

New Hampshire Department of Education

Student/Keene School District

IDPH FY 11-02-035

**Order on Summary Judgment and Declaratory Judgment Motions**

The parties filed pleadings regarding the independent evaluation issue. The school filed for summary judgment and the guardian called his motion one for declaratory judgment. I resolve the issues raised in both motions in this order.

The crux of the issue is whether the independent education evaluation (called “IEE”) requirements in state and federal law apply to the situation in this case. The school district first asserts that the IEE requirements only apply to reevaluations and that reevaluations were not performed in this case.

The IDEA and its regulations do not limit the right to an independent evaluation to situations where the school conducts a reevaluation. Rather, the law states that the right applies “if the parent disagrees with an evaluation obtained by the public agency.” 34 CFR § 300.502(b). Evaluation is defined in the law to include both evaluations and reevaluations that are conducted pursuant to 34 CFR 300.304-311. See 34 CFR 300.15. In this case, a variety of evaluations were conducted including a reading assessment, psychological assessment, a speech-language assessment, an assistive technology assessment, and a vocational assessment. The right to an independent evaluation applies to these types of evaluations. As a result, I reject the school’s argument to the contrary.

Next, the school district argues that the IEE requirements do not apply in this case because the evaluations at issue are themselves independent evaluations because they were not conducted by Keene school district employees. The school district correctly notes that independent evaluation is defined in the law 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). Here, the evaluations were not conducted by employees of the Keene School District.

However, the regulations also have language that seems broader than just evaluations conducted by school employees as it references the right to an IEE applying to evaluations “obtained” by the school district, as opposed to only those “performed” or “conducted” by the school district. See 34 CFR § 300.502(b)(1).

Additionally, the complicating factor with interpreting the IEE requirements in this case is that student is in an out of district placement that is funded by the Keene School district and the evaluations (or the majority of them) were performed either by the student’s service providers at the placement, or people employed by or associated with the out of district placement. In that situation, the out of district placement evaluators are effectively like public school employees for purposes of the independent evaluation requirements because the Keene School District is responsible for the out of district placement in a way that is very similar to its responsibilities for an in district placement. See 34 CFR § 300.146 and 300.147. The school district has an obligation to monitor the placement and services provided and to ensure that the service providers at the placement implement the IEP and provide FAPE. Thus, evaluations performed by

these service providers or placement personnel are akin to evaluations performed by the school's own service providers or personnel.

Moreover, one of the key components to an independent evaluation is the parent's involvement in choosing the evaluator. State and federal law mention the parent, as opposed to the school district, obtaining the independent evaluation with the school district just providing information about where it can be obtained, and any criteria the school may have regarding evaluations. See 34 CFR § 300.502(a)(1) & (e) and Ed 1107.03. State law provides that the school's criteria cannot be so restrictive so as to "effectively prohibit the parent's choice." Ed 1107.03. OSEP has also noted this parental choice requirement. See *Wall Township Board of Education v. C.M.*, 534 F.Supp.2d 487, 490 (D.N.J 2008) discussing an OSEP letter that states "in order to ensure the parent's right to an independent evaluation, it is the parent, not the district, who has the right to choose which evaluator on the list will conduct the [independent educational evaluation].... [W]hen enforcing the IEE criteria, the district must allow parents the opportunity to select an evaluator who is not on the list but who meets the criteria set up by the public agency."

In this case, the guardian apparently did not have any role in choosing any of the evaluators, except for the READS evaluation, and was not permitted to communicate with the evaluators. As a result, the parental participation and choice requirements of an independent evaluation were not met.

For all of these reasons, I conclude that the independent evaluation requirements in state and federal law apply to the evaluations at issue in this proceeding and that the evaluations that have already been conducted and that are at issue in this proceeding are not independent evaluations, with the exception of the READS evaluation.

As a result, the school district's claims regarding the independent evaluation will go forward to the hearing pursuant to the provisions of 34 CFR § 300.502(b)(2) with the issues being whether the evaluations performed were appropriate and whether the school district requested a hearing without unnecessary delay. If the evaluations were performed appropriately and the school district moved forward to a hearing without unnecessary delay, then the parent is not entitled to an independent evaluation.

The guardian argues that the school waived its ability to defend its evaluations because of the delay in filing for a hearing and that argument fits into the unnecessary delay requirement I mention above. I need to hear evidence on the issues and give the parties a chance to provide written submissions on the issues before I can rule on the unnecessary delay requirements in 34 CFR § 300.502(b)(2).

At the prehearing, I also raised the issue of whether the independent evaluation claims were precluded from a due process hearing since the guardian previously filed a complaint on the same issue and the Department issued a decision on the issue after investigating the complaint. Both parties seem to agree that the claims are not precluded because of the differences between the complaint process and a due process hearing. As a result, I will allow the claim to go forward to a hearing.

So Ordered

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Date

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Scott F. Johnson