STATE OF NEW HAMPSHIRE
DEPARTMENT OF EDUCATION

In Re: Student/North Hampton School District

IDPH-FY-10-03-033

PRE-HEARING ORDER

A Pre-Hearing Conference was held on April 9, 2010. Representing the interest of the Student were Richard O'Meara, Esquire and the Student's father. Representing the interest of the School District were Jeanne M. Kincaid, Esquire and Karen Frisbee, Director of Pupil Services.

The issue in dispute is the District's request to conduct a re-evaluation of the Student. The Parents disagree and further take the position that the District is retaliating against the Parents because of a dispute between the District and Parents related to another child of the family. The parties are each filing Motions for Summary Judgment. The School District has already filed its Motion and the Parent's will file theirs by the 16th of April, 2010. The District has also filed a Motion in Limine. Objections to all Motions should be submitted by April 23, 2010. The parties waive the 45 day rule. There has also been a Motion to Produce filed by the Parents and the District must object by April 16, 2010. The matter will be heard on May 5, 2010 from 9:00 a.m. to 4:00 p.m. and on May 6, 2010 from 9:00 a.m. to 2:00 p.m. The District shall product the core exhibits by April 26, 2010 and the Parents shall supplement by April 28, 2010. The School District will present first reserving the right to call rebuttal witnesses with respect to the retaliation claim.

So Ordered.

Dated: _____

_____
John P. LeBrun, Esquire
Hearing Officer

STATE OF NEW HAMPSHIRE
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ORDER ON CROSS MOTIONS
FOR SUMMARY JUDGMENT

The School District (SD) filed a Motion for Summary Judgment asserting that it is entitled to Summary Judgment as a matter of law with respect to its request to perform a reevaluation of the Student. The Parents (P) objected to the Motion for Summary Judgment and filed a Cross Motion for Summary Judgment asserting that they are entitled to Summary Judgment as a matter of law because they properly declined consent with respect to duplicative testing sought by SD until such time as existing evaluation information is reviewed by members of the Student's team and informed decisions can be made relative to whether additional testing is warranted.

SD argues that it is entitled to perform reevaluations in the following areas: academic performance, communication skills, intelligence/cognitive, hearing screening, motor ability (occupational and physical therapy), observations, vision screenings, Connors and BRIEF checklists (see Motion at paragraph 9). It appears to be uncontested that P provided the team with a copy of an independent evaluation (intellectual assessment administered by a school psychologist, Barbara Cascadden). It also appears undisputed that the Student participated in a privately funded audiological evaluation on February 5, 2010. At a team meeting on February 12, 2010, P provided a copy of the intellectual assessment from Ms. Cascadden to the team and notified the team that they would be submitting a report regarding the audiological evaluation upon receipt. The P notified the team that a privately funded neurological test was already

scheduled. The neuropsychological testing was conducted by Dr. Gatti and completed on April 6, 2010 and P indicates at paragraph 27 of the Cross Motion for Summary Judgment that that report would be shared with SD.

SD asserts that notwithstanding the existence in 2010 of intellectual, audiological and neuropsychological testing which either has been or would be provided to the team SD has an absolute right as a matter of law to conduct the testing it proposes.

There is no dispute that the triennial evaluation is over one year away.

20 U.S.C. §1414 (c)(1997) provides that in pertinent part, "as part of any reevaluation under this section the IEP team and other qualified professionals, as appropriate, shall:

A. 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 teacher and related services providers observation; and

B. On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine IDEA eligibility, present levels of performance and educational needs, and required special education and related services to meet the IEP's annual goals and to participate in the general curriculum.

The Affidavit of Karen Frisbie, Director of Pupil Services for SD was attached to the SD Motion for Summary Judgment. Therein, Ms. Frisbie acknowledges that the team was provided with a copy of the Cascadden evaluation. The affidavit fails to indicate that the team reviewed or was willing to review that evaluation notwithstanding the provisions of 20 U.S.C. §1414 C (1)(A). In addition, the mother submitted an affidavit in support of P's Cross Motion for

Summary Judgment and indicates at paragraph 20 that SD was notified that the P's would provide a copy of the audiological evaluation report upon receipt and that a neuropsychological evaluation was scheduled. The SD does not indicate in its Motion that it had any willingness to review the audiological or neuropsychological reports once received but instead argues that it should be allowed to conduct its own testing.

In its Objection to the P's Motion for Summary Judgment, the District makes several arguments. First, it argues that at the February 12, 2010 meeting the team reviewed existing data as required which is documented in the meeting minutes (see page 7 of Objection). A review of the meeting minutes provides the following information:

> "Mrs. N brought in an evaluation from Barbara Cascadden that she had done for an application to a summer program. See Report dated January 31, 2010."

There is no mention in the meeting minutes that the evaluation had been reviewed or considered by the team. In addition, the audiological evaluation had been completed and as indicated previously, P notified the team that the report would be provided upon receipt. The District argues that P's are attempting to demand that the District adopt the results of the independent evaluations. However, whatever motive P's have is irrelevant to the legal requirement that their IEP team review existing evaluation data on the child. Clearly, the Cascadden evaluation was not reviewed. In addition, the audiological examination had been completed. No explanation has been provided by the District as to why it would not wait to review the results of the audiological evaluation which had already been completed before determining whether to conduct its own audiological evaluation.

The IDEA does not prohibit the IEP team from conducting any assessments of the child if the parents believe that existing evaluative data is sufficient. However, the IEP team must

review existing evaluation data on the child so that it can make a determination as to whether there is a need to conduct the re-evaluations set forth in the February 12, 2010 request. With respect to the neurological evaluation the District argues that because it was scheduled as of the February 12, 2010 meeting it had not been undertaken that the information did not exist and the SD could not consider it. The Hearing Officer agrees with SD that the neuropsychological evaluation did not exist as of the date of the meeting. As such, the SD was not required to review that information as it did not exist.

The Hearing Officer finds that the P's are entitled to Summary Judgment with respect to the District's request to conduct the intelligence/cognitive evaluation as well as the hearing screening (audiological) evaluation because the SD failed to review that data before deciding to re-evaluate. The SD is entitled to Summary Judgment with respect to its request to re-evaluate the child in the areas of academic performance, communication skills, motor ability, observations, vision screening and the Connors and Brief checklist. With respect to the intelligence/cognitive evaluation and the hearing screening the team must review the evaluation data and on the basis of that review and the input from the parents, identify what additional data if any, are needed as part of the re-evaluation.

The hearing officer need not reach the P's argument relative to retaliation for purposes of ruling on Summary Judgment. The retaliation argument has not been considered in rendering this decision.

As a result of the granting of Summary Judgment as set forth above in favor of each party, the hearing dates are cancelled and the matter is resolved.

Appellate Rights

If either party is aggrieved by the Decision of the Hearing Officer as stated above, either party may appeal this Decision to a Court of appropriate jurisdiction. The Parents have the right to a transcription of the proceedings from the Department of Education. The District shall notify the Commissioner of Education when either party, Parents or District, seeks a judicial review of a Decision.

If neither party appeals this Decision to a Court, then the District shall, within 90 days, provide to the Commissioner of Education and the Hearing Officer a written report describing the implementation of this Decision and provide a copy to Parents. If Parents do not concur with the District's report, Parents shall submit their own report to the Commissioner of Education on the implementation of the Decision.

So Ordered.

Dated: _____

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John P. LeBrun, Esquire
Hearing Officer