

STATE OF NORTH CAROLINA
JOHNSTON COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14-EDC-01705

Johnston County Board of Education,
Petitioner,

v.

PROPOSED DECISION

█, by his parent █,
Respondents.

This case was filed by Petitioner on February 28, 2014. On March 12, 2014, this tribunal issued a Notice of Contested Case, Assignment, and Order which provided, *inter alia*, Respondents had ten (10) days from receipt of the Petition to file a response. Respondents have not filed a response to date.

The case was first set for hearing on April 23, 2014, with an exchange of exhibits, witness lists, and stipulations to occur on or before April 15, 2014. On April 16, the Honorable Augustus B. Elkins II presided over a pre-hearing teleconference in which counsel for Petitioner stated that Petitioner had produced exhibits, a witness list, and proposed stipulation on April 15 to Respondents, but that Petitioner had not received any items from Respondents. Respondent █ made an oral request to postpone the hearing and Judge Elkins directed Respondent to submit her request in writing and propose a date certain for the hearing. Respondent did not specify alternate dates for hearing in her written request for a continuance.

On May 15, 2014, in consideration of Respondent's request to continue, this tribunal continued the due process hearing until June 17, 2014, with an exchange of exhibits, witness lists, and stipulations to occur on or before June 9, 2014. On June 6, 2014, the Honorable Julian Mann III presided over a pre-hearing teleconference in which Respondent █ stated that she would comply with the June 9 deadline to provide exhibits, witness list, and stipulations, but she made another oral request to continue the hearing. Judge Mann directed Respondent to submit her request in writing to the court for consideration. He directed Respondent to specify compelling reasons for the request and proposed dates for hearing. He directed the parties to confer to determine alternate dates for hearing. At the teleconference, Judge Mann scheduled another teleconference for June 9, 2014.

At the June 9 teleconference, Respondent █ stated she had not provided any documents to counsel for Petitioner. The parties reported that they had attempted to confer about alternate dates for hearing, but Petitioner's counsel stated that as they began discussing specific dates for hearing Respondent █ stated she needed to end the call. Judge Mann stated that he had not received Respondent █'S written request to continue hearing and directed Respondent █ to submit the request for consideration. Respondent █ submitted a written request and did not identify a date certain.

On June 13, 2014, this tribunal issued an Amended Notice of Hearing and Order of Reassignment, which provided that Respondent's motion to continue would be taken up preceding the call of the due process hearing on June 17. The order further provided: "Respondent will be allowed to appear by telephone for the purpose of arguing her motion to continue. The presiding judge will determine how to proceed if the motion is denied, as to whether Respondent will be allowed to continue their appearance by telephone." The case was reassigned to Donald W. Overby, Administrative Law Judge.

On June 17, 2014, the undersigned heard Respondents' motion to continue and issued an oral order denying Respondents' request. At the motion hearing, the undersigned decided that, consistent with the June 13 Order, Respondent [REDACTED] would be permitted to continue to appear by telephone for the due process hearing. At the Respondent's request, the undersigned recessed the due process case until Respondent [REDACTED]'s lunch break at noon the same day. At noon, the contested case was called for hearing with Respondent [REDACTED], appearing by telephone. The undersigned engaged in conversation with Respondent [REDACTED], explaining that we were beginning the evidentiary hearing and discussing the facts she had presented in the motion to continue hearing earlier that morning. When the undersigned asked Respondent [REDACTED], whether she had any objection to Petitioner's first witness being proffered as an expert witness, Respondent [REDACTED] was no longer on the telephone line. The court made multiple attempts to reach Respondent [REDACTED] on the telephone again but was not successful, even after a delay in the proceedings for an additional twenty-five minutes. The hearing continued as scheduled. Petitioner submitted a proposed final order for consideration by the trier of fact.

APPEARANCES

For Petitioner: Carolyn A. Waller
Tharrington Smith, L.L.P.
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Post Office Box 1151

Raleigh, North Carolina 27602-1151

For Respondents:
(Pro Se)

[REDACTED]
[REDACTED]
(by telephone)

WITNESSES

For Petitioner: Francine Knott

Barbara Jennings
Jill McKenna

For Respondents: No witnesses

EXHIBITS

The following exhibits were received into evidence:

Petitioner's Exhibits: 1, 2, 4, 5, and 6

The exhibits have been retained as part of the official record of this contested case.

STIPULATIONS

The parties did not agree to any stipulations.

ISSUES

PETITIONER contends that the contested issues to be tried by this Court are as follows:

- (1) Was Petitioner's evaluation of ██████ in January 2013 appropriate?
- (2) Are Respondents entitled to an independent educational evaluation at public expense?

RESPONDENTS contend that the contested issues to be tried by this Court are as follows:

- (1) Are Respondents entitled to an independent educational evaluation at public expense?

Based upon the preponderance of the admissible evidence, the undersigned makes the following:

FINDINGS OF FACT

In making the following findings of fact, the undersigned has considered only the admissible evidence introduced at the hearing. The undersigned has weighed such evidence and has assessed the credibility of the witnesses by taking into account the appropriate and traditional factors for judging credibility, such as the demeanor of the witness, the manner and appearance of the witness, any interests, bias, or prejudice the witness may have, the apparent understanding and fairness of the witness, the opportunity of the witness to see, hear, know or remember the

facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other credible evidence in the case. Based upon these standards, the undersigned makes the following findings of fact:

1. Petitioner Johnston County Board of Education is a local education agency (LEA) receiving funds pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq., (IDEA).

2. [REDACTED] is identified as a child in need of special education services, with an area of eligibility of Other Health Impaired. [REDACTED] attended [REDACTED] School, in Johnston County, during the 2012-13 school year.

3. In its Petition for a Contested Case Hearing, Petitioner alleged that Respondent [REDACTED] has requested an independent educational evaluation (IEE) at public expense on December 17, 2013, that it timely filed for a due process hearing to show that its evaluation is appropriate, that its evaluation of [REDACTED] in January 2013 is appropriate, and that Respondents' request for an IEE at public expense should be denied.

January 2013 Evaluation

4. Francine Knott is a school psychologist for the Johnston County Schools. She has been a school psychologist for 14 years. Ms. Knott has experience in conducting psycho-educational evaluations and performs an average of 50 to 70 such evaluations each year.

5. Ms. Knott testified at the hearing for Petitioner and was qualified as an expert witness in the area of school psychology and the evaluation of children with exceptional needs,

6. Ms. Knott completed a psycho-educational evaluation of [REDACTED] in January 2013.

7. For the January 2013 psycho-educational evaluation of [REDACTED], Ms. Knott used the following strategies and assessments:

- a. She reviewed [REDACTED] cumulative file and special education records, including the background information contained in these records.
- b. She interviewed [REDACTED] to gather information on interpersonal and socialization skills.
- c. She gathered information on [REDACTED] behavior from classroom teachers regarding what they observe from [REDACTED] in the classroom.
- d. She administered the Wechsler Intelligence Scale for Children — Fourth Edition to [REDACTED] to gather information about [REDACTED] intellectual functioning and cognitive ability.
- e. She administered the Woodcock-Johnson Test of Achievement — Third Edition Normative Update (WJ III NU) to gather information about [REDACTED] academic achievement in reading, mathematics, and written language.

8. Ms. Knott has received training regarding how to interview students, how to administer the Wechsler Intelligence Scale for Children — Fourth Edition, and how to administer the Woodcock-Johnson Test of Achievement — Third Edition Normative Update (WJ III NU).

9. Ms. Knott is confident in the methodology that she used to evaluate K.R. and that the evaluation was administered properly. Ms. Knott had sufficient time to complete the evaluation of [REDACTED]. There is no evidence that Ms. Knott was rushed in any manner as contended by Respondent [REDACTED].

10. On January 29, 2013, Ms. Knott completed an evaluation report that summarized her assessments and observations of [REDACTED]. Ms. Knott had sufficient time to write the evaluation report regarding [REDACTED].

11. Ms. Knott included recommendations in her report. She did not base these recommendations on a single test or observation, and she is confident in the recommendations she offered.

12. The recommendations in Ms. Knott's report include, but are not limited to the following: break up information into segments so as not to overwhelm [REDACTED]; allow for scheduled breaks and movement opportunities as appropriate; due to low fluency scores, [REDACTED] would benefit from extended time to complete his assignments; break down tasks into smaller units; use writing aids such as graphic organizers; and make real life connections in newly learned material and vocabulary.

Consideration of Evaluation

13. Barbara Jennings is a special education teacher at [REDACTED] Middle School for Johnston County Schools. She has worked as a special education teacher for approximately 20 years.

14. Ms. Jennings was [REDACTED] teacher and case manager during the 2012-13 school year when [REDACTED] was in eighth grade.

15. Barbara Jennings testified at the hearing for Petitioner.

16. On February 6, 2013, [REDACTED] Individualized Education Plan ("IEP") team met to review the evaluation and develop a new IEP. [REDACTED] IEP at that time was scheduled to expire on February 7, 2013. Stephen Baker, Jennifer Jacobson, Francine Knott, and Barbara Jennings attended the meeting. [REDACTED] had agreed to attend the meeting, but the night before the meeting, [REDACTED] called Ms. Jennings and stated that she would not be able to attend the meeting, Ms. Jennings told [REDACTED] they would hold the meeting on February 6, but the team could meet again to review the IEP and make changes.

17. At the February 6 meeting, the attendees considered Ms. Knott's evaluation and recommendations. Ms. Jennings testified that the team used some of the recommendations for [REDACTED] classroom accommodations and strategies, such as graphic organizers for adding details to his writing, extended time to complete assignments, multiple test sessions for tests, and

breaking writing up into small chunks. Ms. Jennings testified that the recommendations were considered when creating part of [REDACTED] goals.

18. On March 3, 2013, [REDACTED] MP team met. Barbara Jennings, Stephen Baker, Martha McCullen, and [REDACTED] attended the meeting. [REDACTED] did not request an independent evaluation. At the meeting, the team began creating a math goal.

19. On April 30, 2013, [REDACTED] IEP team met. Barbara Jennings, Stephen Baker, Martha McCullen, Kara Acree, and [REDACTED] attended the meeting. [REDACTED] did not request an independent evaluation. The team discussed Ms. Knott's evaluation and the evaluation testing data. The team finished creating a math goal that addressed [REDACTED] struggles in math and was based on the evaluation testing data.

Attempts to Schedule a Subsequent IEP meeting to Discuss further Testing

20. Although Petitioner has refused to grant Respondent's request for an independent evaluation at public expense, Petitioner has remained willing to conduct a subsequent evaluation by district staff to address any concerns Respondent was raising in regard to the January 2013 evaluation. Jill McKenna, Exceptional Children's Director, has contacted Respondent, as has a facilitator from the Department of Public Instruction assigned to this case to participate in an IEP meeting. Testimony at the hearing indicated that Respondent has refused to cooperate with all attempts to schedule a meeting to discuss her request for an evaluation.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. and implementing regulations, 34 C.F.R. Parts 300 and 301. N.C. Gen. Stat. § 115C-109.6(a) controls the issues to be reviewed. To the extent that the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.

2. The IDEA is the federal statute governing the education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301.

3. Petitioner is a local education agency receiving monies pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1500 et seq.

4. The controlling state law for students with disabilities is N.C. Gen. Stat. Section 115C, Article 9 and the corresponding state regulations, including the Policies Governing Services for Children with Disabilities,

5. [REDACTED] is a child with a disability for the purposes of the IDEA, 20 U. S.C. §1400 et seq. and a child with special needs within the meaning of N.C. Gen. Stat. §115C, Article 9.

6. Petitioner has the burden of proof in this contested case. Schaffer v. Weast, 549 U.S. 49, 57-58. Petitioner has the burden of proof by the preponderance of the evidence. N.C. Gen.

Stat. §150B-34(a). Black's Law Dictionary defines preponderance: "[I]t denotes a superiority of weight or outweighing." The finder of fact cannot properly act upon the weight of evidence in favor of the one having the onus, unless it overbears, in some degree, the weight upon the other side. Thus, the Petitioner has the burden of proof to show by a preponderance of evidence that its evaluation of █████ was appropriate.

7. Generally, Respondents have "the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 C.F.R. 300.502(b)(1), NC 1504-1.3 (b)(1). However, in response to a request for an IEE, Petitioner may, without unnecessary delay, "file a due process complaint to request a hearing to show that its evaluation is appropriate." 34 C.F.R. 300.502(b)(2)(i), NC 1504-1.3(b)(2). If the tribunal's final decision is that Petitioner's evaluation is appropriate, "the parent still has the right to an independent educational evaluation, but not at public expense." 34 C.F.R. 300.502(b)(3), NC 1504-1.3(b)(3),

8. The IDEA sets the requirements for an evaluation and is relied upon to assess whether Petitioner's evaluation was appropriate. An evaluation must, inter alia:

- a. "use a *variety of assessment tools and strategies* to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining. . . the content of the child's individualized education program including information related to enabling the child to be involved in and progress in the general education curriculum[;]"
- b. "*not use any single measure* or assessment as the sole criterion for determining . . . an appropriate educational program for the child;" and
- c. "use *technically sound instruments* that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors."
- d. The assessments and evaluation materials "are used for purposes for which the assessments or measures are *valid and reliable*;" "are administered by *trained and knowledgeable personnel*;" and "are administered in accordance with any instructions provided by the producer of such assessments"

20 U.S.C. §1414(b)(2-3) (emphasis added); *see also* NC 1503-2.5,

9. Relying on these criteria, courts have denied parent requests for an IEE at public expense where the district's evaluation was conducted by qualified personnel, relied on various methods to collect data, and provided pertinent information for the IEP team. See, e.g., H.D. ex rel. A.S. v. Central Bucks Sch. Dist., 902 F.Supp.2d 614, 627 (E.D. Pa. 2012) (denying request for IEE at public expense where district's functional behavior assessment was conducted by a qualified behavioral analyst, used various methods to collect data, identified the most significant behaviors of concern, identified behavior triggers, and made recommendations regarding how to address behaviors and skill deficits); Council Rock Sch. Dist. v. Bolick, 2010 WL 5186154, *7 (E.D. Pa. 2010), *aff'd* 462 Fed. Appx. 212 (3d Cir. 2012) (concluding district's evaluation appropriate where it was: (1) conducted by certified school psychologist; (2) used a variety of

tests and assessment tools; and (3) analyzed past academic performance); Kirby v. Cabell County Bd. of Educ., 2006 WL 2691435, at *7-*8 (S.D. W.Va. 2006) (holding district evaluation appropriate where the evaluator: (1) used numerous evaluation instruments; (2) considered previous evaluations and tests; (3) the evaluation instruments were technically sound; and (4) the evaluation produced necessary, relevant information to assist the school district in providing FAPE).

10. Whether a district's evaluation is appropriate does not turn on whether it could have been more detailed or the fact that the parent disagrees with its conclusions. See, e.g., L.S. ex rel. K.S. v. Abington Sch. Dist., 2007 WL 2851268, at *13 (E.D. Pa. 2007) (concluding district's evaluation was appropriate where it contained a sufficient amount of detail; "While the District's report could have included more detail, it was not required by law to be so. It addressed K.S.'s deficiency between ability and achievement in math skills, identified that he had a specific learning disability and used a number of reliable tests in so finding. This is more than sufficient information from which the IEP Team could create an adequate IEP for K. S.")

11. Petitioner offered evidence at hearing that showed that Ms. Knott's evaluation used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about [REDACTED]. These tools and strategies included records review, student interview, behavioral observations, the Wechsler Intelligence Scale for Children — Fourth Edition, and the Woodcock-Johnson Test of Achievement — Third Edition Normative Update (WI III NU). These tools and strategies yielded information regarding [REDACTED] interpersonal and socialization skills, intellectual functioning and cognitive ability, and academic achievement in reading, mathematics, and written language.

12. Petitioner offered evidence at hearing that showed Ms. Knott is experienced and trained in conducting psycho-educational evaluations. She relied on an appropriate methodology and administered the evaluation properly. She produced recommendations that did not rely on any single measure or assessment.

13. Petitioner offered evidence at hearing that showed that the IEP team considered Ms. Knott's evaluation when creating the IEP on February 6, 2013, and when revising it on April 30, 2013. At these meetings, the IEP team incorporated recommendations from Ms. Knott's evaluation in the IEP and its addendum.

FINAL DECISION

1. Petitioner has the burden of proof on all issues pending before the Office of Administrative Hearings. Petitioner filed this due process hearing without unnecessary delay and at hearing showed that its evaluation of [REDACTED] in January 2013 was appropriate. As a result, Respondents are not entitled to an independent educational evaluation at public expense.

2. In follow-up to Petitioner's efforts to schedule an IEP meeting and offer an evaluation by district staff, Petitioner is directed to make reasonable attempts to schedule an IEP meeting with Respondent for the purpose of discussing further testing by district staff. If, after thirty days from the date of this order, Petitioner has made reasonable attempts to schedule a meeting and Respondent has not appeared for such a meeting, Petitioner shall be relieved from any

obligations to consider whether the educational or related services needs of [REDACTED] warrant a reevaluation until the school year of 2015-2016, the time when [REDACTED] three-year re-evaluation cycle will naturally occur.

NOTICE

In order to appeal this Final Decision, the person seeking review must file a written notice of appeal with the person designated by the State Board under N.C. Gen. Stat. § 115C-107.2(b)(9). The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Final Decision. N.C. Gen Stat § 115C-109.9 (a).

IT IS SO ORDERED.

This is the 24th day of July, 2014.



Donald W. Overby
Administrative Law Judge