

STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student¹ v. Regional School District 14

Appearing on behalf of Student:

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Appearing on behalf of the Board of Education:

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Appearing before:

Janis C. Jerman
Hearing Officer

FINAL DECISION AND ORDER

Issues:

1. Whether Student's Mother's failure to consent to a neuropsychological evaluation based solely on the identity of the evaluator should be overridden.
2. Whether BOE failed to implement Student's IEP by not selecting Dr. Lovecky to perform the neuropsychological evaluation.

Procedural History:

A special education hearing was requested by the Board of Education's ("BOE's") Attorney via letter dated March 21, 2011.² BOE's Request was assigned case number 11-0364 and assigned to the undersigned Hearing Officer. It was received by Student's Attorney on March 23. The original deadline to mail the final decision and order was May 7.

On March 25, Student's Attorney filed a letter that was treated as a motion to dismiss and request for order of stay put.

¹ In order to comply with the confidentiality requirements of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g ("FERPA") and related regulations at 34 CFR § 99, this decision uses "Student", "Parents", "School" and titles of school staff members and certain other witnesses in place of names and other personally identifiable information. The school district is identified by name, as are district-wide staff whose identity will not reveal the particular school, program, or student.

² All dates are 2011 unless otherwise indicated.

A pre-hearing conference was held on March 29. Attorney Cvejanovich appeared on behalf of Student³ and Attorney Santiago appeared on behalf of BOE. The following issue was identified: Should BOE be permitted to conduct a neuropsychological evaluation of Student over Student's Parent's objection?

During the pre-hearing conference, the parties agreed to entry of the following stay put order which was deemed an Order of the Hearing Officer: "Absent consent of Student's Parent, BOE shall conduct no testing of Student and shall make no change in Student's special education status until a Hearing Officer has rendered a decision in this case. BOE shall maintain Student's current level of services during the pendency of this case."

Hearings were scheduled for April 27 and 29.

On April 4, BOE's Attorney filed a timely objection to the motion to dismiss. On April 5, Student's Attorney filed a reply to BOE's objection. On April 7, the motion to dismiss was denied on the basis that the findings that Student's Attorney asks the Hearing Officer to make in deciding the motion to dismiss are the ultimate questions that the Hearing Officer must decide after an evidentiary hearing and can not decide through a motion to dismiss.

The motion to dismiss included a statement of fact that raised a question as to whether the issue was properly framed. A status conference was scheduled for April 14 to discuss whether the issue was properly framed or whether it should be re-framed to be "Whether the neuropsychological evaluation must be performed by Dr. Lovecky."

Via letter dated April 13, BOE's Attorney proposed that the issue be re-framed to be "Whether the District is entitled to conduct a neuropsychological evaluation by a Connecticut licensed neuropsychologist of its own choosing?"

On April 14, a pre-hearing status conference was convened to discuss whether the issue was properly framed or whether it should be re-framed. The parties presented their positions on the issue. Following the status conference, via letter dated April 14, Student's Attorney proposed the following re-framed issues: Should BOE be permitted to propose an evaluator, recommended and agreed upon by the PPT, as the only evaluator, then, on its sole initiative, and without any factual basis, change that evaluator without the consent of Student's Parents or the PPT?; and

³ Student's Attorney appeared on behalf of Student and Student's Mother. During the pre-hearing conference, the parties' attorneys indicated that they were unaware of whether Student's Father wished to participate in the case. Student's Father was given notice of the proceedings and an opportunity to participate. Student's Father did not respond or participate in any way.

Should BOE be permitted to limit testing to only a narrow range of Student's psychological issues?

By order of the Hearing Officer, the issue was re-framed as: Whether BOE is entitled to conduct a neuropsychological evaluation by an evaluator of its own choosing, over Student's Mother's objection?

Via letter dated April 18, BOE's Attorney requested a 30-day extension of the mailing date to permit the parties to file briefs on the question of whether the re-framed issue should be decided as a matter of law. After fully considering the positions of the parties, the request for an extension was granted. The deadline to mail the final decision and order was extended to June 6 and the April 27 and 29 hearings were cancelled.

Via letter dated April 26, Student's Attorney filed a request for an impartial due process hearing (Student's Request was assigned case number 11-0418 and was assigned to Hearing Officer Gelfman). On April 27, BOE's Attorney filed a motion to strike and dismiss Case 11-0418. On that same date, Student's Attorney filed an objection to the motions. On April 28, BOE's Attorney filed a motion to consolidate the two cases.

Pursuant to Section 10-76h-8(f)(3) of the Connecticut State Agency Regulations, the two Hearing Officers consulted and agreed that the cases should be consolidated with the undersigned Hearing Officer. The two cases were consolidated with the undersigned Hearing Officer on May 2.

A pre-hearing status conference was held on May 5. Attorney Cvejanovich appeared on behalf of Student and Attorney Santiago appeared on behalf of BOE. During the pre-hearing status conference, the case timelines were consolidated according to the timelines of the later filed case. By order of the Hearing Officer, the deadline to mail the final decision and order in the consolidated cases is July 10.

On May 15, the Hearing Officer ruled that, as a matter of law, a board of education has a right to conduct its own evaluation utilizing the professional(s) of its own choosing prior to a parent obtaining a second opinion through an independent educational evaluation. Since Student's Mother refused consent for evaluation based on the identity of the evaluator, BOE has the burden of proving, at a hearing, that this refusal of consent should be overridden. The hearing in Case 11-0364 was limited to the very narrow issue of whether Student's Mother's failure to

consent to a neuropsychological evaluation based solely on the identity of the evaluator should be overridden.

BOE's motion to strike and dismiss Case 11-0418 was denied. The hearing in Case 11-0418 was limited to the narrow question of whether BOE failed to implement Student's IEP by not selecting Dr. Lovecky to perform the neuropsychological evaluation.

Hearing was held on June 1. The parties submitted simultaneous post-hearing briefs and proposed findings of fact on June 9.

Findings of Relevant Fact:⁴

1. Student is a fifteen year old student (Stip FOF 1).⁵ Student is a twice-exceptional student – gifted and disabled (Testimony of Struckus; Student's Mother).
2. Student is eligible to receive special education and related services from the Regional School District No. 14 ("BOE") under the eligibility category of autism (Stip FOF 4).
3. Dr. Joseph "Jed" Struckus, a neuropsychologist, has provided psychological services to Student since 2004. At that time, Student had no diagnosis and was attending a Montessori school where he was struggling. Student's attitude about school was worsening and he would not attend school (Testimony of Struckus; Quirk).
4. Struckus worked with Dr. Deirdre Lovecky to develop a program to get Student on an educational track. Lovecky evaluated Student in her office in Rhode Island and provided recommendations that were used in Student's educational program (Testimony of Struckus).
5. In approximately 2007-08, Student returned to a classroom setting. He attended a small, flexible learning environment (Testimony of Struckus).
6. Student has not had any standardized assessments conducted in the last three years (Stip FOF 19). The last time Student was evaluated was when he received a Speech, Language and Relatedness Evaluation that began in December, 2007 and concluded in February, 2008 (Stip FOF 20).
7. Student was last evaluated by Lovecky in 2005. He has not seen her since that time (Testimony of Student's Mother). Lovecky has not had a continuing relationship with Student or with Struckus (Testimony of Struckus; Student's Mother).

⁴ Findings of Fact are cited as "FOF" in the discussion section.

⁵ Per Order of the Hearing Officer, the parties filed a Joint Stipulation of Uncontested Facts on May 27. It is cited as "Stip FOF."

8. Christopher Quirk is currently the Director of the Easton Country Day School High School program. Quirk was BOE's Director of Special Services from June 2006 to June 2010 (Testimony of Quirk).
9. A Planning and Placement Team ("PPT") meeting was held on April 19, 2010 (Stip FOF 7). The April 19, 2010 PPT meeting was Student's Annual Review (Stip FOF 8).
10. Quirk attended Student's April 2010 PPT meeting (Exh. B-1). At that time, the PPT determined that no additional evaluation was needed. The PPT did not make a recommendation as to the type of evaluation that might be needed in the future. The PPT envisioned a future need for testing and wrote Lovecky's name into the summary of the individualized education program ("IEP") as being the person to whom they would put the question as to what type of testing was needed given the data provided (Testimony of Quirk).
11. The April 19, 2010 IEP contains the following language in the "List of PPT Recommendations" section: PPT recommended that no additional evaluation needed at this time. Recommendation to review need for testing at each annual PPT meeting. Recommendation for Dr. LaVecchi [sic] to do testing when PPT determines necessary. . . Future programming recommendations will be developed [sic] by a mutually agreed upon independent consultant if there is disagreement among the administrative team, or between the administrative team and Region 14; consultant will be chosen from one of the following disciplines - Education (CT Certified educational professional) or Neuropsychology (Stip FOF 9).
12. It was Quirk's intention that Lovecky would direct the evaluations that would take place. Quirk recognized that there are some limitations to the types of evaluations Lovecky could perform but anticipated that she would perform some evaluations. Quirk would follow her guidance if additional testing was recommended. The PPT was concerned about unknown people performing evaluations and proposed that Lovecky would handle the transition (Testimony of Quirk). Quirk testified that Student should be introduced to new situations utilizing people outside of his family that he trusts. Quirk testified that Struckus could fill that role.
13. A PPT meeting was held on July 20, 2010 (Stip FOF 10). By that time, Quirk had left BOE's employ (Testimony of Quirk). Donna Marcinek, BOE's Interim Director of Special Services, attended the PPT meeting (Exh. B-2).

14. The July 20, 2010 IEP contains the following language in the "List of PPT Recommendations" section: PPT recommended that no additional evaluation needed at this time. Recommendation to review need for testing at each annual PPT meeting.
Recommendation for Lovecky to do testing when PPT determines necessary (Stip FOF 11).
15. Student's Mother provided a written addendum to both the April 19, 2010 and July 20, 2010 IEPs. The written addenda are attached to the respective IEPs (Stip FOF 12).
16. Student currently receives counseling services, which are provided by Struckus, as part of his IEP (Stip FOF 6). Struckus has attended all of Student's PPT meetings (Testimony of Struckus).
17. Student has historically had a difficult time transitioning to new environments and is sensitive to what he perceives are invasions of his privacy (Testimony of Struckus; Student's Mother; Quirk).
18. Student currently attends the Marvelwood School, in Kent, CT, where he is a boarding student in the ninth grade (Stip FOF 5). Student transitioned to Marvelwood during summer 2010 with the assistance of Struckus. All of the faculty at Marvelwood were new to Student when he began his transition to the school (Testimony of Struckus).
19. Student transitioned well to Marvelwood and has done well academically (Testimony of Struckus).
20. Student's interactions with school staff and fellow students are more appropriate; his anxiety and dysthymia are under more control; and he is better able to reflect on and verbalize his feelings in different situations (Testimony of Struckus; Quirk).
21. Student's improvement since 2005 is marked (Testimony of Struckus; Quirk).
22. A PPT meeting was held on February 15 (Stip FOF 13). Kimberly Culkin, BOE's current Director of Special Services, was present at the PPT meeting (Testimony of Culkin).
23. The February 15 PPT meeting was Student's Annual Review (Stip FOF 14). At the PPT meeting, a comprehensive neuropsychological evaluation was recommended by BOE to determine Student's current level of adaptive skills functioning, behavioral and emotional functioning, cognitive skills and reading/writing skills (Stip FOF 15).
24. Culkin initially recommended that the evaluation be performed by BOE's School Psychologist. Student's Mother did not consent to the evaluation being performed by BOE's School Psychologist (Testimony of Culkin).

25. Student's Mother asked that Lovecky perform the evaluation (Testimony of Student's Mother). Student's Mother indicated that Lovecky was familiar with Student, had evaluated him in the past, and was named in the 2010 IEPs.
26. The PPT considered and denied the request because they believe that Lovecky is not properly credentialed (Testimony of Culkin).
27. Culkin provided Student's Parents with the names of three neuropsychologists in an effort to come to an agreement as to the evaluator (Testimony of Culkin; Exh. B-4). Student's Mother did not consent to any of the three proposed evaluators (Testimony of Student's Mother).
28. Culkin subsequently offered Student's Parents three options: a) have school staff conduct the evaluation; b) select a mutually agreed upon neuropsychologist to conduct the evaluation; or c) have Lovecky conduct an element of the evaluation and the mutually agreed upon neuropsychologist conduct the other portions of the evaluation (Exh. B-5).
29. Student's Parents do not object to a neuropsychological evaluation being conducted as part of a comprehensive evaluation of Student's cognitive, behavioral, emotional, and communication functioning (Stip FOF 16).
30. Student's Parents have not signed consent for a neuropsychological evaluation (Stip FOF 17).
31. One or both of Student's Parents attended the April 29, 2010; July 20, 2010; and February 15, 2011 PPT meetings (Stip FOF 18). Student's Parents received a copy of their procedural safeguards prior to each PPT meeting (Stip FOF 23).
32. Student's last triennial evaluation, in January, 2010, was a records review (Stip FOF 21).
33. Lovecky does not hold a Connecticut Department of Public Health license as a psychologist (Stip FOF 22). Lovecky is a clinical psychologist licensed in Rhode Island and Massachusetts (Exh. P-14). Lovecky is not a neuropsychologist (Testimony of Culkin).
34. Culkin is a certified school psychologist and is trained in evaluating students with special needs. In her experience as a school psychologist, Culkin has evaluated students and conducted assessments. As a member of the PPT, she makes recommendations regarding evaluations (Testimony of Culkin; Exh. B-7). Culkin's role in the PPT is to ensure compliance with the IDEA and to ensure that BOE meets its obligations to students (Testimony of Culkin).

Conclusions of Law:

1. Student is eligible for special education and related services as set forth in the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Sec. 1401, et seq.
2. The Hearing Officer has the authority (A) to confirm, modify, or reject the identification, evaluation or educational placement of or the provision of a free appropriate public education to the child or pupil, (B) to determine the appropriateness of an educational placement where the parent or guardian of a child requiring special education has placed the child or pupil in a program other than that prescribed by the PPT, or (C) to prescribe alternate special educational programs for the child. Where a parent has refused consent for reevaluation, the Hearing Officer may order a reevaluation without the consent of the parent. Connecticut General Statutes § 10-76h(d)(1).
3. A student's IEP must be reviewed not less than annually and revised as appropriate. 34 CFR § 300.324(b).
4. A school district must conduct a reevaluation of each child with a disability at least once every three years, unless the parent and school district agree that reevaluation is not necessary. 34 CFR § 300.303(b)(2).
5. Parental consent is required for reevaluations. 34 CFR § 300.300(c)(1)(i). If a parent refuses consent for reevaluation, the school district may request a hearing to seek an order of the Hearing Officer overriding the lack of parental consent. 34 CFR § 300.300(c)(1)(ii); Connecticut General Statutes § 10-76h(d)(1).
6. A school district has a right to conduct its own evaluation utilizing the professional(s) of its own choosing prior to a parent obtaining a second opinion through an independent educational evaluation.
7. A school district has the burden of proving that lack of parental consent for evaluation should be overridden.
8. The criteria for an independent educational evaluation ("IEE") must be the same as that used by the school district in an evaluation. 34 CFR 300.502(e)(1).

Discussion:

Issue 1: Whether Student's Mother's failure to consent to a neuropsychological evaluation based solely on the identity of the evaluator should be overridden.

A school district must conduct a reevaluation of each child with a disability at least once every three years, unless the parent and school district agree that reevaluation is not necessary. A school district has a right to conduct its own evaluation utilizing the professional(s) of its own choosing prior to a parent obtaining a second opinion through an independent educational evaluation.

Parental consent is required for reevaluations. If a parent refuses consent for reevaluation, the school district may request a hearing to seek an order of the Hearing Officer overriding the lack of parental consent.

The parties have stipulated that Student's Parents do not object to a neuropsychological evaluation being conducted as part of a comprehensive evaluation of Student's cognitive, behavioral, emotional, and communication functioning (Stip FOF 16); that Student has not had any standardized assessments conducted in the last three years (Stip FOF 19); and that the last time Student was evaluated was when he received a Speech, Language and Relatedness Evaluation in 2007-08 (Stip FOF 20).

Student's Mother argues that the April 2010 and July 2010 IEPs obligate BOE to use Lovecky for the evaluation and that failure to use Lovecky will result in invalid results due to Student's historically difficult time transitioning to new environments and his sensitivity to what he perceives as invasions of his privacy.

Witnesses on behalf of Student testified that they believe that Lovecky is the best candidate to get the most valid and useful results; that introducing a new person to Student will have a negative effect on him that would cause him to under-represent his capacity and affect his education; that Student knows and feels safe with Lovecky; and that using Lovecky will have no risk of adverse effect.

Utilization of Lovecky was described as a "risk minimization strategy." Quirk testified that the validity of the evaluation results could affect the appropriateness of Student's IEP and that the goal is to get the best possible performance from Student.

BOE argues that it has the right to conduct the neuropsychological evaluation with the evaluator of its own choosing and that Student's Parents can pursue an IEE if they disagree with BOE's evaluation.

On behalf of BOE, neuropsychologist Kristi Sacco testified that there are ways to acclimate a child to an unknown evaluator and ways to avoid invalid results. For example, the

evaluator might observe a child in class before meeting him; the evaluator could discuss a child with parents and school officials to understand their concerns; an evaluator could place the child in a comfortable setting and conduct several sessions to help the child acclimate.

Sacco further testified that it is not problematic to evaluate an unknown student; that the stress of meeting a new person is possible in any case; and that an evaluation by an unknown person is not likely to damage a child.

Testimony regarding the possibility of invalid results caused by an unknown person evaluating Student is speculative. Uncontroverted testimony indicates that Student has not seen Lovecky in six years; that he recently transitioned successfully to a new school; that he was able to develop relationships with and be taught by faculty that were new to him; that Student's interactions with school staff and fellow students are more appropriate, his anxiety and dysthymia are under more control, and he is better able to reflect on and verbalize his feelings in different situations; and that Student's improvement since 2005 (when he was last evaluated by Lovecky) is marked.

There is no evidence that Lovecky and her office environment (which were described as being comfortable to Student) are the same as they were in 2005 or that they will be consistent with Student's memory of them.

Quirk credibly testified that, in April 2010, it was his intention that Lovecky would direct the evaluations that would take place; that there were limitations to the types of evaluations Lovecky could perform; that Lovecky would handle the transition for other necessary evaluations which she could not perform; and that Student should be introduced to new situations utilizing people outside of his family that he trusts, such as Struckus.

This issue is very narrow - whether Student's Mother's failure to consent to a neuropsychological evaluation based solely on the identity of the evaluator should be overridden. The issue is not whether Student's Mother's proposed evaluator is appropriate or a better choice, but whether failure to consent should be overridden, taking into consideration BOE's right to select the evaluator and Student's Mother's right to withhold consent.

Student's Mother's lack of consent based on the identity of the evaluator is dependent on speculation as to the validity of the results. BOE has a right to conduct its own evaluation utilizing the professional of its own choosing. If Student's Parents disagree with the evaluation or believe that it is not valid, they can seek an IEE.

BOE has met its burden of proving, by a preponderance of the evidence, that lack of parental consent should be overridden to permit BOE to conduct a neuropsychological evaluation utilizing the professional(s) of its own choosing in order to gather current data about Student's functioning and educational needs.

Issue 2: Whether BOE failed to implement Student's IEP by not selecting Dr. Lovecky to perform the neuropsychological evaluation.

Student's Mother argues that BOE failed to implement Student's IEP by not selecting Lovecky to perform the neuropsychological evaluation. Student's Mother claims that the PPT did not agree to change the April 2010 and July 2010 IEPs identifying Lovecky.

The 2010 IEPs were not conclusive as to whether Lovecky would perform all evaluations and were written prior to Student's successful transition to Marvelwood when the PPT was concerned about his transition capability.⁶

Quirk testified that it was his intention that Lovecky would direct the evaluations that would take place and that selection of appropriate evaluators would be controlled by their credentials. The IEPs were not conclusive that Lovecky would perform a neuropsychological evaluation as her ability to do so was conditioned on her credentials. In 2011, at the time that BOE and Student's Mother agreed that a neuropsychological evaluation was appropriate, BOE determined that Lovecky's credentials did not render her to be an appropriate evaluator since she was not licensed in Connecticut and is not a neuropsychologist.

A student's IEP must be reviewed not less than annually and be revised as appropriate. The April 2010 and July 2010 IEPs do not bind BOE indefinitely. Student's IEP was reviewed and revised at a PPT meeting in February 2011. BOE determined that there was a need for a neuropsychological evaluation and sought to exercise its right to conduct an evaluation utilizing the professional of its own choosing.

BOE is responsible for developing the IEP and ensuring that it provides Student with a free, appropriate public education ("FAPE"). The members of the PPT, including parents, participate in that process. Right to participation does not give parents veto power over the ultimate decision. IEPs are not created by way of majority vote. Where there is a lack of

⁶ The PPT determined that an evaluation was not necessary in 2010 because they thought it was too much for Student to go through while he was transitioning to Marvelwood (Testimony of Quirk; Struckus).

agreement as to the contents of an IEP, a school district has an obligation to develop an IEP that provides FAPE.

Student's Mother cites the silence of members of the PPT as evidence that they did not agree to change the IEP with regard to the identity of the evaluator. As representatives of the school district, the silence of school staff could equally be seen as acquiescence with Culkin's recommendation to have the neuropsychological evaluation performed by a Connecticut licensed professional (Lovecky is not licensed in Connecticut).

The IEP was revised in February 2011 and did not require selection of Lovecky as evaluator.

BOE met its burden of proving, by a preponderance of the evidence, that it did not fail to implement Student's IEP when it refused to select Lovecky as evaluator in 2011.

FINAL DECISION AND ORDER

1. The Board of Education may conduct a neuropsychological evaluation of Student. The lack of parental consent to the evaluation is hereby overridden.
2. The neuropsychological evaluation shall be conducted by an evaluator of the Board of Education's choosing under the condition that said evaluator must be properly credentialed consistent with the criteria set forth in the Board of Education's Independent Educational Evaluation Criteria (Exhibit B-12).
3. The Board of Education shall, at public expense, consult with Dr. Jed Struckus concerning Student's needs and suggestions for ensuring the test experience leads to a positive result and shall, at public expense, utilize Dr. Struckus to introduce Student to the evaluator and the evaluation process.
4. The Board of Education did not fail to implement Student's IEP by not selecting Dr. Lovecky to perform the neuropsychological evaluation. Case 11-0418 is dismissed.

Attachment A – Exhibits

Hearing Officer exhibits are identified as “HO-#”; BOE’s exhibits are identified as “B-#”; and Student’s Parent’s exhibits are identified as “P-#”. The following exhibits were admitted into evidence as full exhibits.

HO-1: March 21, 2011 request for hearing filed by the BOE in case 11-0364

HO-2: April 26, 2011 request for hearing filed by Student in case 11-0418

HO-3: Joint Stipulation of Uncontested Facts dated May 27, 2011

P-3: Lovecky Psychological Evaluation September 14-15, 2005

P-4: Thurman Consultation Report

P-5: Thurman Consultation Report

P-9: Corrections to February 15, 2011 IEP

P-10: E-mails between Student’s Mother and Culkin

P-11: E-mail from Culkin to Student’s Mother March 16, 2011

P-12: E-mail from Student’s Mother to Lovecky April 7, 2011

P-14: Letter from Lovecky April 14, 2011

P-16: Student’s Parent’s letter April 25, 2011

B-1: PPT Meeting Minutes/IEP April 19, 2010

B-2: PPT Meeting Minutes/IEP July 20, 2010

B-3: PPT Meeting Minutes/IEP February 15, 2011

B-4: Letter from BOE Attorney to Student’s Attorney March 1, 2011

B-5: Letter from Culkin to Student’s Parents March 17, 2011

B-6: E-mail between Culkin and Student’s Parents March 2011

B-7: Culkin Resume

B-8: Marcinek Resume

B-9: Hay Resume

B-10: Sacco Resume

B-11: Policy Statement from Houston Conference on Specialty Education and Training in Clinical Neuropsychology

B-12: Independent Educational Evaluation Criteria