

BEFORE THE NEBRASKA DEPARTMENT OF EDUCATION

SHERIDAN COUNTY SCHOOL)
DISTRICT NO. 81-0010,)
Commonly known as)
Gordon-Rushville Public Schools,)
810 North Oak Street)
Gordon, NE 69343)
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Petitioner,)
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vs.)
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Respondent.)

CASE NO. 22-04 SE

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

FILED 10
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NEBRASKA DEPARTMENT
OF EDUCATION

This case was heard on September 27, 2022. Mona (Molly) Burton, the duly qualified and appointed fair Hearing Officer, presided, via Zoom videoconference. Petitioner Sheridan County School District No. 81-0010, commonly known as Gordon-Rushville Public Schools, was represented by its attorney, Karen Haase, who appeared in person. Respondent, appeared via Zoom videoconference. Jerald Ost diek, Attorney for Educational Service Unit (ESU) 13, appeared via Zoom videoconference. The hearing was recorded by Jamie Davis, Court Reporter for Thomas & Thomas Court Reporters. The case was adjourned on September 27, 2022, the record closed, and the case taken under advisement.

Jurisdiction is promised upon Tit. 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, Sheridan County School District No. 81-0010 (SCS) filed a petition on May 20, 2022, requesting this Hearing Officer issue an order permitting SCS to conduct evaluations of the minor child in question, _____, in the areas of academic achievement, social and emotional functioning, executive functioning, and behavior self-regulation.

Mr. Ostdiek moved to have Jessica Broderick, a subpoenaed witness, excused from the hearing. There was no objection to said request. Accordingly, the Hearing Officer granted Mr. Ostdiek's motion. Mr. Ostdiek further moved to have subpoenaed witnesses Paul Smith and Laura Barrett participate via Zoom videoconference. The parties did not object to the request. Accordingly, the Hearing Officer granted Mr. Ostdiek's motion. Mr. Ostdiek was then excused from the hearing.

The following witnesses testified:

- Jill Simmons, Special Education (SPED) Director for Gordon-Rushville Public Schools. Ms. Simmons has a K-12 SPED endorsement in mild-moderate education as well as a Masters Degree in Curriculum Instruction. Ms. Simmons additionally has a Pre-K-12 Administrative Certificate. Ms. Simmons has held the SPED Director position for four (4) years and has been in education for twenty (20) years. Ms. Simmons' duties include working with grants, supervising SPED teachers, working with families on individual education plans (IEPs) and multidisciplinary teams (MDT). Ms. Simmons also works with non-public schools as well as birth-to-21 student services. (10:11-11:10) Ms. Simmons is certified and endorsed to serve as a SPED Director in K-12. (11:16-19) Ms. Simmons has experience in reviewing and interpreting educational evaluations and has reviewed thousands in her career. (11:20-12:1) Ms. Simmons has experience in assessing and working with students diagnosed with ADHD who have executive functioning deficits, and emotional and behavioral disorders. (12:6-16) Ms. Simmons has participated in approximately 100 MDTs. (12:17-20) Part of Ms. Simmons' duties includes ensuring students are verified in the

appropriate category to receive special education services. (14:24-15:4)

- Paul Smith, Contracted School Psychologist with ESU 13. (134:12-19) Mr. Smith has an Educational Specialist Degree from the University of Nebraska Lincoln in School Psychology and a Masters Degree in Educational Psychology. Mr. Smith has been with ESU 13 for twenty-two (22) years as the Director of School Psychology. Mr. Smith retired and came back as a contracted employee serving as a school psychologist. (138:1-18)
- Laura Barrett has been the Administrator for ESU 13 for one (1) year and three (3) months. (140:24-141:9) Dr. Barrett oversees the operations of ESU 13. (142:2-5) Prior to holding this position, Dr. Barrett was a Special Education Director and teacher of the deaf. (141:12-13) Dr. Barrett has a Doctorate in Educational Leadership, a Masters Degree in Educational Administration, a Masters Degree in Special Education, and a Bachelors Degree in Special Education. (141:22-142-1)
- Lynn Schott, Grade Teacher at Gordon-Rushville Public Schools. (146:1-8) Ms. Schott has a Bachelors Degree in Elementary Education, a Masters Degree in Counseling K-8, an Early Childhood Endorsement, and a Middle School Endorsement. (146:11-14)
- Casey Slama, Activity Director for Gordon-Rushville High School. As Activity Director, Mr. Slama schedules school events and activities. He organizes athletic officials and fills out required NSA forms. (164:4-12) Mr. Slama has held this position since August 1, 2022. (164:13-17) Prior to this position, Mr. Slama was the Principal for Gordon Elementary School as well as Principal for the Gordon-Rushville Middle School. (164:22-165:2) Mr. Slama has a Bachelors Degree in Elementary Education as well as a Masters Degree in Educational Administration. (165:8-12)
- Jackie Roth, Administrative Assistant for Gordon Elementary School. (183:17-24)

- Merrell Nelsen, Interim Superintendent for Gordon-Rushville Public Schools since July 1, 2022. (190:1-12) Mr. Nelsen holds an Educational Specialist Certificate. Mr. Nelsen attended the University of Wyoming in its doctorate program. (190:23-191:6)

The following Exhibits were received from Petitioner:

- Exhibit 1: 2019 MDT Report
- Exhibit 2: 2019 IEP Report
- Exhibit 3: December 14, 2020, Communication Plan
- Exhibit 4: January 13, 2021, letter to Respondent
- Exhibit 5: January 18, 2021, letter to Respondent
- Exhibit 6: January 22, 2021, letter to Respondent
- Exhibit 7: February 19, 2021, letter to Respondent
- Exhibit 8: March 5, 2021, letter to Respondent
- Exhibit 9: April 2, 2021, letter to Respondent
- Exhibit 10: April 13, 2021, letter to Respondent
- Exhibit 11: September 9, 2021, IEP
- Exhibit 12: September 9, 2021, Notice and Consent for Reevaluation
- Exhibit 13: October 11, 2021, Email to Jill Simmons from Respondent
- Exhibit 14: October 11, 2021, Email to Respondent from Jill Simmons
- Exhibit 15: October 11, 2021, Email to Jill Simmons from Respondent
- Exhibit 16: October 25, 2021, Email to Jill Simmons from Respondent
- Exhibit 17: October 27, 2021, Email from Respondent
- Exhibit 18: October 27, 2021, Email to Jill Simmons from Respondent
- Exhibit 19: October 27, 2021, Email to Respondent from Jill Simmons
- Exhibit 20: October 27, 2021, Email to Jill Simmons from Respondent

- Exhibit 21: November 9, 2021, Email to Jill Simmons from Respondent
- Exhibit 22: November 16, 2021, Email to Respondent from Jill Simmons
- Exhibit 23: November 16, 2021, Email to Jill Simmons from Respondent
- Exhibit 24: December 6, 2021, Email to Jill Simmons from Respondent
- Exhibit 25: December 8, 2021, Email to Jill Simmons from Respondent
- Exhibit 26: December 13, 2021, Email to Respondent from Jill Simmons
- Exhibit 27: January 12, 2022, Email to Respondent from Jill Simmons
- Exhibit 28: January 26, 2022, Email to Respondent from Jill Simmons
- Exhibit 29: January 26, 2022, Email from Respondent to Jill Simmons
- Exhibit 30: February 1, 2022, Email to Respondent from Jill Simmons
- Exhibit 31: February 1, 2022, Email to Jill Simmons from Respondent
- Exhibit 32: February 7, 2022, Email to Respondent from Jill Simmons
- Exhibit 33: February 7, 2022, Email to Jill Simmons from Respondent
- Exhibit 34: February 2, 2022, Email to Casey Slama from Respondent
- Exhibit 35: February 4, 2022, Email to Respondent from Casey Slama
- Exhibit 36: February 15, 2022, Email to Respondent from Casey Slama
- Exhibit 37: February 15, 2022, Emails from Respondent

- Exhibit 38: February 15, 2022, Emails to Respondent from Casey Slama
 - Exhibit 39: February 16, 2022, Email to Respondent from Casey Slama
 - Exhibit 40: February 16 and 17, 2022, Emails from Respondent
 - Exhibit 41: February 17, 2022, Email to Respondent from Casey Slama
 - Exhibit 42: 2021-2022 Attendance Record
 - Exhibit 43: 2021-2022 Report Cards
 - Exhibit 44: April 2022 Emails between Jessica Broderick and Respondent
 - Exhibit 45: April 11, 2022, Voicemail from Respondent to Jessica Broderick
 - Exhibit 46: September 6, 2022, Order issued by Hearing Officer
 - Exhibit 47: September 12, 2022, Initial Notice of Emergency Exclusion letter to Respondent
 - Exhibit 48: September 16, 2022, Extension of Emergency Exclusion letter
 - Exhibit 49: Report of Mason Goedde's incidents
- The following Exhibits were received from Respondent:
- Exhibit 1: 2019 MDT Report
 - Exhibit 2: November 14, 2019, Notice of Meeting to Respondent
 - Exhibit 3: August 15, 2021, Notice of Meeting to Respondent
 - Exhibit 4: August 24, 2021, Notice of Meeting to Respondent
 - Exhibit 8: Telephone recording between Respondent and Jackie Roth

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
2. Respondent is mother. (15:22-16:1)
3. grade student at SCS. (13:20-25)
4. is currently a student verified as a student with a disability under other health impaired category due to his diagnosis of ADHD. (14:1-6) (Ex. 2 at 3) (Ex. 11 at 3)
5. In order to have an IEP, an MDT meeting must first occur. (21:4-14)
6. Multi-Disciplinary Teams are required to update testing of a student receiving special education services every three years. (13:12-19) (158:10-17) (180:24-181:7)
7. triennial reevaluation was due on March 5, 2022. (19:6-11) (Ex. 1)
8. Ms. Simmons decided to begin the process of reevaluation early because did not attend school at SCS his grade year, and, in part, because Ms. Simmons believed the process would take longer due to difficulties with Respondent. (17:25-19:5)
9. Ms. Simmons believed needed to be reevaluated because even though missed grade : was doing well in the classroom. was not having executive functioning challenges. It was unknown what specialized instruction needed without a reevaluation. (25:23-26:9) (69:25-70:10)
10. Ms. Simmons indicated should be reevaluated to determine verification, services, areas of growth, strengths, and needs. (69:20-24)
11. SCS proposed to reevaluate in the areas of academic, intellectual, social, and emotional areas. (128:4-9)

12. A school district will fill out a form and select the evaluations it believes is necessary for the student. (117:25-118:5)
13. The testing/evaluations chosen for were specific to his needs. (118:21-24)
14. Professionals who testified agreed with Ms. Simmons.
15. Ms. Schott testified additional testing of would be appropriate because had undergone a lot of changes physically. was near puberty or already in levels of puberty. medication needs changed in grade. (152:12-153:8)
16. Ms. Schott believed it would be appropriate to conduct additional academic, psychological, social and emotional testing for (158:4-9)
17. Mr. Nelsen testified it would be appropriate for to receive psychological, educational, social, emotional, and behavioral testing. Testing was necessary to determine if qualifies as a student with a disability. (200:6-18)
18. The school cannot conduct the testing when a parent does not provide consent for the reevaluation/testing. (29:8-10)
19. SCS sent Respondent a notice and consent for reevaluation on September 9, 2021. (25:17-23) (Ex. 12)
20. Respondent initially agreed to the reevaluation, but later revoked consent on October 27, 2021. (28:21-29:1) (Ex. 17)
21. evaluations had not been completed between mid-September 2021 and October 27, 2021. (78:13-25)
22. Evaluations had not been completed because had been placed on the list for testing and testing was not due until March 2022. (79:1-9)
23. Ms. Simmons subsequently sent Respondent a new notice and consent for the reevaluation on November 16, 2021. (33:9-20) (Ex. 22)
24. As of January 12, 2022, Ms. Simmons had not received a signed consent for reevaluation from Respondent. Ms. Simmons then emailed Respondent another copy of the consent form. (41:11-20) (Ex. 27)
25. Respondent did not sign the content form. (41:24-42:1)

26. Ms. Simmons emailed Respondent on January 26, 2022, explaining the consent process for the triennial reevaluation under Rule 51. Ms. Simmons additionally explained if consent was not given, the school would either go forward without the additional data or override the parent's lack of consent. (42:9-19) (Ex. 28)

27. In the January 26, 2021, email, Ms. Simmons again provided a consent form and additionally indicated to Respondent she would consider a lack of response to be a refusal to sign the consent. Ms. Simmons additionally informed Respondent if there were additional issues to discuss she wanted to know the issues and how she can work to address them. (42:20-43:11) (121:4-8) (121:22-122:2) (Ex. 28) (Ex. 30)

28. Respondent replied on January 26, 2021, that the triennial reevaluation was not due. (44:2-6) (121:9-13) (Ex. 28)

29. Ms. Simmons indicated it was normal to start the reevaluation process prior to the due date for scheduling purposes. (44:13-18)

30. Respondent's reply was treated as a refusal and on February 1, 2022, it was determined an IEP meeting would be scheduled to determine if needed additional testing. (46:6-16) (121:18-21) (Ex. 30)

31. A school district is not required to meet with a parent and have an IEP meeting before a reevaluation. (117:20-24)

32. Ms. Simmons additionally wanted to use the IEP meeting as a forum to explain to Respondent the need for testing. (46:21-47:5)

33. While Respondent indicated she was not refusing, she did not sign the consent for testing. (48:12-49:6) (122:3-5) (Ex. 31)

34. Ms. Simmons again sent a consent form to Respondent on February 7, 2022, which was not signed. (49:11-17) (122:6-10) (Ex. 32)

35. Respondent indicated she needed some answers to questions before she would sign the consent. (49:20-50:2) (122:6-10) (Ex. 33)

36. Ms. Simmons offered to answer Respondent's questions via email, however, Respondent never submitted her questions. (124:1-6)

37. On February 15, 2022, another consent to evaluate was sent to Respondent by Mr. Slama. (52:10-14) (Ex. 36) Mr. Slama additionally offered

dates and times to meet and discuss Respondent's questions. (123:5-9) (Ex. 36)

38. SCS scheduled an IEP meeting for on April 11, 2022. The IEP group intended to review existing data for as well as answer Respondent's questions. (62:20-63:1) (Ex. 44)

39. Jessica Broderick was chosen to facilitate the IEP meeting. (63:11-17)

40. Ms. Broderick emailed the Respondent as well as the other IEP team members to provide notice of the April 11, 2022, IEP meeting. (63:17-25) (Ex. 44)

41. Respondent left a voicemail for Ms. Broderick indicating she could not attend the IEP meeting. (64:1-8) (Ex. 45)

42. The IEP meeting was cancelled because Respondent could not attend. (65:8-9)

43. Ms. Simmons did not contact Respondent to see if the April 11, 2022, date worked for Respondent. (112:12-14)

44. SCS decided to initiate due process proceedings after the April 11, 2022, IEP meeting was cancelled. (124:12-15)

45. behaviors, thus far, in the 2022 school year have increased. has been a destruction in class. has made threatening statements to teachers and students. (66:10-13)

46. indicated to teachers would bring a gun to school and shoot kids and students. Students have also heard these threats. (67:6-14) (Ex. 49)

47. brought a taser in backpack to school and threatened students with a taser. (67:15-18) (Ex. 49)

48. Ms. Simmons believed recent behaviors indicate needs additional evaluation and testing in order for the school district to appropriately serve. (67:19-23)

49. Respondent believed a functional behavioral assessment needed to part of the triennial evaluation. (81:12-82:2)

50. Mr. Smith agreed a functional behavioral assessment would be appropriate if a student was having difficulties in the classroom. (136:11-14)

51. Ms. Schott also indicated behaviors warranted assessment. (136:11-14)

52. At the time of the due process hearing, a functional behavioral assessment could not be performed because , due to safety concerns, was not in the school setting. (128:14-19)

53. The team could determine a functional behavioral assessment was warranted after reviewing the evaluations. (128:24-129:16)

54. As of the date of the due process hearing, Respondent had not consented to reevaluation. (70:20-23)

CONTESTED ISSUES

- Whether it has been more than three years since initial evaluation.
- Whether Petitioner is obligated to conduct a reevaluation of
- Whether Respondent consented to the reevaluation.
- Whether Petitioner may pursue consent override pursuant Tit. 92, Ch. 51 § 009.08A5.

CONCLUSIONS OF LAW

Burden of Proof

55. The burden of proof in a due process hearing routinely rests on the Petitioner.

Whether it has been more than three years since Mason's initial evaluation

56. A reevaluation must occur at least once every three years, unless the school district and the parent agree a reevaluation is not necessary. Tit. 92 Ch. 51 § 006.05B2

57. It is undisputed triennial reevaluation was due on March 5, 2022, three years after his initial evaluation.

58. Petitioner filed its Petition on May 20, 2022, more than three years after initial evaluation.

59. Petitioner met its burden of proof.

Whether Petitioner is obligated to conduct a reevaluation of Mason

60. A school district or approved cooperative shall ensure a reevaluation of each child with a disability is conducted if the school district determines the educational or related service needs, including improved academic achievement and functional performances, of the child warrant a reevaluation. Tit. 92 Ch. 51 §§ 006.05A and 006.05A1

61. Ms. Simmons, Ms. Schott and Mr. Nelson agreed additional testing was appropriate to determine if continued to qualify for special education services.

62. The reevaluation decision was made due to progress and success despite being absent from the school setting during - grade year.

63. By the time the due process hearing was held on September 27, 2022, classroom behaviors had become a concern.

64. Ms. Simmons opined recent behaviors further indicated need for additional evaluation and testing.

65. Respondent stated she was not refusing the reevaluation but questioned whether the appropriate tests were chosen. Specifically, Respondent believed a functional behavioral assessment should be part of the testing.

66. Based on the evidence, reevaluation was warranted.

67. Petitioner met its burden of proof.

Whether Respondent consented to the reevaluation

68. Each school district must obtain informed parental consent prior to conducting any reevaluation of a child with a disability. Tit. 92 Ch. 51 §009.08C1

69. Refuse is defined as to withhold acceptance, compliance, or permission. *Merriam-Webster.com*. 2022

70. Respondent initially provided consent to the reevaluation.

71. Respondent subsequently revoked consent on October 27, 2021.

72. Petitioner provided Respondent with consent for reevaluation forms on November 16, 2021, January 12, 2022, January 26, 2022, February 7, 2022, and finally, on February 15, 2022.

73. Respondent did not sign the consent forms.

74. As of September 27, 2022, the date of the due process hearing, Respondent had not signed a consent for reevaluation.

75. While Respondent indicated she was not refusing, her action of not signing the forms prevented SCS from pursuing the reevaluation.

76. Respondent withheld permission for the reevaluation indicating she had questions and/or did not believe SCS was evaluating in all areas of need (i.e. the functional behavioral assessment).

77. Petitioner attempted to meet with Respondent and answer her questions in an attempt to obtain Respondent's consent.

78. Assuming arguendo Respondent's concerns were justified, what is undisputed is she did not sign the consent form. She withheld permission which prevented SCS from moving forward with the reevaluation. Respondent's actions or lack of action amounted to a refusal of the reevaluation.

79. Rule 51 provides a process should a parent disagree with an evaluation. Respondent previously utilized this process when she requested and was granted a request for an independent educational evaluation.

80. Petitioner met its burden of proof.

Whether Petitioner may pursue consent override pursuant Tit. 92, Ch. 51 § 009.08A5

81. If the parent refuses consent, the school district may, but is not required to, pursue the reevaluation by using the consent override procedures described in Tit. 92 Ch. 51 § 009.08A5. Tit. 92 Ch. 51 § 009.08C1a

82. If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under 92 NAC 51-009.08A1 or the parent fails to respond to a request to provide consent, the school district or approved cooperative may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural

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 10th day of November, 2022, upon the following:

Karen A. Haase
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/s/ Mona L. Burton
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