel would not be qualified, impartial, and professional to conduct the proposed evaluations. The impartial hearing officer ordered that in the absence of the parents' consent, the district should arrange for "the performance of the appropriate triennial evaluations; a psychological, an educational, a classroom observation, a social history and a medical" (IHO Decision at p. 10).

This appeal ensued. On appeal the parents ask that the district's request for new testing be denied and that the district be required to convene a CSE to review existing data currently available to determine what additional data is needed.

Federal and State regulations mandate that each student with a disability be reevaluated at least once every three years (34 C.F.R. § 300.303[b][2]; 8 NYCRR 200.4[b][4]). The procedure for a reevaluation requires that a group that includes the CSE and other qualified professionals, as appropriate, to conduct an initial review of the existing evaluation data including information provided by the student's parents, current classroom-based assessments and observations, and observations by teachers and related service providers (34 C.F.R. § 300.305[a][1]; 8 NYCRR 200.4[b][5][i]). Such review may take place without a meeting (8 NYCRR 200.4[b][5][i]). Based on that review, and based on input from the student's parents, the CSE must then identify what additional information, if any, is needed to determine whether the student continues to have an educational disability, the student's present levels of performance, whether the student needs special education services, or whether any additions or modifications to the special education services are needed (34 C.F.R. § 300.305[a][2]; 8 NYCRR 200.4[b][5][ii]). If additional data is needed, the school district shall administer tests and obtain other evaluation materials as may be needed to produce the needed data (34 C.F.R. § 300.305[c]; 8 NYCRR 200.4[b][5][iii]). However, before administering tests or other evaluation materials to reevaluate a student with a disability, a school district must obtain informed parental consent (34 C.F.R. § 300.300[c]; 8 NYCRR 200.5[b][1][i]).

Consent is defined in the federal and State regulations as meaning that the parents have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and further that the parent must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 C.F.R. § 300.9; 8 NYCRR 200.1[1]). If the parent refuses to consent to the reevaluation, a school district may, but is not required to, pursue the reevaluation by using the consent override procedures (see 34 C.F.R. §§ 300.300[c][1][ii]; 300.300[a][3]).

In the instant case, I find that the procedures at the hearing were consistent with the requirements of due process and the impartial hearing record supports the impartial hearing officer's decision.<sup>6</sup>

There is sufficient information in the hearing record to support the impartial hearing officer's conclusion that an educational evaluation and psychological evaluation with cognitive testing is appropriate. In addition to the reasons stated by the impartial hearing officer, I note that testimony by the district school psychologist indicated that the last time a cognitive evaluation had been conducted was in January 2005 when the student was in fourth grade, three and one-half years prior to the impartial hearing in the instant case, and as part of a neuropsychological evaluation (Tr. pp. 12-3, 17; Dist. Ex. 1 at pp. 1, 4-5, 17). The

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<sup>6</sup> See 20 U.S.C. § 1415[g]; 34 C.F.R. § 300.514[b]; Educ. Law § 4404[2]; 8 NYCRR 200.5[k].

neuropsychological evaluation report indicated that at that time, the neuropsychological evaluation would

...help assess [the student's] current cognitive and academic functional levels and identify learning strengths and weaknesses." Results obtained will be useful in determining academic placement and optimal teaching techniques to best serve [the student's] educational needs at this time (Dist. Ex. 1 at p. 1).

The school psychologist stated at the impartial hearing that the Wechsler Intelligence Scale for Children–Fourth Edition (WISC-IV) administered to the student by the neuropsychologist is a comprehensive instrument that is norm-based and for students between the ages of six through sixteen (Tr. p. 16). The WISC-IV examines different domains of cognitive abilities including verbal comprehension, perceptual organization, working memory, and processing speed (*id.*). When asked what this type of cognitive testing provides to a CSE the school psychologist indicated that,

...it speaks directly to the child's learning, to their problem solving skills, to their language development, their ability to solve problems with words and without words. It looks at their ability to use short-term memory and to hold things in their memory, and then reorder it, and use that information. It also looks at graphomotor speed and accuracy (Tr. pp. 16-7).

The school psychologist stated that in her professional opinion updated cognitive testing was necessary and was overdue (Tr. p. 17). The school psychologist explained that at the time of the impartial hearing the student presented as "a very different child" since 2005 when cognitive testing was completed (*id.*). Regarding the WISC-IV scores, the school psychologist noted that a student's pattern of cognitive scores can change, especially after receiving intervention in school and making growth and progress (Tr. pp. 17-18). In the student's case, the school psychologist testified that at the time of the 2005 neuropsychological evaluation report, the student displayed relative weakness in his working memory skills (Tr. p. 18). She noted that working memory was relevant to the student's academics because it related to his ability to listen to class discussion and lecture and his ability to hold information in memory long enough to process and understand it and to use the information (*id.*).

At the time of the impartial hearing in the instant case, the student was completing seventh grade (Tr. p. 12). The school psychologist indicated that discussion regarding the student's reading occurred "many times" at CSE meetings and at parent/teacher conferences (Tr. pp. 28-29). She reported that the student more than 25 books during the 2007-08 school year; that he enjoyed reading; that he engaged in reading groups with other students; that he discussed books he read; that made excellent progress, and that the teacher was pleased with his reading and progress (Tr. p. 28). According to the school psychologist, a comparison of 2005 and 2006 administration of the Woodcock-Johnson Tests of Achievement-Third Edition (W-J III ACH) reflected "some growth" in the student's performance in reading (Tr. p. 27; Dist. Exs. 1 at pp. 6, 18; 2 at pp. 2-5). She noted however, that test results were out-of-date and did not reflect where

the student was functioning at the time of the impartial hearing (Tr. p. 23). The 2005 and 2006 scores specific to the student's reading domain were dated and that the student was "a very different reader" than he was two years ago. At the time of the impartial hearing he was reading "quite complicated books" and "doing well with them" (Tr. p. 29).

The school psychologist testified that there was value in conducting the psychological evaluation and the academic evaluations contemporaneously (Tr. p. 30). She explained that best practice is that the psychological (especially the cognitive portion of the evaluation) and educational testing be conducted within a short period of time of each other because it provides a view of the "whole child" rather than only one aspect (Tr. p. 31). She opined that when considering a triennial evaluation it is important to look at all of the recent evaluative pieces at the same time (id.).

In regard to an educational evaluation, in addition to the reasons stated by the impartial hearing officer that such an assessment is appropriate, I note that the school psychologist stated that writing instruction was a very important part of the curriculum and there was concern that the district did not have a norm-based measure of the student's writing skills (Tr. p. 30).

The impartial hearing officer also gave due consideration to the parents' arguments opposing the psychological and educational evaluations. The impartial hearing officer did not find persuasive the parents' argument that a private psychological evaluation in 2006 negated the weight of the evidence that showed the appropriateness of an updated psychological evaluation, given the evidence that the private psychological evaluation was not sufficiently "comprehensive" (IHO Decision at p. 8). The impartial hearing officer also found support for ordering the additional evaluations requested by the district in evidence showing that there were conflicting recommendations in the existing psychological evaluative data (id.). Regarding the need for an educational evaluation, the impartial hearing office found that the parents argument that the student would resist testing to be speculative and that prior testing had been incomplete (id. at p. 9). Moreover, the hearing record suggests that the student is performing at a much different level than the testing in 2005 and 2006 would indicate (Tr. p. 30),<sup>7</sup> and that a current classroom observation is warranted to assess the student's performance in his current environment (Tr. p. 80). The hearing record supports the impartial hearing officer's determination that the weight of the evidence supports the district's requests.

As to the social history, the parents have already indicated a willingness to have an update completed (Tr. p. 107; Dist. Ex. 10). As to the medical evaluation, likewise the parents have indicated a willingness to submit one (Tr. pp. 100, 103; Dist. Ex. 8 at p. 2)

Pertaining to the parents' argument that the district failed to provide appropriate notice of the evaluations sought and the need for such evaluations, I concur with the impartial hearing officer's determination (IHO Decision at p. 9) that any inadequacies in the content of the initial notices sent to the parents were adequately addressed through correspondence, conversations and

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<sup>7</sup> See 8 NYCRR 200.4(b)(4).

meetings (see also Tr. pp. 85, 127; 235-36; Dist. Exs. 8 at p.2; 9). Any procedural inadequacies did not rise to the level of a denial of a free appropriate public education.<sup>8</sup>

In consideration of the above, and in consideration of IDEA's requirement that special education instruction be provided to meet a student's unique needs based upon appropriate evaluative data,<sup>9</sup> the impartial hearing officer's decision is sustained.

In light of my decision herein, I need not address the district's objection on appeal pertaining to the form of the parents' petition for review. Lastly, I have considered the parents' other arguments and find them to be without merit.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
November 19, 2008**

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**PAUL F. KELLY  
STATE REVIEW OFFICER**

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<sup>8</sup> While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). Here, with all the opportunities afforded the parents to discuss their concerns and elicit information they believed to be required, neither substantive harm nor significant impediment of parental participation occurred.

<sup>9</sup> An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to appropriately identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]).