

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

In Re: Newton Public Schools

BSEA No. 1300077

DECISION

This decision is issued pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 USC Sec. 1400 et seq., Section 504 of the Rehabilitation Act of 1973 (29 USC Sec. 794); the Massachusetts special education statute or “Chapter 766,” (MGL c. 71B) and the Massachusetts Administrative Procedures Act (MGL c. 30A), as well as the regulations promulgated under these statutes.

On July 6, 2012, Parent filed a hearing request with the Bureau of Special Education Appeals (BSEA) in which she disputed the Newton Public Schools’ (Newton or School) determination that the Student was ineligible for special education services. Additionally, Parent alleged numerous procedural violations, challenged the validity of the School’s evaluations of Student, and alleged that the School had failed to timely respond to her request for an independent educational evaluation (IEE) as required by pertinent statutes and regulations. The relief initially sought by Parent included an order directing the School to fund an IEE of Student, and, “if warranted by the IEE,” to find the Student eligible for special education and provide services and accommodations.

The hearing in this matter was postponed for good cause at the request of the parties to allow time for the Team to consider an outside evaluation obtained by the Parent and for the parties to attempt resolution of this matter. On or about November 5, 2012, Parent filed a status report in which she limited her request for relief to an order for public funding of the IEE that she had obtained previously.

The hearing took place at the offices of the BSEA in Boston, Massachusetts on November 26 and December 7, 2012. The Parent proceeded pro se, and the School was represented by counsel. Each party had an opportunity to examine and cross-examine witnesses and submit documents into the record. The record consists of Parents’ exhibits P-1 through P-11, P-14 through P-15, P18 through P-19, P-21 through P-27, P-29 through P-32, P-37 through P-40, P 48 through P-50; and School’s exhibits S-1 through S-9; and S-29 through S-34. Additionally, the record includes tape recorded testimony and argument. The School’s request to postpone the conclusion of the hearing to December 28, 2012 to file written closing arguments was granted, over Parent’s

objection. The parties filed written closing arguments on December 28, 2012 and the record closed on that day.

Those present for all or part of the hearing were:

Parent	
Janelle Bradshaw	Educational Advocate
Dr. Brigitte Mercedes ¹	Private Neuropsychologist
Maura Tynes	Administrator, Newton Public Schools
LuAnn Keough	School Psychologist, Newton Public Schools
Ouida Young, Esq.	Counsel for Newton Public Schools
Sara Berman	Hearing Officer, BSEA

ISSUES PRESENTED

1. Whether the School is obligated to pay for an independent neuropsychological evaluation obtained by the Parent in June 2012;
2. If so, whether the School is required to pay the evaluator's charges in excess of the state-authorized rate.

POSITION OF PARENT

After Parent requested an IEE in May 2012, Newton failed to follow the procedures mandated by federal and state law, in that Newton failed to respond to Parent within legally-mandated timelines; failed to provide Parent with a list of potential evaluators; failed to provide Parent about the availability of a fully or partially School-funded IEE for income-eligible families; and failed within the mandatory timeline to either fund an IEE or seek a BSEA hearing to defend its own evaluation as comprehensive and appropriate. Because of the School's procedural violations, Parent had no choice but to obtain a neuropsychological evaluation from a qualified provider who charged more than the rate allowed by the state Division of Health Care Finance and Policy; therefore, the School must pay the evaluator's actual charges.

POSITION OF SCHOOL

Upon receipt of the Parent's request for an IEE, the School responded timely and appropriately by offering to conduct its own neuropsychological evaluation. Because the Parent refused to consent to this School-based evaluation, Newton had no obligation either to fund the evaluation sought by the Parent or proceed to a hearing at the BSEA to demonstrate that its own evaluation was appropriate.

Further, even if Newton was obligated to fund an IEE, it is not required to pay more than the state-approved rate.

¹ Dr. Mercedes testified by speaker phone.

FINDINGS OF FACT

1. Student is a child who attends elementary school in Newton. Although Newton has evaluated Student and held several Team meetings, Newton has never found Student eligible for special education.² Student does have a Section 504 Accommodation Plan. (Parent, S-2)
2. In March 2012, Parent requested a special education evaluation for Student because she was concerned about Student's academic progress, particularly in reading and writing. (Parent, Bradshaw, P-6 – P-12)
3. In response, during April and May 2012, the School conducted an evaluation consisting of psychological, educational, and occupational therapy assessments. (P-7, 10, 11)
4. The psychological assessment consisted of cognitive testing, including the WISC-IV and Wide Range Assessment of Learning and Memory, Second Edition (WRAML-2), academic/achievement testing via the Wechsler Individual Achievement Test – Third Edition (WIAT - III), and an assessment of Student's executive functioning and social-emotional status using parent and teacher rating scales. (P-11)
5. The Team convened on May 15, 2012. The School members of the Team concluded that Student did not have a disability; therefore, she would be ineligible for special education. Parent disagreed, and so stated at the Team meeting. (S-3)
6. At the conclusion of the meeting, Parent stated that she wanted an independent evaluation of Student. (Parent) On the Special Education Eligibility/Initial and Reevaluation Determination form, also completed at the conclusion of the Team meeting, Parent indicated that she disagreed with the School's evaluations. (S-2)
7. On the same date as the Team meeting, May 15, 2012, the School issued a Form N-2, Notice of School District Refusal to Act, stating its finding of ineligibility and acknowledging Parent's disagreement with this conclusion. (S-3)
8. In a letter to the Team Chair dated May 22, 2012, Parent requested an independent evaluation as follows:

As discussed during our meeting on May 15, 2012, I disagree with the District's conclusion that [Student] does not have a disability. We also had a discussion regarding an independent evaluation. Because I believe that more information needs to be gathered in order to assess whether [Student] has a disability, I am exercising

² Parent has rejected the School's finding of ineligibility. This hearing did not address the underlying eligibility issue, and Parent has reserved her right to litigate eligibility if necessary.

my right to an Independent Educational Evaluation (IEE). I have noted that the N-2 Form does not contain any information regarding the independent evaluation which was discussed. (S-4)

9. On May 29, 2012, in response to Parent's letter of May 22, 2012, the School sent Parent a Form N-1, Notice of Proposed School District Action. In pertinent part, this N-1 form stated the following:

Newton Public Schools acknowledges that [Parent] would like more information to assess whether [Student] has a disability. Newton Public Schools will send a consent form for an extended evaluation and complete additional subtests in the areas that [Parent] is concerned. (S-5)

10. The N-1 form did not mention the Parent's request for an IEE.
11. In a second N-1 form, dated May 31, 2012, the School proposed "an extended evaluation at parent's request," because "[parent] was dissatisfied that Newton Public Schools did not qualify her daughter for special education." (S-6) This second N-1 form proposed "further evaluations in the areas of writing, memory and processing speed" to be conducted by the school psychologist and special educator. (S-6)
12. Parent received the proposal for the extended evaluation referred to above on June 1, 2012. In a letter dated June 12, 2012, Parent rejected this proposal and reiterated her request of May 22, 2012 for an independent evaluation, specifying that she sought a neuropsychological assessment.³ Among other things, Parent's letter stated the following: (S-7)

[Parent] rejects this statement [proposing further school-based evaluations] which contravenes the legal right she exercised pursuant to 34 CFR 300.502 and 603 CMR 28.04(5) requesting an...(IEE) which was submitted on May 22, 2012. The "Parents' Notice of Procedural Safeguards" also provides information regarding this statutory right. Specifically, this document states "you have the right to request an IEE of your student at public expense if you disagree with the school district's evaluation. If you request an IEE, the school district must provide you with information about where you may obtain an IEE and about the state requirements that apply to IEEs." (emphasis added) ...As of today, no such information has been provided by the NPS."

13. Attached to the letter referred to above were copies of the letter of May 22, 2012 and of the "Parents' Notice of Procedural Safeguards." (S-7)

³ Parent testified that around the time of the Team meeting, Student's pediatrician suggested a neuropsychological assessment. (Parent)

14. In a letter to the Newton Superintendent of Schools dated June 7, 2012, Parent expressed concerns about the Team process, and asked for assistance in resolving those concerns. (P- 28)
15. On June 14, 2012, Newton convened a meeting with Parent, Parent's advocate, the principal of Student's elementary school, and Robin Fabiano, who was then the Co-Director of Elementary Student Services for Newton. The purpose of the meeting was to discuss the concerns Parent had raised in her letter to the Superintendent. Parent's request for a publicly funded neuropsychological evaluation was one of the topics discussed at the meeting. Parent understood that this meeting was not intended to be a formal Team meeting. (Parent, P-29, P-31)
16. In a letter from Ms. Fabiano to Parent of the same date, Newton stated the following:

According to the DESE Administrative Advisory, if a parent requests funding for an independent evaluation in an area not yet assessed by the school district, the best practice would be for the district to offer to conduct its own evaluation before considering an independent evaluation. Therefore, [NPS] proposes to conduct a neuropsychological assessment completed by a district neuropsychologist...The school district proposes that David Gotthelf, Coordinator of Therapeutic Services and a neuropsychologist, review the previously completed assessments, complete any necessary subtests, and synthesize the results as part of a neuropsychological evaluation completed by the school district. (P-29)
17. On June 15, 2012, the School sent Parent a Form N-1 proposing "a neuropsychological assessment completed by an independent NPS evaluator...in response to a request for an independent evaluation by [Parent]." (P-30) Parent received this form on June 20, 2012. After having a discussion with Dr. Gotthelf, and learning that he was affiliated with Newton (albeit not in Student's school building), Parent determined that he was not an independent evaluator and decided not to proceed with an evaluation with him. In a letter dated June 29, 2012, Parent rejected the School's proposal in full. (P-31) Parent received no response from Newton to this rejection. (Parent)
18. Meanwhile, after the Team meeting, Parent had begun to search for an individual or facility that could conduct an independent neuropsychological evaluation of Student. Parent contacted evaluators from a list provided by the Student's pediatrician. Among other things, Parent asked prospective evaluators whether they accepted Parent's insurance. Parent also asked the prospective evaluators when they would be able to test the Student and write a report. Parent did not ask potential evaluators whether they would accept payment at a rate established by the state Division of Health Care Finance and Policy (hereafter, "HCFP rates" or "state-approved rates") because she was not aware that this was a requirement for most publicly funded evaluations. (Parent, Bradshaw)

19. Parent found that most evaluators were booked for the next several months, and would not be able to meet with Student in time to have a report available over the summer of 2012 or at the start of the 2012-2013 school year. For example, Children's Hospital-Boston had no available appointments for about one year. Other evaluators would be unable to see Student until September or October 2012. Additionally, Parent learned that she would not be able to secure insurance coverage for a neuropsychological evaluation. (Parent)
20. The only individual on the list who was available within the time period sought by the Parent was Brigitte Mercedes, Ph.D., who is a licensed neuropsychologist located in Cambridge, MA. Dr. Mercedes conducted a neuropsychological evaluation of Student on June 8 and 14, 2012, completed a report on June 30, 2012, and submitted the report to Newton on August 15, 2012. (Mercedes, P- 14) Parent and Dr. Mercedes did not discuss the issue of HCFP rates, again, because Parent was not aware that they existed or were an issue. (Parent, Mercedes)
21. In June 2012, Parent informed Student's teacher that Student was undergoing outside testing, and asked the teacher not to administer further school-based assessments so as to avoid compromising the outside test results. (Parent, P-40)
22. Dr. Mercedes charged Parent a total of \$4500.00 (four thousand, five hundred dollars). The breakdown of charges was as follows: "school neuropsychological evaluation--\$3000.00; Review of Additional Documents (2.5 hours), Parent Consultation (4 hours) Meeting Attendance (tentative, 2 hours)--\$1500.00. (Mercedes, P-15) As of the hearing date, none of these charges had been paid. (Parent, Mercedes)
23. The applicable regulations of the Division of Health Care Policy and Finance, Ambulatory Care establish that a public agency may pay for a "Comprehensive Neuropsychological Assessment" including but not limited to record review, interview and client history, testing, scoring, diagnosis and recommendations, report preparation, and follow-up meeting at a rate of \$74.94 per hour, for a maximum of 12 hours. 114 CMR 29.04. Thus, the maximum allowable state-approved payment for such evaluation would be \$74.94 x 12, or \$899.28.

DISCUSSION

Both federal and state law provide that a parent who disagrees with an evaluation conducted by a school district may request an independent educational evaluation (IEE) at school expense.⁴ The pertinent federal regulations provide a detailed description of the applicable procedure in 343 CFR Sec. 300.502 as follows:

300.502 Independent educational evaluation.

(a) *General.* (1) The parents of a child with a disability have the right under this part to obtain an independent educational

⁴ 20 USC Sec. 1415(b)(1) and (d)(2)(A); 34 CFR Sec. 300.502, G.L. c. 71B, Sec. 3, 603 CMR 28.04(5).

evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations...

(3) For the purposes of this subpart—

(i) *Independent educational evaluation* means an evaluation conducted by a qualified examiner who is not employed by the [child's school district.]; and

(ii) *Public expense* means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent...

(b) *Parent right to evaluation at public expense*

(1) A parent has the right to an [IEE] if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an [IEE] at public expense, the public agency must, without unnecessary delay, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an [IEE] is provided at public expense, unless the agency demonstrates in a hearing...that the evaluation obtained by the parent did not meet agency criteria.

(3).....

(4) If a parent requests an [IEE] the public agency may ask for the parent's reason [for objection to] the public evaluation.

However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the [IEE] at public expense or ...request[ing] a due process hearing to defend the public evaluation.

(c)...[]

(d)...[]

(e) Agency criteria. (1) If an [IEE] is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an [IEE].

(2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an [IEE] at public expense.

Consistent with federal law, the Massachusetts special education statute, G.L. c. 71B, Sec. 3, also states that parents have a right to an IEE at public expense. Like the

corresponding federal statute and regulations, the state statute provides that upon receipt of a request for an IEE, a school district must exercise one of only two options: either to fund an IEE or to request a hearing to defend its own evaluation as appropriate. The state statute is more protective of parents than the federal law, however.⁵ While the federal law requires schools to act on a request for an IEE “without unreasonable delay,” the state statute imposes an explicit time limit of five school working days for this purpose. Id. Additionally, the Massachusetts statute requires districts to fully or partially fund IEEs for students who are income-eligible. Id., 603 CMR 28.04(5)(c).

The implementing regulations outline the school’s obligation of timely response to IEE requests at 603 CMR 28.04(d) as follows:

If the parent is requesting an [IEE] 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...establishing family income level, the school district shall respond in accordance with the requirements of federal law. Within five school working days the school shall either agree to pay for the [IEE] or proceed to the [BSEA] to show that its evaluation was comprehensive and appropriate. Id.

As a general rule, schools are not required to pay for IEEs unless they have first had an opportunity to conduct school-based evaluations. The plain language of both GL c. 71B Sec. 3 and the corresponding regulation states, however, that the prerequisite of a school-based evaluation does not relieve the school of its obligation to request a hearing within the five-day period even if there has been no school evaluation in the area to be assessed by the IEE. See, e.g., *In Re: Bridgewater-Raynham Public Schools v. Student*, BSEA No. 11-6444 (Figueroa, 2011), pp. 8-9.

Here, the School conducted its own special education evaluation consisting of educational, psychological, and occupational therapy assessments. Parent was not satisfied with the School’s evaluation of Student or the resultant conclusion that Student did not have a qualifying disability. Parent first indicated her dissatisfaction immediately after the Team meeting of May 15, 2012 by checking the appropriate box on the eligibility determination flow chart. One week later, on May 22, 2012, Parent sent a written request for an IEE to the Team chair.⁶ No later than five school working days later, which was May 30, 2012, the School was obligated both to: (1) provide Parent with information about where an independent educational evaluation could be obtained, and about the criteria that the evaluator must satisfy to qualify for public funding, including the requirement that the evaluator accept payment at state rates, and about the

⁵ . Since the Massachusetts standard provides more protection to the Parent than the federal IDEA, the state standard must be applied. Town of Burlington v. Mass. Dept. of Education, 736 F.2d 773, 792 (1st Cir. 1984).

⁶ The record shows that Parent and/or her advocate probably mentioned the possibility of an IEE at the May 15 Team meeting; however, Parent made her first written request for an IEE on May 22, 2012.

sliding fee scale option; (2) either agree to pay for the IEE or request a hearing before the BSEA to defend its evaluation as appropriate. 603 CMR 28.04(5).

Between May 22 and 30, 2012, the School did nothing in response to Parent's request. Specifically, during that five school-day interval, the School neither provided the requisite information, agreed to pay for the IEE nor requested a BSEA hearing. Instead, in June 2012, after repeated efforts by the Parent to obtain a response to her request for an IEE, Newton proposed first, an extended school-based evaluation and then a "neuropsychological" evaluation by a school-designated provider, Dr. Gotthelf.⁷ While these offers of additional school-based evaluations might have been reasonable, they did not absolve Newton of its responsibility for a timely response to Parents' IEE request as set forth in 603 CMR 28.04(d).

The School argues that the offer of a neuropsychological evaluation by Dr. Gotthelf was an acceptable response to Parent's IEE request. The School's position is that a neuropsychological assessment constituted an evaluation in an area not previously assessed by the school district, such that the request for a neuropsychological evaluation should be treated as a request for additional school-based assessment, not for a request for an IEE. The School goes on to argue that since there is no right to an IEE in an area not previously assessed, it would not make sense to require the School to request a hearing to defend an evaluation that it had not performed, in an area that it had not assessed. This argument is not supported by a plain reading of the statute and regulations, which do not exempt schools from the requirement to request a hearing in such instances. Moreover, it is clear from the testimony on the record (Keough, Mercedes), that whether or not psychological and neuropsychological evaluations are "equivalent," and cover the same areas of disability is a question of fact in any given case. It is precisely such factual issues that are to be addressed in a hearing to determine if a school's evaluation was "comprehensive and appropriate."

Since the Newton Public Schools clearly failed to follow the requisite procedures in response to Parent's request for an independent evaluation, it is required to fund the evaluation conducted by Dr. Mercedes. The only remaining issue is whether the funding is limited to state-approved rates, which would cap the payment at \$899.28. The applicable state regulation provides that "[u]nique circumstances of the student may justify an independent assessment rate that is higher than normally allowed. " 603 CMR 28.04(5)(a). The BSEA has interpreted "unique circumstances" to encompass a variety of situations, including the unavailability of providers who would charge the approved rate, *In Re: Foxborough Regional Charter School*, BSEA No. 06-3158 (2006); and, particularly relevant here, where the school district has not complied with procedural requirements triggered when the Parent requested the IEE. See *In Re Student v. Boston Public Schools*, BSEA No. 08-4873 (2008).

⁷ While the School described Dr. Gotthelf as "independent," it is clear that he did not meet the legal definition of an independent evaluator, since he was employed by the District. 343 CFR Sec. 300.502(a)(3)(i).

In the instant case, the record unequivocally shows that upon receipt of Parent's IEE request of May 22, 2012, the School never informed Parent of where or how she could obtain an IEE, never informed Parent of the allowable payment rate, never informed Parent of the sliding fee scale option, and never requested a hearing to defend its own evaluation. These procedural missteps were substantial, and effectively precluded Parent from even knowing the requirements and limitations of public funding for an IEE. The record also shows that Parent did a diligent search for a qualified evaluator who would be available within a reasonable time, and also inquired about insurance coverage for an evaluation. The only qualified evaluator whom she could find who could evaluate Student before the fall of 2012 was Dr. Mercedes.

I conclude that in the instant case, it would be inequitable to confine payment to the state-approved rates; here, there clearly are "unique circumstances" that justify payment of Dr. Mercedes at higher than state-approved rates. Since there is no dispute that Parent had no knowledge of any cap on payment for the evaluation, the School must pay the entire \$4500 charged, even though under normal circumstances, the School might not be responsible for the additional \$1500 charged for additional document review, parent consultation and meeting attendance.

ORDER

The Newton Public Schools is responsible for payment for the neuropsychological evaluation of Student conducted by Dr. Brigitte Mercedes in June 2012 in the amount of \$4500.00 (four thousand, five hundred dollars). Upon receipt of appropriate documentation from Parent, Newton shall reimburse Parent for any payments she may have made to Dr. Mercedes. Newton shall pay the remainder of the outstanding balance, if any, directly to Dr. Mercedes.

Dated: February 6, 2013

Sara Berman,
Hearing Officer