

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA



MAY 6 2016

**CHEROKEE COUNTY SCHOOL
DISTRICT,**
Petitioner,

v.

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Respondent.

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Docket No.
OSAH-DOE-IEE █-28-KENNEDY

Kevin Westray
Kevin Westray, Legal Assistant

**MEMORANDUM ORDER AND DECISION
GRANTING PETITIONER'S MOTION FOR SUMMARY DETERMINATION**

I. INTRODUCTION

The Cherokee County School District (hereinafter Petitioner or District), filed a Due Process Hearing Request (Complaint) seeking a determination that its comprehensive evaluation of █ (hereinafter Respondent), that included a Developmental Educational Assessment, be found appropriate such that Respondent is not entitled to an Independent Educational Evaluation (hereinafter IEE) at public expense. The following day, Petitioner filed a Motion for Summary Determination. Respondent filed a reply to Petitioner's Motion in accordance with the court's scheduling order.

Having considered the pleadings and arguments set forth before the Court, and based on the undisputed material facts set forth below, the Court **GRANTS** the Petitioner's Motion for Summary Determination.

II. FINDINGS OF UNDISPUTED MATERIAL FACT

1.

Respondent is █ years old and resides with his parents within the Cherokee County School District, but is not currently enrolled in school. However, Respondent does receive thirty

minutes of speech services two times per week at [REDACTED] Elementary, which is a school within Petitioner's district. (Petitioner's Motion, Exhibit 1)

2.

Respondent receives services, in part, because his parents became concerned about his speech and sought to have him evaluated. (Respondent's Reply to Petitioner's Motion, Affidavit of Respondent's Father, ¶ 4)

3.

An evaluation was completed through the Babies Can't Wait program on July 12, 2012, when Respondent was [REDACTED] years old. (Petitioner's Motion, Exhibit 1; Respondent's Reply to Petitioner's Motion, Affidavit of Respondent's Father, ¶ 4)

4.

Respondent's parents shared the July 12, 2012 evaluation with Petitioner, which resulted in Petitioner preparing a Developmental Educational Preschool Assessment that was completed on October 10, 2013. (Petitioner's Motion, Exhibit 2; Respondent's Reply to Petitioner's Motion, Affidavit of Respondent's Father, ¶ 4 and Exhibit 2)

5.

On December 3, 2013, the parties found Respondent eligible for special education and developed an Individualized Education Program (hereinafter IEP). (Petitioner's Motion, Exhibit 1 and Affidavit of Charlette McRay Green ¶ 7)

6.

The following year, on November 7, 2014, the parties held an annual review of Respondent's IEP. At that time, the parties developed an IEP that provided Respondent 90 minutes per week

of speech therapy. (Respondent's Reply to Petitioner's Motion, Affidavit of Respondent's Father, ¶ 5 and Exhibit 3)

7.

In October 2015, Petitioner contacted Respondent's parents to schedule the annual review of Respondent's IEP. As part of that review, Petitioner proposed to reduce Respondent's services from 90 minutes per week to 60 minutes per week. (Respondent's Reply to Petitioner's Motion, Affidavit of Respondent's Father, ¶ 6)

8.

At Respondent's parent's request, a second IEP meeting was conducted on November 19, 2015. During this meeting, Respondent's father raised concerns about Respondent's lack of progress. He also objected to Petitioner's reduction of services. (Respondent's Reply to Petitioner's Motion, Affidavit of Respondent's Father, ¶ 7)

9.

Following the November 19, 2015 IEP meeting, Respondent's father requested an IEE be conducted at public expense. (Respondent's Reply to Petitioner's Motion, Affidavit of Respondent's Father, ¶ 9)

10.

Respondent and his parents do not disagree with the evaluation that was conducted in July 2012 by the Babies Can't Wait program. Nor has Respondent ever voiced disagreement with the Developmental Educational Assessment completed by Petitioner in October 2013, which was developed, in part, on reliance of the July 2012 evaluation. Instead, Respondent's parents disagree with Petitioner's determination in October 2015 to reduce Respondent's services, which

serves as the basis for Respondent's parent's request for an IEE at public expense. (Respondent's Reply to Petitioner's Motion, Affidavit of Respondent's Father, ¶¶ 4 and 9)

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In their request for an IEE at public expense, Respondent rejected the potential evaluators proposed by Petitioner because Respondent's father "learned each one was inappropriately tied to the school district." In lieu of the evaluators proposed by Petitioner, Respondent requested that Petitioner pay the cost of having an evaluation conducted by an evaluator located in California at a cost of \$1,200 for airfare and hotel, \$400 for a rental car, and \$5,000 for the speech evaluation and report. (Respondent's Reply to Petitioner's Motion, Affidavit of Respondent's Father, ¶ 10 and Exhibit 4)

12.

Following receipt of Respondent's request for an out-of-state evaluation be conducted at public expense Petitioner chose to deny Respondent's request and timely file a Due Process Complaint to request a hearing to show that the prior evaluation is appropriate.

III. STANDARD ON SUMMARY DETERMINATION

Summary determination in this proceeding is governed by Office of State Administrative Hearings ("OSAH") Rule 15, which provides, in relevant part:

Any party may move, based on supporting affidavits or other probative evidence, for a summary determination in its favor upon any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

GA. COMP. R. & REGS. r. 616-1-2-.15(1). On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact such that the moving party "is entitled to a judgment as a matter of law on the facts established." G.J. v. Muscogee Cnty.

Sch. Dist., 2010 U.S. Dist. LEXIS 28764 (N.D. Ga. 2010); A.B. v. Clarke Cnty. Sch. Dist., 2009 U.S. Dist. LEXIS 47701 (N.D. Ga. 2009).

Further, pursuant to OSAH Rule 15:

When a motion for summary determination is made and supported as provided in this Rule, a party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or other probative evidence, that there is a genuine issue of material fact for determination in the hearing.

GA. COMP. R. & REGS. r. 616-1-2-.15(3). See Lockhart v. Dir., Env'tl. Prot. Div., Dep't of Natural Res., OSAH-BNR-AE-0724829-33-RW, 2007 Ga. ENV LEXIS 15, at *3 (OSAH 2007) (citing Leonaitis v. State Farm Mutual Auto Ins. Co., 186 Ga. App. 854 (1988)). In this case, as set forth below, the Court concludes that no genuine issue of material fact remains for determination and that the Petitioner is entitled to the relief sought.

IV. CONCLUSIONS OF LAW

1.

In order for a child with a disability to receive services under IDEA, a school district must conduct an initial evaluation of the child. 20 U.S.C. § 1414(a)(1)(A). Thereafter, the school district must conduct a reevaluation of the child “at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary.” 20 U.S.C. § 1414(a)(2)(B)(ii); see also 34 C.F.R. § 300.303(b)(2); GA. COMP. R. & REGS. 160-4-7-.04(3)(a), (b). However, before a school district can conduct its reevaluation, it “must provide notice to the parents of a child with a disability . . . that describes any evaluation procedures the agency proposes to conduct.” 34 C.F.R. § 300.304(a). The district “[m]ust obtain informed parental consent . . . prior to conducting any reevaluation of a child with a disability.” 34 C.F.R. § 300.300(c)(i).

In this matter, a tri-annual reevaluation will need to be discussed amongst the parties in the upcoming months since the last evaluation was completed in October 2013, unless the District and the Parents both agree that a reevaluation is not necessary. It will be necessary for the parties to work cooperatively in ensuring that an evaluation by the Petitioner is completed, if the parties determine that a tri-annual reevaluation is necessary. However, it should be noted that under IDEA, school districts have the right to conduct evaluations by individuals of their choosing. *See M.T.V. v. DeKalb County*, 446 F.3d 1153 (11th Cir. 2006). *See also Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176, 179 (5th Cir. 1995) (“A parent who desires for her child to receive special education must allow the school district to reevaluate the child using its own personnel”); *G.B. v. San Ramon Valley Unified Sch. Dist.*, 2008 U.S. Dist. LEXIS 70248, at *16 (N.D. Cal. 2008) (upholding an administrative law judge’s findings that a school district “has the right to evaluate . . . using its own personnel” and that the district’s staff “should use their professional judgment in determining which tests to give”). *See also Federal Way School Dist.*, 107 LRP 11238 (WSEA 2007) (finding that parents’ refusal to provide unconditional consent to a legitimate reevaluation proposed by a school district was unreasonable, and that their restrictions – such as insisting on being present for the evaluations – constituted a refusal to consent to the reevaluation). *See also G.J. v. Muscogee County Sch. Dist.*, 668 F.3d 1258, 1264 (11th Cir. 2012) (A parent's decision to place conditions on his or her consent for a reevaluation is tantamount to no consent at all) and *M.L. ex rel A.L.*, 610 F.Supp.2d at 599 (a school district is not required to provide services to a child whose parents have refused to consent to a reevaluation).

3.

However, the issue before this court is Respondent's request for an IEE at public expense and Petitioner's decision to file a due process request to show that the evaluation was appropriate and therefore Respondent is not entitled to an IEE at public expense.

4.

A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school, subject to certain conditions. 20 U.S.C. § 1415(d)(2)(A); 34 C.F.R. § 300.502(b)(1). When a parent requests an IEE at public expense the school must, without unnecessary delay, ensure that an IEE is provided at public expense or 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). If the school files a due process complaint notice to request a hearing and the final decision is that the school's evaluation is appropriate the parent has the right to an independent educational evaluation but **not** at public expense. 34 C.F.R. § 300.502(b)(3) (emphasis added). Accordingly, pursuant to 34 C.F.R. § 300.502(b), a parent is entitled to an IEE at public expense *only* when the public agency has conducted an evaluation with which the parent disagrees. In the present case, Respondent does not disagree with the July 2012 evaluation, or the Developmental Educational Assessment completed in October 2013. Instead, Respondent disagrees with the IEP team decision in October 2015 to reduce Respondent's services from 90 minutes per week to 60 minutes per week. Respondent's parent's disagreement with a decision of the IEP team does not entitle Respondent to an IEE at public expense.

V. ORDER

Based on the foregoing, the court hereby **GRANTS** the Petitioner's Motion for Summary Determination. Although Respondent is entitled to an IEE at their own expense, they are not

entitled to an IEE at public expense since they do not disagree with the most recent evaluation but, instead, only disagree with the IEP team decision to reduce Respondent's services.¹

So Ordered this 5th day of May, 2016.



Ana Kennedy
Administrative Law Judge

¹ However, the parties will need to address the tri-annual reevaluation that will become due in October 2016.

JUDICIAL REVIEW

Any party aggrieved by the findings and decision of the Judge has the right to appeal the decision under 20 U.S.C. § 1415 by bringing a civil action with respect to the complaint presented which action may be brought in any State court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy. In any action or proceeding under 20 U.S.C. § 1415, courts may award reasonable attorney's fees. A copy of the Notice of Appeal should be filed with the Department of Education.