

Hearing #16.039H

STATE OF MAINE
SPECIAL EDUCATION DUE PROCESS HEARING

York School Department)
v.)
Parents)

ORDER

This decision is issued pursuant to Title 20-A M.R.S.A. § 7202 et seq., Title 20 U.S.C. § 1415 et seq., and accompanying regulations. A due process hearing was held on February 26 and 29, 2016 and April 12 and 19, 2016 in Biddeford, Maine. Present and participating throughout the hearing were: [REDACTED], Parents¹; Amy Phalon, Esq. and Richard O'Meara, Esq., attorney for the Parents²; Hanna King, Esq., attorney for the York School Department³; Melissa Camire and Karen Ropes, Director of Special Services, York School Department⁴; and David Webb, Esq., Hearing Officer.

Witnesses:

1. Melissa Camire, Director of Special Services, York School Department;
2. Karen Ropes, Interim Director of Special Services, York School Department;
3. Sasha Greenberg, BCBA York School Department;
4. [REDACTED], the Student's Mother;
5. Russell Maguire, Ph.D, BCBA-D, independent evaluator;
6. Elisha Hegg, BCBA;
7. Elisabeth Kinney, BCBA;
8. Laura Slap-Shelton, Psy.D.;
9. Heather Blier, Ph.D.

¹ [REDACTED] did not attend the hearing on February 26 and 29, 2016.

² Attorney O'Meara did not attend the hearing on February 26 and 29, 2016.

³ Eric Herlan, Esq. entered a limited appearance for the School on April 1, 2016 solely for the purpose of filing a petition to vacate the subpoena of Hannah King, Esq.

⁴ Melissa Camire retired from her position as the Special Education Director at the York School Department on March 11, 2016 and Karen Ropes was appointed as the acting Special Education Director and attended the hearing dates on April 12 and 19, 2016

All witness testimony was taken under oath.

PROCEDURAL BACKGROUND

On January 12, 2016, the School ("School") filed a due process hearing request alleging that the Parents denied consent for reevaluations with regard to their ■ year old son ("Student"). On February 16, 2016, a prehearing conference was held with the Hearing Officer, counsel and parties. Documents and witness lists were exchanged in a timely manner. A Prehearing Report and Order was issued by the Hearing Officer on February 16, 2016. On February 16, 2016, the School filed an interim motion in limine with regard to the qualifications of the School's evaluators. On February 17, 2016, the School filed partial objection to the Pre-Hearing Order moving to exclude evidence with regard to evaluator's qualifications, the sequestration of witnesses and the rewording of the second issue identified in the Pre Hearing Order. An Interim Order was issued by the Hearing Officer on February 19, 2016 granting the sequestration motion and the modification of issue 2, and ordering the exclusion of evidence with regard to an individual evaluator's qualifications provided the evaluator met the state qualifications for administering the given assessment.

Following the initial two days of hearing on February 26 and 29, 2016, this matter was recessed to allow the parties to discuss pending evaluation and reevaluation issues. A Stipulated Interim Order was issued by the Hearing Officer on March 2, 2016 ordering the Student's IEP team to convene no later than April 4, 2016 to reconsider testing necessary to complete the Student's triennial evaluation. The order also required Parents to provide written notice of their consent, or refusal to consent, within 48 hours from the IEP team meeting.

On April 1, 2016, the Hearing Officer issued an Amended Scheduling Order addressing additional discovery and evidentiary issues for the resumption of the hearing on April 12, 2016. On April 11, 2016, the Hearing Officer issued an Interim Order denying the School's motion to exclude Dr. Russell Maguire as a witness. On April 14, 2016, the Hearing Officer issued an Interim Order granting the School's motion to vacate the subpoena issued to Hannah King, Esq. and denying the School's motion to vacate the subpoena from the Parents for additional documents. At the conclusion of

the hearing, the parties agreed the School may, in accordance with its terms, conduct the following testing while the outcome of the above-referenced hearing is pending: Key Math (Form B), Woodcock Johnson Reading Mastery Test III, Woodcock Johnson III, Token Test of Children, Test of Pragmatic Language, Pragmatics Profile, Sensory Profile School Companion 2016, Beery VMI, Motor Free Visual Perception Test – 4 (MFVPT-4), and Bruininks-Oseretsky Test of Motor Proficiency-2 (BOT-2)—fine motor components⁵.

The Parents distributed 239 pages of documents (herein referenced as P-#) and the School distributed 341 pages of documents (herein referenced as S-#). Following the hearing, both parties requested to keep the hearing record open until May 5, 2016 to allow the parties to prepare and submit closing arguments electronically by 5:00 p.m. Pursuant to a post hearing order issued on April 22, 2016, the closing arguments were due on May 6, 2016 and limited to a maximum of 35 pages for a closing brief and a reply brief of no more than 10 pages.

The record closed upon receipt of the reply briefs on May 6, 2016. The parties further agreed that the hearing officer's decision would be due on May 23, 2016.

II. ISSUES: Evidence was taken on the following issues:

1. Whether the Parents refused consent of psychological evaluation and academic/achievement testing, and if so should the Hearing Officer override the Parents' refusal to consent;
2. Whether the School's November 20, 2015 e-mail changed the period that the Parents must consent to the School's proposed psychological evaluation and academic/achievement testing and if so, what is the deadline for the parents to respond to this consent to evaluate⁶;
3. Whether the Parents refused consent for a behavior assessment and if so, whether the hearing officer can order that the behavior assessment take place

⁵ The order specified that evidence of the forgoing testing shall not be admissible, on behalf of any party, either to prove or disprove the validity of any disputed claim now pending.

⁶ Issue amended pursuant to February 19, 2016 Order. In his March 2, 2016 Order, the Hearing Officer ordered a new timeline for the parent signing consent. This order mooted Issue No. 2

with the assessor chosen by the school;

4. Whether the School breached an agreement to use a specific evaluator chosen by the parties at the Student's transitional meeting on May 18, 2015.

At the hearing on April 19, 2016, the following issue was added by the Parents without objection of the School:

Did the [REDACTED] School Department or the parents violate the Hearing Officer's March 2, 2016 Order and, if so, what, if anything, is the remedy?

1. FINDINGS OF FACT

1. The Student is [REDACTED] years old (d.o.b. [REDACTED]) and resides with his parents in [REDACTED], Maine. He is a [REDACTED] at [REDACTED] School in [REDACTED]. [Parent Testimony]. The Student's mother has experience instructing students with disabilities in Maine. [Parent Testimony]
2. The Student has been diagnosed with autism and, has a speech/language impairment. [P-66A, P-76A, P-82, P-86; Parent Testimony]
3. In 2013, The Student began receiving early childhood services through Maine Child Development Services ("CDS"). [Camire Testimony]
4. In a letter dated March 25, 2015, Melissa Camire informed the parents that the School proposed a transition IEP to discuss planning and evaluations for the Student's placement at [REDACTED]. [S-7] In this letter, Ms. Camire enclosed a parental consent form and wrote: " We also anticipate discussing the need for additional evaluations...updated achievement, speech language, physical therapy and occupational therapy testing will likely be necessary...". [S-7]

5. The Parents denied consent for testing citing a variety of reasons including continuity, redundancy, over-testing, a belief that the experts working with student had sufficient data, and their intention to seek independent evaluations. [S-15; S-16]
6. An IEP team meeting was convened on May 18, 2015, to plan for the Student's transition to [REDACTED] from CDS. [S-7; S-21]
7. At that meeting, the Student's IEP Team received information from various providers, including recent progress summaries for the Student in the areas of speech-language, behavior, occupational therapy, and physical therapy. [S-21] The Team also had information about the Student's direct instruction, IEP goals, and CDS provider updates, as well as Dr. Castro's neuropsychological evaluation report. [S-21]
8. Dr. Russell Maguire, a doctoral-level board certified behavior analyst ("BCBA-D") [P-29], and Elisa Hegg, also a BCBA, both participated in the team meeting held on May 18, 2015. They recommended conducting a Functional Analysis ("FA") to identify functions for certain target behaviors that required intervention. [S-22] At this meeting, the IEP team determined that a functional analysis (FA) would be appropriate. [Camire Testimony, S-22] The parents proposed to have Dr. Maguire conduct the FA. [S-28]
9. The Student's mother testified that Dr. Maguire's qualifications and expertise was necessary to properly evaluate the Student and that the School's agreement to have Dr. Maguire conduct the FA was essential to their

willingness to have the Student attend school in the [REDACTED] School District.

[Parent testimony]

10. The Written Notice from the May 18, 2015 meeting references “Dr. Russell Maguire’s forthcoming evaluation” when discussing items to be reviewed at the IEP Team’s next meeting. [S-20] The written notice further refers to following the advice of Dr. Maguire to refrain from including one of the proposed pragmatics goals in The Student’s IEP “until a functional analysis is completed.” [S-21]
11. The IEP team, based on a private PT evaluation provided by the parent, determined that the Student needs PT services at the May 18, 2015 meeting. [S-22; S-69]
12. On June 16, 2015 Ms. Camire sent an e-mail message to the Parents stating:
“The District has agreed to contract with Dr. Maguire to do the FA. Accordingly, we will contact Dr. Maguire to make arrangements.” [S-27] She did not provide the Parents with a consent form to sign at that time. Ms. Camire’s email also references that the School would be “contracting with a local BCBA to provide the consult in [the Student]’s IEP” starting in September. [S-27]
13. Dr. Maguire testified that while many BCBAs are well trained, some BCBAs may need further training for certain students. [Maguire testimony] Dr. Maguire further testified that the Student needed a sophisticated program in part because of some of the complex interrelationships between the Student’s behaviors and communication/socialization skills. [Maguire testimony]

14. The Student was scheduled to receive Extended School Year Services at the School with 1:1 services provided by CDS during the summer of 2015.[Camire testimony]
15. In an e-mail exchange between Ms. Camire and Dr. Maguire on July 2 and 6, 2015, Ms. Camire referenced “the FA on [the Student] that was agreed to at our last IEP Meeting.” [S-28] In her email, Ms. Camire told Dr. Maguire that the Student’s summer services were not being provided at the [REDACTED] School, and expressed her view that “it seems to make sense to complete the FA in the fall instead of over the summer.” [S-28]
16. Ms. Camire did not tell Dr. Maguire that he would be replaced as the evaluator if the FA were delayed until the after the start of the new school year. [Maguire testimony]
17. Dr. Maguire responded by email with a suggestion to “at least start the FA this summer, which will put us a bit ahead of the game when school starts. At the very least we can get a baseline behavior support plan in place, based on the initial FA findings.” [S-28] Dr. Maguire testified that he expected that he would be conducting a functional analysis of the Student for the IEP Team, even if that work spilled into the 2015-2016 school year. [Maguire testimony]
18. In an e-mail dated July 2, 2015, Melissa Camire asked Dr. Maguire if the FA should wait until the Student started school in the fall in that his summer services changed, and that he was receiving services at his previous preschool, “Smarty Pants.”
19. In an e-mail to Melissa Camire dated July 6, 2015, Dr. Maguire stated:

If [the Student] engages in the target behavior across settings then it matters little where he is when the FA is conducted...I suspect that the

function of his challenging behaviors will be unchanged setting to setting thus it does not matter where the FA is conducted. My suggestion...is to at least start the FA this summer.

20. Ms. Camire testified that when she learned that the Student's mother would be providing the 1:1 support services, she discussed this on the phone with Dr. Maguire in the context of whether this would impact the effectiveness of the FA. [Camire testimony] Dr. Maguire agreed that it would not be appropriate to do assessment if parent is 1:1 support as it could impact the testing results and recommended that the FA commence when the Student returned to school in fall of 2015. [Maguire testimony].
21. The School sent a consent form to the Parents on August 4, 2015 requesting consent for a FA for the Student. [S-32] The Student's mother signed the consent form on August 9, 2015, consenting to the FA provided it was conducted by Dr. Maguire. [S-32].
22. In August, 2015, the School hired Atlantic Behavior Services to provide ongoing behavior services for the Student prior to the start of the 2015-2016 School year. [Camire testimony] Atlantic Behavior Services is owned by Jedd Schwalm, BCBA and employs two additional BCBA's, Sacha Greenberg and Lisa Kinny. [S-A-22, S-35]
23. Ms. Camire did not provide Dr. Maguire with a contract for services. [Camire testimony] Ms. Camire testified that it would be more appropriate to have Sacha Greenberg conduct the assessment as the local BCBA who would be working with the Student, developing his programming and training the staff. [S-41; S-45; Camire testimony]

24. On September 8, 2015, the Student became the educational responsibility of the School and has received the following supports and services through his IEP:

1:1 educational technician support; Board Certified Behavior Analyst ("BCBA") consultation up to 6 hours per week; Psychologist consultation 60 minutes per month; Consultation between providers 60 minutes per month; Occupational Therapy 30 minutes twice a week; Physical Therapy 30 minutes twice a week; Speech and Language consultation 60 minutes per week for pragmatic language; Speech Language 60 minutes per week to be provided by a speech language pathologist; Specially designed instruction in social pragmatics 30 minutes per day (150 minutes per week) to be provided by a special education teacher; Specialized transportation. [S-83-84]

25. The IEP also includes fourteen functional goals addressing social pragmatics, pragmatic language, behavior, occupational therapy, and physical therapy as well as other accommodations. [S-67; S-83]

26. Dr. Slap-Shelton, the Student's independent Psychologist, recommended a behavior assessment for the Student and testified that previous evaluations establish to her satisfaction the Student's autism diagnosis. [Slap-Shelton testimony] She said that the Autism Diagnostic Observation Schedule ("ADOS") evaluation is unnecessary for diagnosis at this point. [Slap-Shelton testimony] Additionally, she testified that previous programming would make the ADOS results less accurate or reliable. [Slap-Shelton testimony]

27. In September and October, 2016, Ms. Greenberg made several attempts to obtain informed parental consent to evaluate. [Greenberg testimony]. The Parents did not provide consent for Ms. Kinney and Ms. Greenberg to assess the student. [Parent testimony, Greenberg testimony]

28. At the November 12, 2015 IEP meeting, the Student's classroom teachers, occupational therapist, physical therapist, and speech and language pathologist provided updates on the Student's progress and what they were observing in the classroom. [S-133-135] The Student's special education teacher, who is also a BCBA, reported on the behavioral data and the Student's progress on his social pragmatics goals. [5-134] At this IEP team meeting, the team considered two private evaluations that had been provided by the parents in October of 2015 as well as evaluations that had been provided to and considered by the IEP team in the spring of 2015. [S-132-133; S-135]
29. The team reviewed and referenced the private psychological evaluation from 2014, the private speech and language, PT, and OT evaluations from spring of 2015, the August 2015 private evaluation by Dr. Catherine Reilly, and the August 2015 private speech and language evaluate by Sharilyn Mott. [S-132; S-62-65; S-73-74]
30. The parent, Joan Kelly (her advocate) and Elisa Hegg, BCBA, participated in the November 12, 2015 IEP team meeting. [S-133-134; S-136]
31. At the November 12, 2015 team meeting, the team determined that speech and language, physical therapy, occupational therapy and observations were necessary "to help inform programming going forward" and "that ... updated psychological evaluation and academic/achievement testing are necessary to establish baselines and inform behavioral and academic interventions/instruction/services going forward." [S-32]
32. Although the School Psychologist, Dr. Blier, did not attend the November 12, 2015 IEP Team meeting, she had been involved with the Student's case since

- the spring of 2015 and provided his psychological consultation services on a monthly basis pursuant to the Student's IEP. [S-83, Blier testimony] Prior to the November 12, 2015 meeting, she discussed his case and assessment needs with Ms. Camire. [Blier Testimony]
33. On November 16, 2015, Mr. Coriaty provided the Parents with an outline of the procedures for the FBA including the interview procedure and data collection method to be used. [S-146] The Parents did not provide consent for the FBA proposed by Mr. Coriaty. [Parent testimony]
34. On November 20, 2015, Ms. Camire sent an email message to the Parents that attached the list of test instruments the School proposed to administer for the Student's triennial reevaluation. [S-147, 148; P-18] In this message, Ms. Camire stated that she would "hold off sending you the consent to test until February to allow enough time for us to receive your signed consent and begin evaluating in March. At that point we will have 45 days to complete testing and convene an IEP to review the evaluations." [S-147; P-18]
35. At a meeting on December 1, 2015, the Student's mother expressly denied consent for Mr. Coriaty to conduct any behavioral assessment of any kind, either an FA or an FBA, of the Student. [S-150; Parent testimony].
36. In early December 2015, the Student was punched in the mouth by a peer and lost a tooth. [S-162] Following this incident, the Parents re-filed a due process hearing request on December 21, 2015. [S-163]
37. On December 28, 2015, Ms. Camire sent the Parents an email message stating: "We have received your hearing request. We will be convening a

resolution session . . . for . . . January 5, 2015, at 3pm” [S-165; P-25]

Attached to her email was a “Parent Consent for Evaluation” form identifying the areas in which the IEP team had recommended that the Student be reevaluated along with a general description of each of the evaluations the IEP team ordered. [S-166; S-167] Ms. Camire’s email message requested that the Parents bring the signed consent to the IEP meeting on 1/5/16.” [S-165; P-18]

38. The Parents did not sign the consent for the January 5, 2016 IEP team meeting but responded with an email message on January 11, 2016, stating: “We are not refusing consent for the district’s proposed triennial reevaluation; rather we wish to await the results of our pending independent evaluations before making decisions about the district’s plan for additional testing of [the Student]” [S-175; P-26]
39. The School commenced this due process hearing on January 12, 2016, seeking an order providing a “consent override” for the testing outlined on the consent form sent to the Parents on December 28, 2015.
40. The first two days of hearing occurred on February 26 and 29, 2016. The Hearing Officer then suspended the hearing to permit the School to convene an IEP Team meeting to consider information from the Parents’ private evaluators. [March 2, 2016 Stipulated Interim Order]

41. On February 28, 2016, the Student's mother signed a limited consent for Dr. Slap-Shelton to speak with Dr. Blier provided a parent was present during any such discussions. [P-77]
42. Dr. Blier received a release to speak with Dr. Slap-Shelton on March 7, 2016. [Blier testimony; P-211] She did not reach out to her, however, as she was waiting for list of testing instruments from her which she never received until date of IEP meeting. [Blier testimony; P-211]
43. Dr. Slap-Shelton testified that no one relayed to her the District's request for information or the need to communicate with Dr. Blier. [Slap-Shelton Testimony] Dr. Slap-Shelton testified that "she didn't know why" the communication between herself and Dr. Blier didn't happen prior to the March 25, 2016 IEP team meeting. [Slap-Shelton Testimony]
44. In a Written Notice dated April 1, 2016 following the March 25, 2016 IEP team meeting, the team ordered testing in the following areas: psychological, achievement, OT, PT, speech language, and audiology. The team ordered the following specific test instruments:
1. The Autism Spectrum Rating Scales and the ADOS-II (psychological);
 2. Key Math (Form B); Woodcock Johnson Reading Mastery Test-3 (WRMT-3); Woodcock Johnson III (achievement);
 3. The Token Test of Children; The Test of Pragmatic Language, Pragmatics Profile (speech language);
 4. Bruininks Oseretsky Test of Motor Proficiency-2nd Edition (BOT-2) gross motor components; Test of Gross Motor Development (TGMD-2); Sensory Profile-School Companion; Beery Motor Free Visual Perceptual

Test-4 (MFVPT-4); Bruininks Oseretsky Test of Motor Proficiency-2 (BOT-2)-fine motor components (Occupational and Physical Therapy)

A written Parent consent for evaluation in these testing areas was given to the parents at the March 25, 2016 IEP team meeting [S-251; S-255]

45. In a letter to Karen Ropes dated April 4, 2016, the Parents provided written consent to all of the tests identified in the April 1, 2016 Written Notice except for the Autism Spectrum Rating Scales and the ADOS-II and the Bruininks Oseretsky Test of Motor Proficiency-2nd Edition (BOT-2)-gross motor components. For Psychological testing, the Parents added that they would consent to the Autism Diagnostic Interview-Revised. [P-183]

2. SUMMARY OF THE PARTIES' ARGUMENTS

A. Brief summary of the position of the School:

The School argues that the Parents have refused consent for the District's Board Certified Behavior Analysts ("BCBA") to evaluate the Student. In addition, Parents have denied consent for the School to reevaluate the Student in all areas deemed necessary by the IEP team. In conducting an evaluation at public expense, schools have a right to choose the qualified evaluator. The law is also clear that if parents want special education services provided by a public school district at taxpayer expense, they must provide unconditioned consent for necessary reevaluation. The School's right to evaluate includes the right to choose the evaluator.

The School argues that it complied with all state and federal procedural requirements regarding reevaluation at the November 12, 2015 IEP meeting. Since the November 2015 IEP team meeting, the Parents have been aware of the areas the School was recommending be tested and the purpose for the testing. On December 28, 2015, The School provided the family with Maine Department of Education "Parent Consent for Evaluation" form. Checked off on the form were the areas in which the IEP team had recommended that the Student be reevaluated.

The identification of appropriate testing instruments is within the discretion of the qualified evaluator and it is best practice to allow the information gathered during the evaluation process to inform the identification of necessary testing instruments.

Consents that are conditioned on a particular evaluator or testing instrument equate to a denial of consent and are subject to the IDEA's override procedure. The Hearing Officer should, given the impact this restricted consent has on the school's ability to meet its obligations under state and federal law and their right to evaluate, find that the restricted consent is a refusal for consent.

With regard to the parent's limiting behavior testing to Dr. Maguire, the IEP team did not order him to conduct the evaluation and that there was no "agreement" with regard to evaluators at the May 18, 2015 IEP meeting. Nor did the team determine that the evaluation needed to be conducted by a BCBA-D, as opposed to a BCBA. Melissa Camire's June 16, 2015 email, even if it were to be deemed a promise, is not an enforceable contract. Moreover, the Parents' failure to plead estoppel in their complaint response, pre-hearing memorandum, or at any time during the proceeding until the final day of hearing on April 19, 2016 constitutes waiver. There is simply no evidence that the parents changed their position based on the e-mail. The school hired a highly qualified BCBA, Elisabeth Kinney, to work with the Student and supervise the FA.

Finally, the District did not violate the Hearing Officer's March 2, 2016 order. The record contains evidence of significant efforts by the District to obtain information that Dr. Blier felt was necessary prior to communicating with Dr. Slap-Shelton.

B. Brief summary of the position of the Parents:

The School, which bears the burden of proof in this proceeding, is not entitled to a "consent override" order under both the federal and Maine special education regulations. The necessary predicate for such a claim is that the school district has properly complied with the IDEA's procedures in generating the request for consent and that the parents have "refuse[d] to consent to the reevaluation." The School cannot begin the process by having parents sign a carte blanche consent form that permits the school's evaluators to do whatever testing they please.

Federal and Maine special education regulations require the IEP Team and other qualified professionals to take the following sequential steps prior to seeking parental consent for reevaluation testing. First, the IEP Team must review existing evaluation

data on the child formulating the aim of the testing to be proposed. Second, on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine four things: (1) eligibility, (2) present levels of performance, (3) service needs, and (4) additions and modifications necessary for child to meet annual goals and to participate in the general education curriculum. The third step involves the design of the testing to be conducted. Thus, once the group has determined what gaps need to be filled with "additional data," the school district is required to develop a testing plan designed to collect that missing information.

In the present case, the School failed to have a group that includes the Parents consider existing data on the Student prior to planning for his reevaluation. The School also failed to consider all existing data when it purported to "reject" all of the evaluative information the Parents provided to the IEP Team in November 2015. The School failed to contact the private evaluators or to determine any necessary additional data. A prime example of this failure involves Ms. Camire insisting that the ADOS test should be administered despite the continued lack of any discussion concerning "additional data" the ADOS may or may not generate. The Student's last three doctoral-level evaluators—Dr. Castro, Dr. Riley, and Dr. Slap-Shelton— have unanimously opined that the ADOS is a time-consuming and unnecessary waste of resources in the Student's case.

The School also failed to provide the Parents with the information they required to provide "informed consent." The March 2015 consent form, the December 2015 consent form and the March 2016 consent form all failed to limit the testing for which parental consent was sought to those assessments found necessary to generate the missing data needed for the Student's triennial. The School promised to send out a consent form in February 2016 for testing to begin in March, but then unilaterally ordered the Parents to sign a consent form by January 5, 2016, when they filed for due process in late December.

The consent form provided to the Parents specifies nothing except a series of vague descriptors with checked-off boxes. Parental signature on such a form would permit the school district to conduct virtually any testing it wished, so long as the instruments used fell generally within the areas authorized.

By contrast, the written notice mailed to the Parents on April 1, 2016 did set forth those test instruments “specifically . . . ordered” by the School, given the lack of consensus at the team meeting. The Parents were correct to respond to the lists included in the written notice when providing “informed consent” through their detailed letter of April 4, 2016.

When the School offered and the Parents accepted to have Dr. Maguire conduct the FA, the law required the testing to go forward immediately. The Parents’ consent was based on their trust of the knowledge and expertise of Dr. Maguire as a BCBA-D and professor of behavioral science at Simmons College. There is no provision in the IDEA or MUSER permitting a school district to act unilaterally in canceling an assessment ordered by the IEP Team and consented-to by the parent. The School’s later offer of a Functional Behavioral Assessment to be conducted by one of its masters-level contracted BCBA’s is not what the IEP Team ordered in May 2015.

The School also violated the Stipulated Interim Order dated March 2, 2016, which required that (1) The School’s psychologist “speak with the Parents’ independent psychologist” to gather information about existing data prior to meeting, (2) that the IEP Team “discuss and consider the recommendations of both Dr. Blier and Dr. Slap-Shelton concerning additional areas of testing that may be necessary,” and then meeting to (3) “determine necessary testing as part of the student’s triennial evaluation to inform the IEP Team’s decisions about the Student’s special education program.” Despite provision of consent by the Parents, Dr. Blier never spoke with Dr. Slap-Shelton (or with Dr. Riley at CHOP, as had been promised in November) which disqualifies it from being in a position to seek a “consent override” in this action.

V. LEGAL STANDARD AND ANALYSIS

A. Burden of Proof

Although the IDEA is silent on the allocation of the burden of proof, the Supreme Court has held that in an administrative hearing challenging an IEP, the burden of persuasion, determining which party loses “if the evidence is closely balanced,” lies with the party seeking relief. *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005). As the party seeking relief, the School bears the burden of proof with regard to whether parents refused to provide consent for the District to conduct a

behavioral assessment and reevaluation of the Student. *Schaller v. Weast*, 546 U.S. 49, 58 (2005). However, the burden of proof with regard to affirmative defenses rest with the party who is asserting the defense. *See, e.g., Howard v. Green*, 555 F.2d 178, 181 (8th Cir. 1977); *In re Bressman*, 327 F.3d 229, 237-38 (3d Cir. 2003); *Merrill v. Sugarloaf Mountain Corp.*, 745 A.2d 378, 383 (Me. 2000). Thus, the burden is on the parents to prove all the necessary elements of any affirmative defense they raise by a preponderance of the evidence.

1. The parents refused consent of psychological evaluation and academic/achievement testing, and the parents' refusal to consent should be overridden.

In a letter to Karen Ropes dated April 4, 2016, the Parents provided written consent to all of the specifically identified tests except for the Autism Spectrum Rating Scales, the ADOS-II and the Bruininks Oseretsky Test of Motor Proficiency-2nd Edition (BOT-2)-gross motor components.⁷ For Psychological testing, the Parents indicated that they would consent to the Autism Diagnostic Interview-Revised.

The Parents' consent to the achievement, OT, PT, speech language, and audiology testing renders moot the issue of the School's request for a consent override in these areas. For purposes of this decision, the issue of "consent override" is therefore limited to remaining disputed areas of psychological and academic/achievement testing, namely: the proposed psychological testing and physical therapy evaluations.

"If the parent refuses to consent to the reevaluation, the [school district] may, but is not required to, pursue the reevaluation by using the consent override procedures" in the regulations. 34 C.F.R. § 300.300(c)(1)(ii); *see also Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53-54, 126 S. Ct. 528, 532 (2005). *G.J., L.J., and E.J., v. Muscogee County Sch. Dist.*, 668 F.3d 1258 (11th Cir. 2012).

In making determinations about reevaluations, Maine and federal law provide, in relevant part, that the IEP Team and other qualified professionals, as appropriate, shall:

- (1) Review existing evaluation data on the child, including:

⁷ The Parent's April 4, 2016 letter clarifying their refusal to consent to the proposed psychological and gross motor testing renders moot the issue of whether they refused consent in these areas.

- (a) Evaluations and information provided by the parents of the child;
 - (b) Current classroom-based, local or State assessments, and classroom-based observations; and
 - (c) Observations by teachers and related services providers; and
- (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine:

(a) Whether the child is a child with a disability as defined in 34 CFR 300.8 [Section VII], and the educational needs of the child, or, in case of a reevaluation of a child, whether the child continues to have such a disability and such educational needs;

(b) The present levels of academic achievement and related developmental needs of the child;

(c) Whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(d) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

34 CFR 300.300(a)(3) [Section XVI.2]. MUSER V.1(A)(1-3).

In the present case, the December 4, 2015 Written Notice provides, in relevant part, as follows:

[The Student] was not evaluated by CDS and has never been evaluated by the school. The last psychological evaluation that the school has is an independent evaluation from August 2014. The school also has independent PT, OT and comprehensive Speech Language OT, or PT evaluations [sic] but some testing in those areas would help inform programming going forward. The team also agreed that updated psychological evaluation and academic/achievement testing are necessary to establish baselines and inform behavioral and academic interventions instruction/services going forward... The [independent] evaluation did not include a classroom observation and no systematic diagnostic or

standardized tools were utilized. No file review was conducted there was no contact with CDS providers. It appears recommendations were solely based on parent report...it is unclear what the recommendations for Speech and OT frequencies and durations are based on...the assessment completed was not normed for the Student's age [S-132, 133 (Secs. 3(2), (4) and (5))⁸

Although the School rejected the Parents' evaluations at this meeting, the December 4, 2015 Written Notice indicates that the School adequately reviewed and considered the evaluations and information provided to them by the parents.⁹

MUSER V.3.A.(2) then requires the IEP team, on the basis of that review, and input from the child's parents, to identify what additional data, if any, are needed to determine four things: (1) eligibility, (2) present levels of performance, (3) service needs, and (4) additions and modifications necessary for child to meet annual goals and to participate in the general education curriculum. MUSER V.3.A.(2)

At the November 2015, IEP team meeting, the team determined as follows with regard to needed additional data:

...speech and language, physical therapy, occupational therapy, and observation were necessary to help inform programming going forward and ...an updated psychological evaluation and academic/achievement testing are necessary to establish baselines and inform behavioral and academic interventions/instruction/services going forward to inform continued eligibility and programming needs. [S-132-134]

The December 4, 2015 Written Notice documents input from the Student's mother and her two advocates who participated in the meeting. [Parent testimony; S-131-137] Similarly, the April 1, 2016 Written Notice documents the team's consideration of Dr. Slap-Shelton's assessments and adjustments to the testing recommendations based on tests recently administered by her. [S-256]

Based upon the foregoing, the record supports a finding that the IEP team

⁸ referencing the private psychological evaluation from 2014, the private speech and language, PT, and OT evaluations from spring of 2015, the August 2015 private evaluation by Dr. Catherine Reilly, and the August 2015 private speech and language evaluate by Sharilyn Mott); *see also* S-62-63; S-64-65; S and S-73-74. S-132-133; S-135.

⁹ Although the School Psychologist, Dr. Blier, did not attend the November 12, 2015 IEP Team meeting, she had been involved with the Student's case since the spring of 2015 and provides his psychological consultation services on a monthly basis pursuant to the Student's IEP. [S-83, Blier testimony]. Prior to the November 12, 2015 meeting, she discussed his case and assessment needs with Ms. Camire. [Blier Testimony].

adequately identified additional data needed for the Student¹⁰. [S-131-137]

After its review of existing evaluation data on the child, Pursuant to MUSER V.3(C), the SAU is then charged with administering “such assessments and other evaluation measures as may be needed to produce the data identified by the IEP Team under paragraph (3)(A)(2).”

Even though this section of MUSER charges the School with administering such assessments and evaluations, school districts are bound to follow the previous steps before administering such assessments. MUSER V.3.A.

The issue of the School’s discretion in administering assessments was addressed in *M.T.V. v. DeKalb County School District*, 446 F.3d 1153 (11th Cir. 2006), cited by the School. In *DeKalb*, the 11th Circuit Court of Appeals held that when conducting a reevaluation, a school is "entitled to reevaluate [a child] by an expert of its choice." *Id.* at 1160. "The school cannot be forced to rely solely on an independent evaluation conducted at the parents' behest." *Id.* (quotation and citation omitted). "Every court to consider the IDEA's reevaluation requirements has concluded if a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation." *Id. G.J., LI, and E.J., v. Muscogee County Sch. Dist.*, 668 F.3d 1258 (11th Cir. 2012).

While the School has certain level of discretion over the administration of evaluations and reevaluations, Parental consent is also required. MUSER V.3.D provides in relevant part:

D. Parental consent. Following prior written notice each SAU shall obtain informed written parental consent, in accordance with subsection (1)(A)(4), prior to conducting any reevaluation of a child with a disability...If the parent refuses to consent to the reevaluation, the SAU may, but is not required to, pursue the reevaluation by using the consent override procedures in 34 CFR 300.300(a)(3) [Section XVI.2].

¹⁰ While the Parents argue that the School failed to contact the private evaluators or to determine any necessary additional data, MUSER V.1(A)(1) only requires the IEP team to Review...evaluations and information provided by the parents of the child including existing evaluation data on the child.

Pursuant to 34 CFR 300.9 (MUSER Appendix II.6) "Consent" means

(a) The parent has been fully informed of all information relevant to the activity for which consent is sought ...;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(c)(1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

In the context of reevaluation, the Maine Department of Education, Parental consent for evaluation guidance (January 6, 2016) provides that a parent has all of the information relevant to the activity for purposes of providing informed consent when the school has informed the parent of the "areas to be evaluated and the purpose of the evaluation (how the evaluation results will be used)." *MUSER Appendix II.6* 34 C.F.R. § 300.9.

As noted, the Parents' specific consent to the achievement, OT, speech language, and audiology testing renders moot the issue of the School's request for a consent override in these areas. With regard to the disputed psychological and physical therapy testing, the record supports a finding that the Parents have been fully informed of all information relevant to the activity for which consent is sought and that they have refused consent of such tests. *MUSER Appendix II.6; 34 CFR 300.9.*

The analysis therefore focuses on whether the School fully informed the Parents of all information relevant to the disputed psychological and physical therapy testing. After the Student's November 12, 2015 IEP Team meeting, Ms. Camire wrote an e-mail to the parents on November 20, 2015, in which she said that she would "hold off on sending you the consent to test until February to allow enough time for us to receive your signed consent and begin evaluating in March."¹¹ The email also stated "I have attached the list of proposed assessments along with the evaluators to ensure you have ample time to consider the proposal and are assured you

¹¹ In the present case, the School first requested Parental consent for testing on March 25, 2015 when Melissa Camire wrote to the Parents and enclosed a parental consent form along with a one-page list of proposed evaluations. Ms. Camire's inclusion of a list *before* the School had reviewed or considered evaluations and information provided from the Parents is a procedural violation of MUSER V.1(A)(1-3). This does not rise to the level of a substantive violation as the Parents did not respond to the request for consent until the School considered the Parent's evaluations and information.

are providing informed consent.” [S-147]

On December 28, 2015, the School provided the family with Maine Department of Education "Parent Consent for Evaluation" form, which included descriptions of evaluations proposed and discussed at the IEP team meeting on November 12, 2016. [S-167; S-132] Ms. Camire requested the Parents sign a consent form by January 5, 2016. [S-167]¹² The Parents did not sign this consent form, and the School commenced this due process hearing on January 12, 2016, seeking an order providing a “consent override” for the testing outlined on the consent form sent to the Parents on December 28, 2015.

Following two days of hearing on February 26 and 29, 2016, a Stipulated Interim Order was issued by the Hearing Officer on March 2, 2016 ordering the Student’s IEP team to convene no later than April 4, 2016 to reconsider testing necessary to complete the Student’s triennial evaluation. The order also required the Parents to provide written notice of their consent, or refusal to consent, within 48 hours from the IEP team meeting.

A Parent Consent for Evaluation form describing evaluations in these testing areas was given to the parents at the March 25, 2016 IEP team meeting and a Written Notice providing further detail on the testing instruments was sent to the parents on April 1, 2016. [S-251; S-255] In a letter to Karen Ropes dated April 4, 2016, the Parents provided written consent to all of the tests identified the April 1, 2016 Written Notice except for the Autism Spectrum Rating Scales, the ADOS-II and the Bruininks Oseretsky Test of Motor Proficiency-2nd Edition (BOT-2)-gross motor components. For Psychological testing, the Parents added that they would consent to the Autism Diagnostic Interview-Revised.

With regard to the disputed psychological and physical therapy testing, the record supports a finding that the Parents have been fully informed of all information relevant to the activity for which consent is sought and that they have refused consent of such tests.

¹²Although the School sent this consent form to the Parents prior to the time that Ms. Camire stated in her November 20, 2015 e-mail, the issue of whether the earlier e mail changed the time for the Parents to consent is moot in light of the Parents’ consent to the achievement, OT, PT, speech language, and audiology and refusal to consent to the proposed psychological testing and physical therapy evaluations.

When considered in the context of reevaluation requirements of MUSER V.1(A)(1-3). The record further supports a finding that the School has met its burden of proof in this proceeding and is entitled to a “consent override” with regard to the identified psychological and physical therapy testing for the Student. 34 CFR 300.300(a)(3) [Section XVI.2]. MUSER V.1(A)(1-3).

2. The Parents did not refuse consent for a behavior assessment and the School breached an agreement to use a specific evaluator chosen by the parties at the Student’s transitional meeting on May 18, 2015.

The May 22, 2015 Written Notice states in relevant part that “The team determined that it would be appropriate to order a[n] FA to identify and program for behaviors of concern.” [S-22] This written notice also references “Dr. Russell Maguire’s forthcoming evaluation” when discussing items to be reviewed at the IEP team’s next meeting. Additionally, the May 22, 2015 Written Notice refers to “following the advice of Dr. Maguire” to refrain from including one of the proposed pragmatics goals in the Student’s IEP “until a functional analysis is completed.” [S-21]

On June 16, 2015, Ms. Camire sent an email to the Parents about planning for the Student’s FA. Her email, with the subject heading “Follow-Up from IEP”, stated: “The District has agreed to contract with Dr. Maguire to do the FA. Accordingly, we will contact Dr. Maguire to make arrangements. The contract with Dr. Maguire will be limited to the FA.”¹³ [S-27]

The Student’s mother testified that the School’s agreement to have Dr. Maguire conduct the Student’s FA was essential to the Parents’ willingness to have the Student attend school in the [REDACTED] School District. [Parent testimony]

The School sent a consent form to the Parents on May 26, 2015 which was resent on August 5, 2015.¹⁴ The Student’s mother signed the form on August 9, 2015, adding the handwritten note in paragraph 11. “Functional Analysis by Dr. Russell

¹³ Ms. Camire noted in her e mail that the School declined to contract with Elisa Hegg due to the Mother’s “personal and professional relationship” with her. [S-27]

¹⁴ The Parent Consent for Evaluation form indicates the date given/mailed to parent as “05/26/2016 resent 8/4/15” with a handwritten notation stating “actually 8/5/15” Melissa Camire testified that the form was resent as the earlier form was missing a page. [Camire testimony]

Maguire". [S-32] The Student's mother checked the "approval" box indicating her consent for the Functional Analysis "only by Dr. Maguire and Elisa Hegg." [S-32]

At issue is whether these facts support a finding that the team agreed to use Dr. Maguire to conduct the Student's FA.

In *DeKalb County School District*, 21 IDELR 426, 21 LRP 2873, (August 5, 1994) the Georgia State Educational Agency addressed the issue of whether an enforceable agreement existed between parents and a district which required the district to provide an aide to an 18-year-old student with traumatic brain injury. In *DeKalb* the Hearing Officer noted that the matter:

"must be considered on both traditional legal contract grounds and within the context of special education law and proceedings... As with all contracts, the cardinal rule of interpreting agreements is to attempt to ascertain the intention of the parties, which is generally determined from a consideration of the entire contract." *Id.*

To determine the terms of the contract between the parties, the Hearing Officer in *DeKalb* considered both a mediation agreement and staffing minutes from a meeting of the parties. The Hearing Officer applied contract principles to determine that no enforceable agreement existed between parents and the district. *Id.* In his opinion, the Hearing Officer noted:

It is undisputed by both parties that had the committee reached a "consensus" as to the provision of an aide, then such would be a binding obligation on behalf of the County...the principle of consensus as the proper decision-making tool at a staffing is supported by the IDEA...which states the purpose of an I.E.P. meeting is to enable parents and school personnel as equal participants to *jointly* decide the issues.¹⁵

21 IDELR 426, 21 LRP 2873

In the present case, the record supports a finding that consensus was reached by the IEP team with regard to retain Dr. Russell Maguire to conduct the Student's

¹⁵ The DeKalb decision also cites *Burlington School Committee v. Department of Education*, 471 U.S. 359, 105 S. Ct. 1996 (1985) which recognized the term "consensus" as the proper decision making tool at an I.E.P. meeting, noting that either party has the right to a due process hearing if consensus is not met.

functional analysis.¹⁶ In particular, it is clear from the May 22, 2015 Written Notice that the team contemplated that Dr. Maguire would conduct the evaluation when it references “Dr. Russell Maguire’s forthcoming evaluation.” This determination was further supported by Melissa Camire’s July 16, 2016 e-mail to the Parents stating that “The District has agreed to contract with Dr. Maguire to do the FA.”

I also find the testimony of the Student’s mother credible that she believed that the team had agreed to contract with Dr. Maguire to conduct the FA on the Student. I find that it was reasonable for her to confirm this understanding with her notation on the August 9, 2015 consent form limiting the administration of the FA to Dr. Maguire. The mother’s addition of Dr. Maguire’s name is not a modification of the consent form but is consistent with the terms of the consensus reached by the IEP team.

Where consensus was reached and consent given, the team was required to insure that Dr. Maguire submitted a written evaluation report no later than 40 school days from the receipt of parental consent to evaluate.¹⁷ MUSER § V.4.B. 20 and U.S.C. § 1414(c)(2)¹⁸.

Accordingly, the evidence supports a finding that 1. The Parents appropriately consented to use Dr. Maguire to conduct the FA on the Student and that 2. The School breached an agreement to use Dr. Maguire at the IEP team meeting on May 18, 2016.

3. Neither party violated the Hearing Officer's March 2, 2016 Order.

The March 2, 2016 Stipulated Interim Order required the School’s psychologist, Dr. Heather Blier, to speak with the Parents’ independent psychologist, Dr. Laura Slap-Shelton, pursuant to the consent form signed by the Parents on February 29, 2016. The consent form signed by the Student’s Mother

¹⁶ *Letter to Anonymous*, 9 IDELR 258, 5 ECLPR 123, 108 LRP 2296 (September 24, 2007), is illustrative of the principal that specific agreements with regard to services or providers, that might otherwise be within the exclusive purview of a School, can be enforced by Parents. In *Letter to Anonymous* the Office of Special Education Programs noted in the context of IFSPs that if the IFSP includes a specific methodology, the State would need to ensure that services are provided in accordance with that specific methodology.

¹⁷ As noted, Dr. Maguire recommended that the FA commence with the Student returned to school in fall of 2015 and not during the summer of 2015 as the Student’s Mother was providing the Student’s 1:1 support which could impact the testing results. Adjustments to the timeframe for administering this evaluation to obtain accurate results, as recommended by Dr. Maguire, is reasonable and may be made in the context of the IEP process with appropriate notice to Parents.

¹⁸ upon obtaining parental consent, the “local educational agency shall administer such assessments and other evaluation measures as may be needed to produce the data identified by the IEP Team” 20 U.S.C. § 1414(c)(2).

limited consent for Dr. Slap-Shelton to speak with Dr. Blier by requiring a parent to be present during any such discussions. [P-77]

The Parents argue that the School violated the order insofar as Dr. Blier never spoke with Dr. Slap-Shelton.

Dr. Blier testified that she received the release to speak with Dr. Slap-Shelton on March 7, 2016. [Blier testimony; P-211] Dr. Blier did not reach out to her, however, as she understood that Dr. Slap-Shelton would first provide her with a list of testing instruments, which she did not receive until the March 25, 2016 IEP meeting. [Blier testimony, P-211] Dr. Slap-Shelton testified that no one relayed to her the District's request for information or the need to communicate with Dr. Blier. [Slap-Shelton Testimony] Dr. Slap-Shelton testified that "she didn't know why" the communication between herself and Dr. Blier didn't happen prior to the March 25, 2016 IEP team meeting. [Slap-Shelton Testimony]

While it appears that both parties could have been more proactive in their communication with regard to these issues, there is insufficient evidence to find that either party violated the March 2, 2016 Stipulated Interim Order. Moreover, Dr. Blier and Dr. Slap-Shelton were ultimately able to share information and communicate with regard to the Student's evaluations at the March 25, 2016 IEP team meeting.

ORDER

After consideration of the evidence presented during this due process hearing,

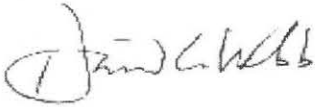
It is hereby ORDERED that:

1. The School's motion to override the Parent's refusal to consent psychological and academic/achievement testing is GRANTED. Evaluations may proceed with regard to the psychological and academic/achievement testing as determined by the IEP team including the Autism Spectrum Rating Scales and the ADOS-II and the Bruininks Oseretsky Test of Motor Proficiency-2nd Edition (BOT-2)-gross motor components.
2. The School shall retain Dr. Russell Maguire to conduct a functional

analysis for the Student at the earliest available time. All reasonable and necessary costs associated with said evaluation shall be paid by the School.

3. An IEP team meeting shall be held as soon as possible after said evaluations have been conducted in order to inform programming and supportive service needs for the Student.

Dated: May 23, 2016

A handwritten signature in black ink, appearing to read "David C. Webb". The signature is written in a cursive style with a large initial "D".

David C. Webb, Esq.
Hearing Officer