

NOVEMBER 24, 2015

COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

BUREAU OF SPECIAL EDUCATION APPEALS

DECISION

IN RE: SHREWSBURY PUBLIC SCHOOLS

BSEA #1508106

BEFORE

LINDSAY BYRNE

HEARING OFFICER

MELISSA MAGUIRE, SCHOOL DISTRICT

PARENTS, PRO SE

**COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS**

IN RE: SHREWSBURY PUBLIC SCHOOLS

&

BSEA #1508106

YANDEL¹

DECISION

This Decision is issued pursuant to M.G.L. c. 71B and c. 30A, 20 U.S.C. § 1401 *et seq.*, 20 U.S.C. 794, and the regulations promulgated under these statutes. The Parties elected to forgo testimony and to submit this matter for Decision on documents alone in accordance with BSEA Rule XII. The Parties, both *pro se*, originally submitted exhibits and arguments on August 10, 2015. The evidentiary record was determined to be incomplete. The Parties then supplemented their submissions on September 16 and October 30, 2015 and the record closed on that date.

ISSUE

Whether the Parents are entitled to public funding of the 2015 comprehensive evaluation of Yandel conducted by the Boston Children's Hospital Learning Disabilities Clinic? M.G.L.c71B; 20 U.S.C. 1415(b)(1) and (d)(2)(A); 603 CMR 28.04(5); 34 CFR 300.502.

FINDINGS OF FACT

1. Yandel is a ten year old fourth grade student attending a substantially separate in- district special education program. He has received special education services through the Shrewsbury Public Schools since preschool. The nature and extent of his special needs are not in dispute for the purposes of this Hearing.
2. The most recent set of comprehensive evaluations conducted by Shrewsbury occurred in November and December 2012. (S-1; S-2). It included: educational assessments, classroom observations, a psychological evaluation, a speech-language evaluation, an occupational therapy

¹ "Yandel" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public.

evaluation and a learning assessment. (S-22; S-23; S-24; S-25; S-26; S-27; S-28) The required three year re-evaluation is scheduled to take place by January 2016. (S-17; S-22 – S-28)

3. The Parents accepted the services and placements outlined in annual IEPs developed by Shrewsbury from preschool through June 2015. On June 10, 2015 the Parents rejected the IEP and the placement proposed for Yandel for the 2015-2016 school year. (S-3; S-6; S-11; S-16)

4. The Parents arranged for privately funded evaluations of Yandel in July 2013, spring 2014 and fall 2014. It is not clear from this record whether the results of those evaluations were shared with the Shrewsbury Special Education Team. The Parents did not request public funding of those evaluations. (Parent Affidavit)

5. At a Team meeting on November 18, 2015 the Special Education Director, Melissa Maguire, suggested that a reading evaluation be conducted “to gain a deeper understanding about what reading program(s) might benefit [Yandel]’s development.” (S-7) Shrewsbury agreed to arrange for a specialist outside the Shrewsbury school system to evaluate Yandel’s reading program. (S-5) Shrewsbury also offered to conduct a vision evaluation of Yandel. The Parents accepted the proposed “reading evaluation” and declined the vision evaluation on November 18, 2014. Shrewsbury did not offer, and the Parents did not request, additional evaluations or assessments. (S-7; S-8).

6. Susan Gately, Ph.D.², conducted the “outside” reading evaluation the School requested on January 12 and January 22, 2015. Her undated report, titled an “Educational Consultation”, details her review of Yandel’s education record, her interviews with school staff, and her observation of Yandel’s school program. She did not conduct any individualized or standardized reading assessments with Yandel. She made comprehensive recommendations concerning appropriate strategies, methods, interventions, curricula and settings for Yandel in the areas of executive functioning and reading. Dr. Gately’s Consultation Report was received by Shrewsbury on February 3, 2015. There is no indication in the record of the date on which the Parents received Dr. Gately’s report. (P-1, S-18)

7. The Team met to review the results of Dr. Gately’s evaluation on March 3, 2015. The Team proposed to increase the in-class special education reading support and a corollary decrease in 1-1 reading instruction outside the classroom. The Parents rejected this change in service. (S-10; S-11; S-12)

8. The Parents initially contacted Children’s Hospital Learning Disabilities Clinic (“Clinic”) about conducting a comprehensive educational evaluation of Yandel on January 22, 2015. The Clinic sent the Parents the pre-evaluation paperwork, including teacher response sheets. The paperwork was returned to the clinic by February 17, 2015. On March 3, 2015 the Clinic advised the Parents that Yandel’s evaluation had been scheduled for July 7, 2015. The Parents made an initial private payment for the Clinic evaluation on June 15, 2015. (P-4; Parent Affidavit)

² Dr. Gately’s curriculum vitae indicates extensive training and experience in evaluating students with, and specialized programs for, language based literacy and learning disabilities. (S-21)

9. The Team reconvened on May 5, 2015 to discuss Yandel's transition to the Middle School building and schedule. Shrewsbury proposed a 2015-2016 fifth grade IEP substantially similar to the one being implemented during the 2014-2015 school year. The proposed Middle School IEP also reduced the direct, outside classroom reading service to Yandel from 60 minutes daily to 30 minutes daily. It replaced the outside 30 minute block with additional time for guided reading in the special education classroom. The Team meeting notes reflect discussion of the impending Children's Hospital Evaluation. The parents rejected the proposed 2015-2016 IEP and placement in full on June 10, 2015. (S-14; S-15; S-16; S-17)

10. On June 8, 2015 the Parents wrote to Shrewsbury requesting funding for "an independent evaluation" of Yandel "by the Learning Disabilities Program at Boston Children's Hospital due to our concerns of not making affective [*sic*] progress." The Parents requested public funding of the Neuropsychology, Psychology, Oral Language, Written Language, Mathematics, and Coordination and Integration of Findings components of the evaluation. (P-1, S-18; P-3, S-19)

11. Shrewsbury declined to fund the Children's Hospital evaluation sought by the Parents. Shrewsbury timely requested a Hearing at the BSEA on June 14, 2015 seeking "a ruling to determine that Shrewsbury is not responsible to fund an independent evaluation as requested by the Parents." The School indicated that Yandel had been evaluated in January 2013 and was due to be re-evaluated by January of 2016. It asserted that the Parents' request was "beyond the 16-month period in which an independent evaluation can be requested" and that the School was "entitle[d] to evaluate prior to a request for an independent evaluation." In its Hearing Request Shrewsbury stated that it had contacted the Parents to explain the reason it had not agreed to fund the independent evaluation. The Hearing Request did not indicate that Shrewsbury had provided the Parents with information about their potential eligibility for a publicly funded IEE using the Massachusetts sliding scale. (Administrative Record) The School sent an N-1 to the Parents dated June 15, 2015 notifying them of its refusal to fund an IEE because their request was lodged more than 16 months after the last comprehensive evaluation conducted by Shrewsbury and that, therefore, Shrewsbury was entitled to conduct its own evaluations prior to an IEE request. (S-20)

12. In July 2015 the Children's Hospital Learning Disabilities Clinic conducted evaluations of Yandel in the areas of: Neurology, Neuropsychology, Psychology, Oral Language, Written Language and Mathematics. The Parents' medical insurance covered the cost of the Neurology evaluation. The Parents paid the bill for the remaining components. The Clinic also charged the Parents for a component titled "Coordination and Integration of Findings." The Clinic's reports were forwarded to Shrewsbury before the start of the 2015-2016 school year. The Team discussed the evaluations at a meeting held on September 15, 2015. (S-29; S-19)

13. The Parents did not identify any element of any evaluation conducted by Shrewsbury school staff with which they disagreed. Nor is there evidence of parental dissatisfaction with Dr. Gately's "educational consultation" before or contemporaneous with their request for public funding of the Clinic evaluation.

14. Shrewsbury submitted an undated, unsigned standard form which contained a checkmark next to language indicating the Parents' agreement with the School's evaluations. Specifically, the question on the form reads, "Is Parent satisfied with school evaluation? If YES, continue forward

as previously discussed. If NO, discuss Extended Evaluation and rights to an Independent Educational Evaluation.” (S-33)

15. There is nothing in this record to indicate that the Parents requested an Independent Educational Evaluation (IEE) from Shrewsbury before they made direct arrangements for a comprehensive evaluation at Boston Children’s Hospital.

16. There is no evidence that Shrewsbury inquired about, or that the Parent offered, family financial information. There is no family financial information in the record.

POSITIONS OF THE PARTIES

The positions of the Parties, both proceeding *pro se*, have been gleaned from their filings and several conference calls.

The District offers three main arguments in support of its position that it properly declined to approve the parent’s request for public funding of the comprehensive evaluation she had arranged for Yandel at Children’s Hospital.³ First, Shrewsbury argues that the Parents’ request was untimely as it was made more than 16 months after the district had conducted its own evaluations in December 2012. The school also argues that Yandel’s three year re-evaluation was due to be conducted in December 2015 and that the school should be permitted to conduct that before funding an IEE. Finally, Shrewsbury argues that the Parents never explicitly disagreed with any of the evaluations Shrewsbury conducted. Therefore, according to the school, the Parents did not meet one of the necessary preconditions for public funding of IEE requests.

The Parents assert that they have acted reasonably and responsibly and that their request for public funding of the Clinic evaluation should not have been denied. Noting that the evaluations are helpful to the school they seek reimbursement of expenses they incurred in connection with Yandel’s evaluation at the Clinic.

³ I note that the District did not make the argument that its November/December 2012/January 2013 evaluations of Yandel were comprehensive and/or appropriate.

LEGAL FRAMEWORK

Independent Educational Evaluations (IEEs) are a fundamental component of both the federal and the state special education framework.⁴ In *Schaffer v. Weast*, 546 U.S. 49 (2005) the Supreme Court recognized the central role that access to a publicly-funded IEE may play in addressing the natural advantage in information and expertise that schools have over parents.⁵ More recently, in *Phillip C. v. Jefferson County Bd. of Education*, 701 F3d 691 (11th Cir. 2012) the Court of Appeals reaffirmed the importance of independent assessments of students, noting that “[t]he right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP,” and without it some children “would not receive, as the IDEA intended, ‘a free and appropriate public education’ as the result of a cooperative process that protects the rights of parents.” *Ibid* at 698.

Under federal law a Parent is entitled to an Independent Educational Evaluation at no cost to her if she disagrees with the evaluation obtained in the first instance by the school district unless the school shows, at a due process hearing, that the disputed evaluation was comprehensive and appropriate⁶ or that the alternate evaluation obtained by the parent did not meet the school’s criteria.⁷ 20 U.S.C. 1415(b)(1) and (d)(2)(A).

Recognizing an implicit power imbalance between the resources and expertise school districts have at hand and those readily available to parents of students with disabilities. Massachusetts chose to assist low-income parents seeking publicly funded IEEs by removing a district’s capacity to defeat the request by showing the appropriateness of its own evaluation at a due process hearing. Instead, if an income-eligible parent requests a publicly funded IEE within 16 months of the school’s evaluation the school must automatically and without delay arrange for

⁴ In 2004 the Massachusetts Department of Education (now DESE) issued an Administrative Advisory, SPED 2004-1, which succinctly explains the then, and still current, rights and obligations of Parents and School Districts with respect to IEEs.

⁵ *Schaffer v Weast*, 546 U.S. 49, 60-61 (2005) (“IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.”)

⁶ The applicable federal regulation is found at 34 CFR 300.502 which provides, in pertinent part:

(3)(b)(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either – (i) Initiate a hearing ... to show that its evaluation is appropriate, or (ii) Ensure that an independent educational evaluation is provided at public expense

...

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent’s reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

(5)(e)(2) ... a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

⁷ The criteria referenced in this section refer to technical issues such as qualifications of the examiner and location of the evaluation. 34 CFR 300.502(e).

the IEE at public expense.⁸ That 16 month time limit does not apply however, where, as here, the parent is not providing financial information in support of her request for public funding. In this instance Massachusetts follows federal law which explicitly bars imposition of time limitations on a parent's IEE request. 34 CFR 300.502(e)(2). The applicable Massachusetts regulation, 603 CMR 28.04(5) provides, in pertinent part:

Upon receipt of evaluation results if a parent disagrees with an initial evaluation or a re-evaluation completed by the school district then the parent may request an independent educational evaluation

...

(d) If the parent is requesting an evaluation in an area not assessed by the school district, the student does not meet income eligibility standards, or the family chooses not to provide financial documentation to the district establishing family income level, the school district shall respond *in accordance with the requirements of federal law*. The district shall either agree to pay for the independent educational evaluation or within five school days, proceed to the Bureau of Special Education Appeals to show that its evaluation was comprehensive and appropriate. (emphasis added)

As the facts of this matter do not implicate the Massachusetts expansion of parental right to an uncontested IEE, Massachusetts and federal law are congruent and may be applied consistently here. Both provide that whenever a parent requests a publicly funded IEE the school must promptly arrange for the evaluation and/or associated funding unless it timely (within 5 school days in Massachusetts) requests a due process hearing to show that the school's evaluation was comprehensive and appropriate.

The language of the applicable Massachusetts regulations, as well as that in the federal statute and regulations, is directive. It requires the school to take immediate responsive action to a parent's IEE request. It also, importantly, places the burden of production and persuasion on the school district. Absent a convincing showing in a due process hearing that its evaluation is comprehensive and appropriate a school must arrange for public funding of nearly any IEE requested by a Parent.

FINDINGS AND CONCLUSIONS

After careful consideration of the pertinent evidentiary record, the applicable statutes and regulations and the arguments of the Parties, I find that the Parents are entitled under federal and Massachusetts law to public funding of the 2015 Children's Hospital Evaluation of Yandel. My reasoning follows:

First, the School's argument that the Parents' funding request is untimely misunderstands the applicable law. The 16 month window applies only to requests for publicly funded IEEs pursuant to the Massachusetts law expanding access to IEEs for families who meet specified financial criteria. Yandel's Parents made no claim to financial

⁸ M.G.L. c71B §3; 603 CMR 28.04(5).

eligibility for public funding of an IEE pursuant to state law.⁹ Therefore the School was obligated to respond to their request “in accordance with the requirements of federal law.”¹⁰ Federal law does not permit imposition of a time limitation that would serve to delay, deny or otherwise infringe upon parental requests for an IEE. Thus Shrewsbury’s argument that the Parents’ request was time barred because it was not filed within 16 months of Shrewsbury’s last set of evaluations finds no support in either state or federal law.

Second, the School’s argument that it should be allowed to conduct updated evaluations before agreeing to the independent evaluation requested by the Parents, while reasonable given the passage of time between evaluations in this matter, is not a permissible ground to deny the Parents’ request. Under federal law, “[a] Parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.” The school district may defeat that right only if it demonstrates at a hearing that its own evaluation was appropriate or that the parent’s evaluation did not meet its own criteria.¹¹ While obtaining parental consent to a more current school evaluation is considered to be “best practice,” the fact that the district intends to begin its next three year re-evaluation in the near future does not extinguish the parents’ right to obtain an IEE at public expense if they disagree with an earlier evaluation conducted by the school district.¹² Although a wait of two years to challenge Shrewsbury’s evaluations may not have been wise, a delay of this sort does not automatically preclude reimbursement for the Clinic evaluation obtained by the Parents.¹³

Third, the District points out that the Parents have not expressed disagreement with Dr. Gately’s January 2015 “Educational Consultation,” nor have they expressed disagreement with the District’s December 2012/January 2013 comprehensive re-evaluation of Yandel. The School contends that the Parents are not entitled to a publicly funded IEE under either state or federal law without first notifying the School of their dissatisfaction with the evaluations conducted by the School and giving the School an opportunity to correct any deficiencies. In this case, the School argues, there is evidence that the Parents actively agreed with the School’s evaluations. Agreement, the School argues, bars the Parents from obtaining an IEE at public expense. Shrewsbury points to its Eligibility Determination worksheet, undated, on which a box labelled “Yes” associated with the question “Is parent satisfied with school evaluation?” is checked, as evidence of Yandel’s Parents’ agreement. (S-33) These are appealing arguments which have not been considered by Courts in this jurisdiction.

Most other courts that have addressed the issue of whether a parent must disagree with a school conducted evaluation and express that disagreement explicitly to the School in order to qualify for a publicly-funded IEE have answered this question in the negative. The Third Circuit in *Lauren W. v. Defiammis*, 480 F.3d 262, 275 (3d Cir. 2007) held that “reimbursement may be warranted where a parent does not take a position with respect to the district’s

⁹ It is unclear from this record whether Shrewsbury advised the Parents of the availability of public funding for IEEs to financially eligible families as required. 603 CMR 28.04 (5)(2).

¹⁰ 605 CMR 28.04(5)(d).

¹¹ 34 CFR § 300.502(b).

¹² DESE Administrative Advisory SPED 2004-1. www.doe.mass.edu/sped/advisories/04_1.html.

¹³ *Warren G. v. Cumberland County School District* 190 F.3d 80, 87 (3rd Cir. 1999).

evaluation or “otherwise fails to express disagreement.” The Court applied “the regulation broadly to permit reimbursement not only when the parents expressly disagree with the evaluation but also when ‘the parents [fail] to express disagreement with the District’s evaluations prior to obtaining their own’ evaluation.”¹⁴ To hold otherwise would render the regulation “pointless because the object of parents’ obtaining their own evaluation is to determine whether grounds exist to challenge the District’s.”¹⁵

In several instances, courts have denied public funding for an IEE obtained where parents explicitly agreed with the District’s evaluation.¹⁶ In each of those cases, however, parents testified before the fact-finder to their agreement. In the matter presently before me, I have only an unsigned, undated form generated by Shrewsbury, purporting to indicate the Parents’ agreement with the school district’s evaluations at some unknown point in time. This is not the type of explicit agreement that courts have relied on to deny parents public funding for an IEE. Similarly, as IEPs reflect a special education program and placement, parental acceptance of the program and the placement outlined in a student’s IEP does not necessarily indicate acceptance of an evaluation conducted before the IEP is proposed.

In the circumstances of this case, I can conclude neither that the Parents explicitly disagreed with, nor that they explicitly agreed with or accepted, Shrewsbury’s 2012/2013 comprehensive evaluation. Their request for public funding of the Clinic evaluation, therefore, is not barred.

Finally, I note that although federal law permits a school district to defeat a parent’s request for public funding of an IEE by demonstrating to a Hearing Officer that its own evaluations were appropriate, or that the evaluation obtained by the parent did not meet agency criteria¹⁷ neither of these arguments was made here.¹⁸ The documentary record simply was not sufficiently strong on its own to carry the School’s burden of persuasion that its challenged evaluations were comprehensive and appropriate.

¹⁴ *Lauren W. ex. rel. Jean W. v. Deflaminis*, 480 F.3d 26, 274 (3rd Cir. 2007) (quoting *Warren G. ex. rel. Tom. G. v. Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, 87-88 (3d Cir. 1999)); see *Hudson ex. rel. Tyree v. Wilson*, 828 F.2d 1059, 1065 (4th Cir. 1987). Dear Colleague letters issued by the United States Department of Education, Office of Special Education Programs support this interpretation. See Letter to Imber, 21 IDELR 677 (OSEP 1994), Letter to Imber, 19 IDELR 352 (OSEP 1992); Letter to Mitchell, 17 EHLR 282 (OSERS 1990).

¹⁵ *Id.*

¹⁶ See, e.g., *R.L. ex rel. Mr. L. v. Plainville Bd. of Educ.*, 363 F. Supp. 222, 234 (D. Conn. 2005); *Deflaminis*, *supra* 480 F.3d at 275.

¹⁷ See 34 CFR § 300.502(b)(2)(ii).

¹⁸ Because the School appeared to be under the misapprehension that the Parents’ request was barred by the 16 month time limit applicable to requests made under 603 CMR 28.04(5) its arguments concerning appropriateness were confined to the Reading Evaluation its consultant conducted in January 2015.

ORDER

Shrewsbury Public Schools shall reimburse the Parents for all out-of-pocket costs they have previously paid to Children's Hospital Learning Disabilities Clinic in connection with Yandel's evaluation there in July 2015, with the exception of any costs directly related to the medical examination by the Neurologist.

By the Hearing Officer,

Lindsay Byrne¹⁹

Dated: November 24, 2015

¹⁹ The Hearing Officer gratefully acknowledges the assistance of Colleen Shea in the preparation of this Decision.