

**BEFORE THE NEBRASKA DEPARTMENT OF EDUCATION
STATE OF NEBRASKA**

**KEARNEY COUNTY SCHOOL)
DISTRICT, commonly known as)
Wilcox-Hildreth Public Schools)
404 E Sapp Street)
Wilcox, NE 68982)
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Petitioner,)
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vs.)
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Respondent.)**

CASE NO. 21-02 SE

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER**

This case was heard on August 17, 2021, at ESU 11, 412 W 14th Ave, Holdrege, NE 68949. Mona (Molly) Burton, the duly qualified and appointed Fair Hearing Officer, presided. Petitioner, Kearney County School District commonly known as Wilcox-Hildreth Public Schools, was represented by its attorney, Karen Haase. Respondents _____ were present. The hearing was recorded by Doris Burby, Freelance Court Reporter. The case was adjourned on August 17, 2021, the record closed and the case taken under advisement.

Jurisdiction is premised upon NAC Title 92 Ch. 55, § 005.01, and the Nebraska Special Education Act, *Neb. Rev. Stat. § 79-1110 et. seq.*, which confers on the hearing officer exclusive original jurisdiction of this case.

Petitioner, Kearney County School District (KCS) filed a Petition requesting a due process hearing to determine whether it appropriately denied Respondent’s request for an Independent Education Evaluation (IEE) at public expense. (Ex. 1) Respondent answered the Petition. (Ex. 4)

The following witnesses testified at the hearing:

- Lyndsey Rossen, First Grade Teacher at KCS. Ms. Rossen has experience working with students with individualized education plans (IEPs). (18:9-17)
- Brad Czaplewski, Endorsed teacher of the visually impaired with Educational Service Unit 10.
- Taylor Strong, School Psychologist for Educational Service Unit 11.

Exhibits 1 through 33 were received.

FINDINGS OF FACT

1. Petitioner is a public school district accredited by the Nebraska Department of Education. Pursuant to the Individuals with Disabilities in Education Act (IDEA) and Title 92, Chapter 51 of the Nebraska Administrative Code (Rule 51) and Title 92, Chapter 52 of the Nebraska Administrative Code (Rule 52) Petitioner serves as the Local Education Agency (LEA) for

(Ex. 1)

2. Respondents are parents. (Ex. 1)

3. is currently a 2nd grade student at KCS.

4. Ms. Rossen referred to Title Services to assist with reading, because was testing below grade level at the beginning of the 2020 school year. (21:2-17) Title I services included one-on-one teacher assistance with reading. (43:20-24)

5. The AIMSWEB test given in the winter of the 2020-21 school year showed growth in skills however, it did indicate a gap between skills and the national average. (33:4-14) (Ex. 15) Because of this, Ms. Rossen referred to the Student Assistant Team (SAT). (33:15-22)

6. The student assistance team is the first step in assessing whether a child is in need of specialized instruction. A referral to SAT is made to assist a student to perform at grade level and is a support offered before testing for special education or a 504 plan. (34:10-16) Ms. Rossen referred to the student assistant team and informed _____ of the referral. _____ preferred to move directly to determine whether _____ was in need of specialized instruction through the Multidisciplinary Team (MDT) process. (37:13-38:7) (Ex. 9)
7. The school began special education testing for _____ while at the same time continuing with the SAT process. (39:5-13)
8. The specific concerns SAT outlined for _____ were individual reading fluency and math concepts. (40:14-19)
9. The SAT determined it would try Tier 1 interventions for 30 days and then review progress. (42:15-21) (Ex. 12)
10. Ms. Rossen was a member of the MDT and reviewed _____ test scores including MAP testing. MAP testing compares _____ to other district students as well as students _____ age on a national level. (22:5-17) _____ scored average as compared to _____ class. (20:9-14)
11. _____ MAP scores showed _____ scoring in the average to slightly below average range (Ex. 6) (24:17-19) The scores also showed _____ improved in the area of language arts from kindergarten to first grade, and by Spring of 2021, _____ was above average in language arts. (Ex. 24) (24:23-25) (26:4-11)
12. _____ MAP testing also indicated growth from the beginning of the school year to the end of the 2020-21 school year. _____ was scoring in the average or above average range. (26:12-18)
13. Ms. Rossen, as well as the other members of the MDT, reviewed _____ AIMSWEB testing results. (Ex. 7) _____ AIMSWEB scores showed _____ had made progress, and by the end of the

school year was average or near average in all tested skills. (32:17-33:3) Spring AIMSWEB tests for literacy demonstrated had improved from below average to average. (Ex. 25) (35:5-15) The same test indicated had closed the gap between performance and the national average. (35:20-23) Ms. Rossen looked at all three AIMSWEB testing given to during the 2020-21 school year. These tests showed started the school year needing assistance; however, made progress throughout the year. (36:6-15)

14. was also given the STAR AR Test for reading. showed an improvement in reading by the end of the year. (36:18-37:3)

15. Ms. Strong performed the WISC-V, which is a cognitive assessment that measures a student's ability level. (92:15-24) (94:2-4)

16. scored in the low average range in three areas, but this did not indicate a cognitive impairment. (94:16-19)

17. full scale IQ was 89. (95:5-6)

18. Ms. Strong also used the BASC Assessment based upon the concern of a possible ADHD diagnosis. The results of this test indicated no concerns. (95:11-25)

19. Ms. Strong observed in different classroom settings. These observations indicated no concerns with social, emotional, or other behaviors. (97:3-8)

20. Special education teacher Brandy Lunsford performed academic assessments, which showed some deficits. (97:22-98:16) Ms. Lunsford then performed the Woodcock-Johnson Assessment which is a more comprehensive academic assessment. (98:19-99:1) Testing results indicated very low or low average scores for reading comprehension and reading fluency. (99:4-7)

21. Based on these scores, the MDT considered whether [redacted] would qualify for a specific learning disability as [redacted] was performing below [redacted] ability or IQ. (99:8-13) However, it was documented [redacted] was making progress with Title I support. (99:24-100:6)

22. The MDT considered the private medical reports provided by the Respondents as well as a functional vision assessment. (46:15-21) (81:15-18) (Ex. 22) [redacted] was diagnosed in a private medical examination with: convergence insufficiency, deficiencies of saccadici movements, deficiencies of smooth pursuit movements, and paresis of accommodation. (Ex. 19) Mr. Czaplewski explained medical eye evaluations report on the health/condition of the eye(s) while a functional vision assessment looks at how the eyes function in the classroom and school setting. (64:3-5) Mr. Czaplewski reviewed Exhibit 19 prior to conducting his testing. (67:17-19)

23. To qualify under the verification category of visual impairment, a medical report from a doctor must be provided. Additionally, documentation indicating a need for modifications in the classroom due to the noted diagnoses must also be provided. (75:16-76:7) Rule 51 further requires deficiencies in or more of the following areas: activities of daily living, social interaction, academic achievement, performance in the education setting or orientation of mobility. (76:22-77:2) Mr. Czaplewski found [redacted] did not meet the verification criteria for visual impairment. (77:17-20)

24. The MDT determined [redacted] did not qualify as a student with a vision impairment and concluded [redacted] did not qualify to move forward with an IEP for special education services and curriculum modifications. (48:10-14) (47:8-16) (46:22-47:2)

25. The MDT discussed [redacted] eye diagnoses for verification under Other Health Impairment and determined [redacted] met the first prong. (101:14-102:3) (Ex. 22 at 18) However, the MDT found [redacted] did not meet the third prong needed to qualify for special education services because

documentation indicated [redacted] did not need individualized instruction as [redacted] was showing progress with the interventions that had been provided. (102:4-13) (Ex. 22 at 18)

26. The MDT did approve a 504 Plan. (48:15-23) The 504 Plan provided accommodations not specialized instruction. (50:24-51:6) The 504 Plan included breaks, a standing desk, and a reading strip. (50:14-21) (60:14-20) (104:4-9)

27. Prior written notice of the MDT's decision was provided to the Respondents. (Ex. 29)

28. Respondents requested an independent educational evaluation at public expense. Specifically, Respondents believed [redacted] met the criteria for Visual Impairment and further believed all three prongs were satisfied to qualify [redacted] for special education services. (Ex. 30)

29. KCS denied Respondent's request, believing its evaluation was appropriate. (Ex. 32)

CONCLUSIONS OF LAW

BURDEN OF PROOF:

30. IDEA and Rule 51 of the Nebraska Department of Education allow for publicly funded IEEs if the parent disagrees with an evaluation obtained by the school district, unless (1) the district demonstrates in a due process hearing that its own evaluation of the child was appropriate; or (2) the district demonstrates in a due process hearing that the evaluation obtained by the parents did not meet district criteria. 92 NAC § 51 006.07(D).

31. The burden of proof in a due process hearing routinely rests on the Petitioner. Accordingly, the burden in this case is on KCS to show by a preponderance of the evidence, that its evaluation of [redacted] satisfied IDEA's requirements and procedures. *See, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005).

32. Preponderance of the evidence means more likely true than not true. *See, Dunne v. Libbra*, 448 F.3d 1024 (8th Cir. 2006).

33. If the school district successfully proves its own evaluation was appropriate, a parent is not entitled to an IEE at public expense. 34 C.F.R. § 300.502(b)(3).

REGULATIONS REGARDING VERIFICATION CRITERIA AND PROCEDURES:

34. School districts and approved cooperatives must ensure a variety of assessment tools and strategies are used to gather relevant functional, developmental and academic information about the child, including information provided by the parent, and information related to enabling the child to be involved in and progress in the general education curriculum. 92 NAC 51 § 006.02C5.

35. School districts and approved cooperatives must ensure the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 92 NAC 51 § 006.02C10.

36. School districts and approved cooperatives must ensure no single measure or assessment is used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. 92 NAC 51 § 006.02C9.

37. School districts and approved cooperatives must ensure tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient. 92 NAC 51 § 006.02C7.

38. School districts and approved cooperatives must ensure in evaluating each child with a disability under Section 006, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. 92 NAC 51 § 006.02C11.

39. The school district or approved cooperative must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. 92 NAC 51 § 006.02C12.

40. The school district or approved cooperative must use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child. 92 NAC 51 § 006.02C13.

41. In interpreting evaluation data for the purpose of determining if a child is a child with a disability and the educational needs of the child, each school district or approved cooperative shall:
(1) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. 92 NAC 51 § 006.02C14a. (2) Ensure that information obtained from all of these sources is documented and carefully considered. 92 NAC 51 § 006.02C14b.

42. Child with a disability means a child who has been verified as a child with autism, a behavior disorder (herein referred to as emotional disturbance), deaf-blindness, a developmental delay, a hearing impairment including deafness, an intellectual disability, multiple impairment, an orthopedic impairment, other health impairment, a specific learning disability, a speech-language impairment, a traumatic brain injury or a visual impairment including blindness, *who because of this impairment needs special education and related services*. 92 NAC 51 § 003.08 (emphasis provided). *See also*, 20 U.S.C. § 1401 (3)(A).

CONTESTED ISSUES:

WHETHER KCS APPROPRIATELY EVALUATED

43. Child with a disability means a child who has been verified as a child with autism, a behavior disorder (herein referred to as emotional disturbance), deaf-blindness, a developmental delay, a

hearing impairment including deafness, an intellectual disability, multiple impairment, an orthopedic impairment, other health impairment, a specific learning disability, a speech-language impairment, a traumatic brain injury or a visual impairment including blindness, *who because of this impairment needs special education and related services*. 92 NAC 51 § 003.08 (emphasis provided).

44. Respondents believed _____ met the criteria for Visual Impairment and further believed all three prongs were satisfied to qualify _____ for special education services.

45. The MDT reviewed _____ MAP and AIMSWEB testing scores. _____ MAP scores showed _____ testing in the average to slightly below average range. The scores also showed _____ improved in the area of language arts from kindergarten to first grade, and by Spring of 2021, _____ was above average in language arts. _____ MAP testing indicated growth from the beginning of the school year to the end of the 2020-21 school year. _____ was scoring in the average or above average range.

46. _____ AIMSWEB scores showed _____ had made progress, and by the end of the school year _____ was average or near average in all tested skills. _____ Spring AIMSWEB tests for literacy demonstrated _____ had improved from below average to average. The same test indicated _____ had closed the gap between _____ performance and the national average. Ms. Rossen looked at all three AIMSWEB testing given to _____ during the 2020-21 school year. These tests demonstrated _____ started the school year needing assistance however, _____ made progress throughout the year.

47. The MDT considered _____ cognitive abilities as evidenced with the WISC-V results. While _____ scored in the low average range in three areas, it was not indicative of a cognitive impairment.

48. Academic assessments indicated very low or low average scores for reading comprehension and reading fluency. Based on these scores, the MDT considered whether [redacted] would qualify for a specific learning disability as [redacted] was performing below [redacted] ability or IQ. However, it was documented [redacted] was making progress with Title I support.

49. Respondents specifically question whether [redacted] qualified as a student with a disability based on [redacted] eye diagnoses. The MDT considered the private medical reports provided by the Respondents as well as a functional vision assessment. [redacted] was diagnosed in a private medical examination with: convergence insufficiency, deficiencies of saccadici movements, deficiencies of smooth pursuit movements, and paresis of accommodation.

50. Mr. Czaplewski explained medical eye evaluations report on the health/condition of the eye(s) while a functional vision assessment looks at how the eyes function in the classroom and school setting. Before conducting the functional vision assessment, Mr. Czaplewski reviewed Exhibit 19.

51. To qualify under the verification category of visual impairment, a medical report from a doctor must be provided. However, documentation indicating a need for modifications in the classroom due to the noted diagnoses must also be provided.

52. While Respondents provided medical documentation indicating [redacted] suffered from vision impairments, a functional vision assessment must be performed to determine whether the impairments interfere with [redacted] learning.

53. Mr. Czaplewski and the MDT determined [redacted] did not qualify as a student with a vision impairment and concluded [redacted] did not qualify to move forward with an IEP because specialized instruction was not warranted. Rather, accommodations would meet [redacted] needs.

54. The MDT also reviewed and discussed eye diagnoses for verification under Other Health Impairment and determined met the first prong. The MDT found did not meet the third prong needed to qualify for special education services because documentation indicated did not need individualized instruction as was showing progress with the interventions that had been provided.

55. KCS's witnesses opined the evaluation, including the functional vision assessment, complied with 92 NAC 51 §§ 006.02C5, 006.02C10, 006.02C9, 006.02C7, .006.02C11, .006.02C12, .006.02C13, .006.02C14 a and b. (51:7-52:24) (81:10-82:24) (106:3-107:10)

56. This testimony was credible.

57. KCS's witnesses testified its evaluation was appropriate. (52:25-53:2) (83:1-2) (107:11-13)

58. Likewise, this testimony was credible.

59. After reviewing the evidence and assessing KCS's witnesses, this hearing officer concludes it is more likely true than not true KCS appropriately evaluated

60. Accordingly, KCS met its burden establishing it appropriately assessed in all areas of suspected disability.

61. KCS has shown by a preponderance of the evidence, its evaluation of satisfied IDEA's requirements and procedures.

CONCLUSION

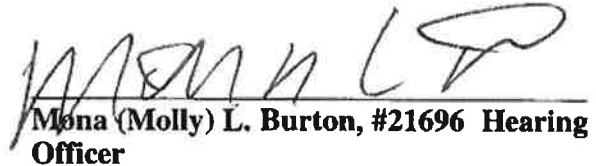
62. KCS met its burden establishing its evaluation of _____ was appropriate. Respondents are not entitled to an IEE at public expense.

IT IS, THEREFORE, ORDERED, AS FOLLOWS:

1. Petitioner's special education petition is sustained.
2. Petitioner is not obligated to grant Respondents' request for an Independent Education Evaluation at public expense.

DATED September 17, 2021

By:



Mona (Molly) L. Burton, #21696 Hearing Officer

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the above and foregoing was duly served via certified mail return receipt requested on the 17th day of September, 2021.

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