

STUDENT b/n/f PARENT, PETITIONER	§	SPECIAL EDUCATION
	§	
VS.	§	HEARING OFFICER
	§	
EL PASO ISD, RESPONDENT	§	STATE OF TEXAS

DECISION OF HEARING OFFICER

This matter was presented to this Hearing Officer after the parent of the child, filed for a Due Process Hearing pursuant to the Individuals with Disabilities Education Act (“IDEA04”), 20 U.S.C. §1400 et.seq., on October 10, 2007.

On November 13, 2007, the district filed a counterclaim seeking to override the lack of parental consent to perform a full and individual evaluation on the child. The district subsequently filed a motion to dismiss the petitioner’s complaint, which was granted by this hearing officer on December 7, 2007. The district’s counterclaim remains the only claim pending.

On the 25th day of February, 2008, the petitioner and the respondent appeared at the El Paso ISD campus for a Due Process Hearing pursuant to IDEA04 regarding the district’s counterclaim seeking an order from this hearing officer to override the lack of parental consent to perform evaluations on the child, and the hearing concluded on the same date.

Parent the parent of Student, (“the counter-respondent”) appeared in person and with her attorney of record, Mark Berry, and announced ready.

El Paso ISD (“the counter-petitioner”) appeared through its district representative, Maria T. Bovinich, and through its attorney, Evelyn Howard-Hand, and announced ready.

Issues Raised and Relief Sought

The counter-petitioner raised one issue/complaint:

1. The parent would not provide parental consent to properly evaluate the child as required by IDEA04.

The counter-petitioner sought the following relief from the outcome of the Due Process Hearing:

1. An order overriding the lack of parental consent and allowing the district to immediately begin a full and complete evaluation of the child.

The hearing began on February 25, 2008 and concluded on the same date. After hearing the testimony of the witnesses presented, reviewing the exhibits from both parties which were admitted into evidence, and weighing such evidence in light of current law, the relief requested from the counter-petitioner is hereby DENIED.

HELD, for the counter-respondent (Parent).

Findings of Fact

1. The parties each agree that the child is a ** grade student who was found eligible for special education services under IDEA04 based a Speech Impairment in the Fall 2005. (See Trial Transcript, pp. 78-79, Respondent’s Exhibit #8, pp. 2 and 3).

2. The ARD Committee met on October 5, 2007 and found that the child had already met his Speech goals for the year at that time. (See Trial transcript, p. 41; Respondent's Exhibit #6, p.1). The ARD Committee was concerned that STUDENT was no longer eligible for special education services as a child with a Speech Impairment. (See Respondent's Exhibit #30, p. 34-36).
3. Parent, the parent, did not want the child removed from special education and she consented to a Speech/Language assessment to determine if the child was still eligible for special education services as a child with a Speech Impairment (See, Respondent's Exhibit #30, pp. 35-36).
4. While the district was in the process of performing the assessment on the child, the parent filed the Due Process complaint with the Texas Education Agency referenced above.
5. The Speech assessment dated October 19, 2007 concluded the child was not eligible for special education services as a student with a Speech Impairment. (See, Respondent's Exhibit #16). However, the assessment recommended further evaluations to determine if the child qualified for special education services under another disability. (See, Respondent's Exhibit #16, p. 5). The parent states she never knew the results of the Speech/Language assessment. (See Trial transcript, p. 229).
6. The district attempted to schedule and convene an ARD Committee meeting on October 22, 2007, but was unable since the parent's counsel was unavailable on that date. (See Trial transcript, p. 191; Respondent's Exhibit #22).

7. The parties met on October 25, 2007 for the Resolution Session. At that time, a Notice of FIE was given to the parent's attorney seeking to do additional assessments as recommended in the Speech/Language assessment of October 19, 2007. (See Trial transcript, p. 177; Respondent's Exhibit #24).
8. The ARD Committee re-convened on November 1, 2007 and found that the child was no longer eligible for special education services as a child with a Speech Impairment. (See, Respondent's Exhibit #30, pp. 2-3, 37). The ARD Committee of November 1, 2007 found the child did not qualify for special education services under any eligibility. (See Trial transcript, pp. 171-172, 180). The ARD Committee did request additional assessments to see if the child would qualify under any other eligibility category, but the parent refused to give consent.
9. The district implemented "Stay Put" because of the pending Due Process complaint which was on file, thus allowing the child to continue receiving special education services to the present. (See Trial transcript, pp. 128. 172).
10. The district performed an evaluation on the child when it performed its Speech/Language evaluation which resulted in the October 19, 2007 report. That evaluation was consented to by the parent.
11. The October 19, 2007 evaluation recommended other evaluations. The parent has refused to give consent to these additional evaluations sought by the district.

DISCUSSION - APPLICATION OF FACTS AND LAW

Issue – Without parental consent, can a district force a second set of evaluations in less than 1 year after an evaluation has already been completed? Does it matter if the second set of evaluations were recommended by the first evaluation?

When a child has already been receiving services under the special education banner, a reevaluation of the child must generally occur at a minimum of once every three years, unless both the parents and the district agree otherwise. 20 U.S.C. §1414(a)(2)(B)(ii). However, such a reevaluation may not occur more frequently than once a year without both the parent and the district agreeing to do so. 20 U.S.C. §1414(a)(2)(B)(i).

As part of any reevaluation, the IEP team and other qualified professionals must review all existing data including existing evaluation data on the child such items as information provided by the parents, state assessment scores, class grades, and teacher observations. 20 U.S.C. §1414(c)(1)(A)(i, ii, and iii). The IEP team and other qualified professionals, based on the review of the data referenced above, shall identify what additional data, if any, is needed to determine whether the child remains a child with a disability and a child with educational needs. 20 U.S.C. §1414(c)(1)(B)(i). The law continues by stating that the district is to administer such assessments and evaluation measures as may be needed to make that determination. 20 U.S.C. §1414(c)(2). Furthermore, parental consent is needed to conduct these assessments and evaluations unless the district can demonstrate that it had taken reasonable measures to obtain the parental consent and the parent failed to respond. 20 U.S.C. §1414(c)(3).

In this case, it is undisputed that the district held an ARD Committee meeting on October 5, 2007, and it was noted that the child had already met his Speech goals for the

year. [See Trial transcript, p. 41; Respondent's Exhibit #6]. Because the ARD Committee was concerned that the child was no longer eligible for special education services as a child with a Speech Impairment and because the child's mother, did not want the child removed from special education, the parent consented to a Speech/Language evaluation to determine if the child was still eligible for special education services as a speech impaired child. [See, Respondent's Exhibit #30, pp. 34-35]. The consent document signed by the parent was titled "Notice of Full and Individual Evaluation" and was signed on October 5, 2007. [See, Respondent's Exhibit #15]. The evaluation report was issued on October 19, 2007, and was titled "Full Individual Evaluation Determination of Disability Condition and Educational Need". [See, Respondent's Exhibit #16]. That report found that the child was no longer eligible for special education services as a child with a Speech Impairment. [See, Respondent's Exhibit #16, p. 5]. That report, however, recommended that "the student undergo a full diagnostic academic evaluation to rule out any underlying disabilities that may be contributing to his current educational placement." [See, Respondent's Exhibit #16, p. 5]. Such an evaluation would be the second reevaluation of the child in less than one month, albeit in a different area.

The dilemma seems to be that a prohibition exists in the law which does not allow for more than one reevaluation in a year unless the parent consents. There is no provision which makes exception to this rule for a second set of evaluations which are sought at the recommendation of the first set of evaluations. At the same time, the law also states the district does not need parental consent if it can demonstrate that it had taken reasonable measures to procure the parental consent and the parent failed to respond. While this

hearing officer could find no case law on the subject, it seems logical that for the laws to work cohesively the district may proceed without parental consent (when it has taken reasonable measures and the parent fails to respond) ONLY WHEN dealing with a reevaluation lawfully authorized by statute. It may not do so when seeking an evaluation prohibited by law. A second reevaluation in less than one year is strictly prohibited by the IDEA04, unless the parent consents (which she has refused to do in this case). That being the case, the district does not have the authority to conduct additional evaluations on the child as a matter of law, even if such evaluations are only being sought at the recommendation of the first evaluation. The district has failed to meet its burden, and failed to provide any legal authority, that this hearing officer has the authority to override the lack of parental consent for a second set of evaluations in less than one year.

This hearing officer does not believe the parent understands the reason the district is seeking to override the lack of parental consent, as demonstrated in her sworn testimony during the hearing. [See Trial transcript, pp. 227-229]. As stated in an ancient proverb: Be careful what you wish for, you just might get it.

Conclusions of Law

1. The child was a student eligible for special education and related services under the provisions of IDEA04, and its related statutes and regulations, as a student with a Speech Impairment.
2. El Paso ISD is the local education agency responsible for the providing the child with the free appropriate public education pursuant to IDEA04, and is a

legally constituted independent school district operating as a political subdivision of the State of Texas.

3. This hearing officer has jurisdiction over this matter.
4. The district is seeking to conduct a second reevaluation of the child in less than one year without parental consent, which is strictly prohibited by statute.
5. The district failed to meet its burden of proof that this hearing officer should override the lack of parental consent on a second set of evaluations.

ORDER

Based upon a preponderance of the evidence and the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that the relief requested by the counter-petitioner is DENIED.

SIGNED this 19th day of March, 2008.

Tomas Ramirez III,
Special Education Hearing Officer

Cases Cited
None

Statutes and Regulations Cited
20 U.S.C. §1400 et.seq.

TEA DOCKET NO: 024-SE-1007

STUDENT b/n/f M.L.,
EDUCATION
PETITIONER

§

SPECIAL

VS.

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HEARING OFFICER

EL PASO ISD,
RESPONDENT

STATE OF TEXAS

SYNOPSIS

ISSUES: Whether district can override the lack of parental consent for reevaluating a child for the second time in less than one year.

HELD: For Counter-Respondent (Parent).